

Animal Law: Principles and Frontiers

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with contributions by

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front cover : Kôno Bairei, *Sea Life* (detail), 19th century Japanese silk ink drawing

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Foreword

THE HON. MICHAEL KIRBY AC CMG*

At the close of this book, the principal author concludes, by reference to a recent vote in a Swiss referendum on an aspect of animal rights, that the cause of animal protection is “on the march”. Certainly, this book shows that, along with many failures, inadequacies and disappointments, a lot is happening in the field of animal welfare law. It is not before time.

The book comes at a most interesting moment in the development of Australian law. Within a few years, a number of texts have been published exploring different aspects of the protection of animals from unacceptable cruelty, torment, confinement and premature death. Amongst the most important of the Australian texts have been:

- * Peter Singer, *Animal Liberation* (1975).
- * Peter Sankoff and Steven White (eds.), *Animal Law in Australasia* (2009).
- * Malcolm Caulfield, *Handbook of Australian Cruelty Law* (2009).
- * Brian Sherman and Ondine Sherman (eds.), *The Animal Law Toolkit, Voiceless* (2009).
- * Deborah Cao, *Animal Law in Australia and New Zealand* (2010)
- * Mirko Bagaric and Keith Akers, *Humanising Animals – Civilising People* (2012).
- * Fiona Probyn-Rapsey and Jay Johnston (eds.), *Animal Death* (2012).

* Patron of Voiceless. Onetime Justice of the High Court of Australia and President of the International Commission of Jurists.

Now comes this book, offering a fresh and different perspective. I welcome it. The field of attention to animal welfare law has been too long neglected. The time is ripe for urgent consideration of many topics. Inevitably, there is some overlap between the texts. And a great deal of concurrence and a shared sense of urgency is found at their heart. But this book is different. That is an extra reason to welcome it to the fold.

Peter Singer's trail blazing analysis in 1975 was written substantially from his perspective, as a philosopher and public ethicist, but with a long-standing interest in moral questions extending to the biosphere and non-human animals, including his later co-authored text *The Great Ape Project* (1993).

The books by Peter Sankoff and Steven White and by Deborah Cao, each select Australia and New Zealand as the focus for analysis of community and expert attention to animal welfare. Launching the book by Sankoff and White brought me to an epiphany. Reading the essays in their book confronted my mind with knowledge that I had safely tucked away in the farthest corner, concerning the realities of corporatised animal slaughter. Since the night of that launch, organised by Voiceless (the body dedicated to animal welfare law), I have eaten neither meat nor fowl.

I had the privilege of writing the foreword to Deborah Cao's excellent text which built upon, and extended with sharp legal analysis, the life-changing work by Sankoff and White. Malcolm Caulfield gives the reader not only a great deal of legal information. He also provides perspectives from the viewpoint of persons on the frontline of protecting animal welfare: those in the veterinary professions and in civil society. His life is caught up in advancing their causes. He has helped notch up several important wins. His advocacy was part of the background to the announcement, in May 2012, by the Tasmanian Minister, that the government of Tasmania will introduce measures to ban battery cages in the State, a long time objective of the Animal Welfare Community Legal Centre that Malcolm Caulfield directs.

The new book by Mirko Bagaric and Keith Akers, painstakingly and argumentatively collects a mass of Australian legal materials. It is beautifully presented – with the usual clarity and simplicity of the CCH Australia publishing style. Thus, step by step, progress is being made.

The book by Fiona Probyn-Rapsey and Jay Johnston presents a collection of essays, many of them disturbing, about aspects of the death of animals. Some are horrific. It is by vivid imagery and knowledge, coldly reported, that the conscience of Australians will be pricked and demands will be made on the law makers to rectify the defaults in the current legal regimes.

Of course, in addition to the foregoing local texts, there are many books written overseas. Several have been produced by animal welfare organisations and by civil society groups. One or two (not many) have been authored by writers with a theological perspective who reject the anthropocentrism of traditional Judeo-Christian-Islamic theology. Notable amongst these is a work by Andrew Linzey and Dan Cohn-Sherbok, *After Noab: Animals and the Liberation of Theology* (London, Continuum, 1997). In a moving address at Westminster Abbey, the Rev'd Professor Linzey castigated the obsessive attention of so many religious leaders towards relative insignificant subjects and controversies. And their moral blindness to other concerns that really matter:

“The truth is that we are spiritually blind in our relations to other creatures, as blind as men have been to women, whites have been to blacks, and straights have been to gays.”

The present book does not adopt any of the foregoing perspectives. It is its differentiation that makes it especially valuable. The book has been written from the particular perspective of practicing lawyers. It is sometimes said that the law sharpens the mind by narrowing its focus. That may be so. I know from my own life that there is nothing that concentrates the mind so acutely as looking across a table at a client with a problem. And puzzling as to how the client's interests can be advanced to improve the legal, reputational, financial and emotional situation of the client. Law cannot always deliver these objectives. But the role of the practicing lawyer is to puzzle out the way, within available rules and remedies, to pursue the client's interests. This Graeme McEwen and his colleagues have attempted to do.

In some of the chapters of this book, there are hints of the broad sweep, great principles, social ethics and international engagements that one can find in the other books. Woven through this text is an undercurrent of the passion for a righteous cause that has always been in the background of those who seek to use law to advance the dignity and protection of minority human beings and non-human

animals. Professor Linzey points out that many of those who founded the RSPCA in England (including Wilberforce and Shaftesbury) were also leaders in the contemporaneous moves to mandate the Royal Navy to end the global slave trade and to enliven the British public, through the NSPCC, to the plight of monstrous cruelty to children. It was an Anglican priest, Arthur Broome, who first set up the RSPCA in Britain in 1824. But all too often religious leaders in Australian society, as in Britain, have been strangely silent about the ethical issues of animal welfare. This has left a moral vacuum to be filled by philosophers, secular ethicists and lawyers.

Because of the specifically practical and legal focus that Graeme McEwen and his contributors have adopted, this book plunges quickly into the detailed provisions of Australia's federal, State and Territory laws, principally the statute book where is now found the majority of the laws binding upon us in our nation. This does not always make for easy reading. But this is certainly the way that the practicing lawyer has to operate. Generalities and high principles may afford a context and the motivation. But winning cases depends upon a mastery of detailed laws and a command of the relevant procedures.

It is because my life's experience has convinced me that the best civil rights lawyers are those with a sound training in the 'black-letter' of substantive and procedural law, that I applaud this book and the efforts that Graeme McEwen and his colleagues have poured into it. Thus, it is vital for those who seek to advance the cause of animal welfare in Australia to be well aware of the procedural and other obstacles that often stand in the way of success:

- * The demands on those who invoke courts and tribunals to first demonstrate that such bodies have relevant jurisdiction;
- * The need for the applicant to show the requisite standing to bring the complaint to a legal forum;
- * Where remedies by way of injunction to prevent cruelty are sought, the need to indicate a capacity to argue that undertakings to accept liability for damage suffered as a result of the grant of interim orders should either be moderated or an exemption sought from their requirement;
- * The peril of costs to which the idealistic litigant may be subjected and must be aware of;
- * The evidentiary rules that govern the use of confidential, and sometimes illegally obtained,

evidence, because great cruelty is often executed in secret;

- * The bureaucratic connivance in wrongs that can sometimes constitute a determined obstacle to success;
- * The complexity of overlapping legal jurisdiction; and
- * The uncertainty that can arise in pushing forward the boundaries of law into new and previously unexplored territory.

I pay respects to Graeme McEwen and his co-authors. And also to the 120 members of Bar Associations throughout Australia, including 25 senior counsel, who have offered pro bono assistance in this initiative.

The point of this book is that the enterprise is not only of considerable philosophical and ethical argumentation. It is not only one of gathering ever-shifting empirical facts. It is not only one of engaging with literature, moving film and other images of horror to spread the epiphany of a new-found sensibility to millions of human beings, with the power to improve the current condition of animals. It is also a realm of law. And the law is sometimes hostile, often untrodden and frequently uncertain and perilous.

For their painstaking and original work devoted to this text, including their invocation to Australian lawyers to think in terms of international as well as national law, I say a citizen's grateful thanks. Animal welfare law is now being taught in increasing numbers of Australian law schools – nearly a quarter of the 34 law schools. It is reassuring to me, towards the end of my legal career, to see the passion and dedication of young lawyers in a cause that lawyers have so long neglected but are now embracing as one of their own. I thank them for this. I praise them for having the insight that, distracted, I so long lacked

Sydney,

Michael Kirby

22 June 2012

Preface

‘What is Animal Law?’ asks the interested lawyer. It is a fair enquiry in view of the comparative recency of Animal Law’s origin as a discipline. It is the synthesis of different principles and learning of the law in a manner which exposes how, in a given case or question, they may affect, challenge or arm the advancement of the welfare and treatment of animals. Second, they go to questions arising in the defence of protestors or public advocates of the animal cause. For example, do the secondary boycott provisions of the *Competition and Consumer Act 2010* apply to what they may publicly advocate and, if so, can those provisions be read down or rendered inoperative where they infringe in a given case the implied freedom of political communication? Third, they go to the question of law reform in circumstances where an animal protection legal regime fails to protect the overwhelming mass of animals. Such a failure is not confined to Australia. It is all but universal.

In Australia, Animal Law is a discipline which calls upon, for example, the principles and learning of constitutional law, administrative law, equity, criminal law, the law and rules of evidence, statutory construction, and public international law. Yet the concerned practitioner, searching the law’s armoury to advance or protect the welfare of animals in a given case, will quickly establish that formidable challenges can exist to persuade courts to adopt new reasoning to meet the needs of the case at hand. For example, there is the well-settled principle that, save in exceptional circumstances, an interlocutory injunction will be refused unless the usual undertaking in damages is proffered by the applicant. Certainly, in the ordinary case involving a private dispute the rule as to the undertaking in damages avoids the obvious injustice to a defendant who may win at trial. Further, an interim or interlocutory injunction “...is by its nature an order with a tendency to prejudice the person to whom it is directed ” : see *National*

Australia Bank Ltd v Bond Brewing Holdings Ltd [1991] 1 VR 386, at 559 (F.C).

But if the case concerns or involves the public interest, should there not also be weighed the possible injury or prejudice to the public interest pending trial? Further, most animal law litigants, usually NGOs, whilst well-endowed with access to high level expertise, have too meagre financial resources to proffer an undertaking. Accordingly, the public interest is not usually sought to be defended by recourse to the law by way of an interlocutory injunction. Added to this is the further reality that possible defendants will more often than not have the backing in any major litigation of an industry fighting fund. However, assume for example that an endangered species may be significantly impacted or part of a protected native forest may be destroyed, pending trial. Should not those matters weigh in the exercise of the court's discretion against any possible injury which may be occasioned to a defendant? Simply put, the difficulty is that the rule as to an undertaking in damages is infected with thinking arising from determination of private interest disputes. The starting point for a Victorian court for example is the Full Court's observation in *National Australia Bank Ltd v Bond Brewing Holdings Ltd* (supra.) at 559, that "*the usual undertaking as to damages is the price that must be paid by almost every applicant for an interim or interlocutory injunction.*" That case of course involved a private dispute between a bank and its customer.

Or again, whilst in the United Kingdom a 'public interest defence' may be invoked to meet an alleged breach of confidence or copyright, in Australia the debate as to its existence continues. Indeed, in Victoria and South Australia such a defence is not available as their appeal courts have 'shut the gate' against such a defence. One only has to consider the Imutran saga in the United Kingdom in the 1990's to appreciate the relevance of such a defence. There, CDs and documents were 'leaked' to an animal society which in turn published them to its website, so publicly pointing up arguably impermissible, heavily intrusive research procedures upon primates and the grave consequences for their welfare.

The UK RSPCA in a lengthy considered report was highly critical of the procedures, their doubtful

benefit, and their welfare consequences.¹

One final example: Australian Wool Innovation, claiming that it represented some 30,000 Australian wool growers, filed a proceeding in the Federal Court of Australia on 9 November 2004 against People for the Ethical Treatment of Animals, a Virginia incorporated company and its head, Ingrid Newkirk, an American citizen ordinarily resident in the USA. The application relied upon in particular the secondary boycott provisions of the former *Trade Practices Act* 1974. Not only did this case raise for consideration whether the applicant in making its case could satisfy potentially challenging key criteria in the secondary boycott provisions, such as acting ‘in concert’, ‘hinders or prevents’, and ‘purpose’ and ‘effect’ or likely ‘effect’. It also raised the very question of whether the secondary boycott provisions stood to be read down or rendered inoperative because of a possible infringement of the implied freedom of political communication under Australia’s constitution. The case was settled on favourable terms to PETA² and other respondents so that these questions were not determined.

The foregoing issues are all examined in the book.

This book though is not the usual legal text. First, it addresses a pioneering, evolving area of the law and its frontiers. For this purpose, it not only examines legal settings, but also where appropriate identifies the relevant factual setting confronting particular animal species. For it is not a discipline where doctrines or principles can simply be recited. Their application or challenge for animal law litigants and their lawyers needs to be identified and explained. Second, the text also canvasses how these legal principles may need to be argued in order to extend them to the needs of a given animal protection case.

But, at bottom, Animal Law exposes a legal justice issue. It is difficult to identify another as compelling.

What is the legal justice issue? It is the manipulation of an animal welfare legal regime to advance

1

[www.http://www.rspca.org.uk/servlet/BlobServer?blobtable=RSPCABlob&blobcol=urlblob&blobkey=id&blobwhere=1109267169109&blobheader=application/pdf](http://www.rspca.org.uk/servlet/BlobServer?blobtable=RSPCABlob&blobcol=urlblob&blobkey=id&blobwhere=1109267169109&blobheader=application/pdf).

2 AWI and PETA each published the terms of settlement. They were not confidential. A copy may be inspected at the Barristers Animal Welfare Panel website: www.bawp.org.au.

producer self- interest where it materially conflicts with even the most rudimentary welfare, so that animal suffering and cruelty on an enormous scale is thus institutionalised and perpetuated by the very laws supposed to protect them. Those who are responsible for the maintenance of this legal regime in its enforcement and formulation view themselves as the ‘friend of industry’ or, they are indifferent to the moral norms such a legal regime is supposed to reflect and nurture. The conflict of interest which taints federal and state departments of agriculture in this respect is self- evident. Yet they control the legal regime, and it shows.

This book also differs from the usual legal text because it is published as an e-book. First, it is so published because it will enable the contents and ultimate message of the book to be more widely disseminated. Second, it will enable the student (or indeed the practitioner) to access learning in this area without the high outlay which normally accompanies purchase of a legal volume. This is thought desirable where it is sought to advance legal principles which may be employed in the public interest’s behalf.

So, why take the animal cause into the court room (beyond existing cases of modest enforcement)? First, unlike politicians, judges will dispassionately hear and determine a case brought before them, provided there is a justiciable issue. Second, success in litigation confers the imprimatur of a court.

Sometimes this will be reported in the media and so confer a wider appreciation of the principle sanctioned by the litigation. Third, it moves the cause beyond reliance upon public education campaigns. Sometimes, in particular instances proactive steps can be taken to protect particular animals by recourse to the courts, rather than simply by way of a legal ‘post-mortem’ vindicating the cause of their fate as ill-treatment at the hands of a defendant. Here, the mainspring is a striving for justice. Alternatively, by way of example, major intensive producers of animal products in a particular industry may be sued say under the misleading and deceptive conduct provisions of the *Competition and Consumer Act* 2010 for marketing their products on the basis that the animals were raised in enriched or even ideal conditions, when plainly they were not. In this way, customer allegiance built by such marketing

stands to be impeached by a successful suit. In turn, by the exertion of market power, the informed consumer or supermarket may bring about a more humane set of practices on the part of that industry. Fourth, the eventual cumulative effect over time of successive court decisions may engender a change in public attitudes, and in the attitudes and willingness to act on the part of our legislators, so that law reform ensues.

Indeed, it is law reform which lies at the heart of the animal cause. The maltreatment of animals in Australia is a social and political issue of the first order. Yet in the broad it is not recognised as such, despite the scale and acuteness of animals' suffering each year- some half a billion. The short point is that suffering is suffering and does not cease at the borders of human experience. Otherwise, why enact animal protection statutes?

In the face of such a legal justice issue, it is perhaps with no little pride that one witnesses the burgeoning interest of the legal profession. For example, at the time of writing, the Barristers Animal Welfare Panel comprises some 120 members of counsel from all the state bars, including some 25 senior counsel. It addresses issues of law reform and a busy national case agenda, with representation and advice offered pro-bono where possible. An adjunct panel of law firms, including national 'first tiers', also assists where possible, as do other law firms, whether at the initiation of PILCH or by direct approach. Indeed, partners of a few prominent law firms have publicly spoken out on the animal cause. Further, Animal Law is now taught in some twelve or so law schools in Australasia, including Sydney, Melbourne, ANU, and Auckland. The interest of the law student body is high. As a final example, at the time of writing and after many months of planning, an international body of lawyers with animal welfare objects is shortly to be established.

It is to the enduring credit of the profession that it offers such service pro bono in the public interest. The lawyer is trained in the learning, procedures and strategy necessary for recourse to our courts. When these skills are put at the service of the public interest, they aptly illustrate in the best sense the maxim that 'knowledge is power'.

I welcome the chapters of my two contributing authors, Gian-Maria Antonio Fini on Australia's whaling case against Japan before the ICJ and Adam Ray on the conception of animals as property. They were the equal top law students in Animal Law at Melbourne University Law School in 2010. Their chapters, based on essays in which they were examined, show a mature grasp of legal principle and lawyerly insight.

I thank my former PA Christie Jones for word processing most of the material on which this book is based. At the time of writing she has commenced her first graduate year at a national law firm. I thank too Shatha Hamade, Suzannah D'Juliet, and Lakshinee Kodituwakku (from the Barristers Animal Welfare Panel Secretariat) for their assistance towards indexing and word processing the manuscript. In particular, I am indebted in this regard to Secretariat member, Jansu Sanli, who has been both tireless and cheerful.

The law for chapters 9 and 12 is at 1 November 2010. The law is otherwise stated at 1 January 2011.

Graeme McEwen
Owen Dixon Chambers West
Melbourne

Easter Thursday, 2011.

Glossary of Terms

ACCC	Australian Competition and Consumer Commission
ACF	Australian Conservation Foundation
ACL	Australian Consumer Law
AEC	Animal Ethics Committee
APAMP	Australian Pest Animal Management Program
AQIS	Australian Quarantine and Inspection Service
BAWP	Barristers Animal Welfare Panel
CITES	Convention on the International Trade in Endangered Species

DAFF	Department of Agriculture, Fisheries and Forestry
DPP	Director of Public Prosecutions
FOI	Freedom of Information
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
JARPA	Japanese Whale Research Program under Special Permit in the Antarctic
MOU	Memorandum of Understanding
NGO	Non-Government Organisation
NH&MRC	National Health & Medical Research Council

NRMMC	Natural Resources Management Ministerial Council
OIE	Office International des Epizooties, known as the World Organisation for Animal Health
Paris Panel	Paris Panel of Independent Legal Experts on Special Permit Scientific Whaling Under International Law
PETA	People for the Ethical Treatment of Animals
POCTA	Prevention of Cruelty to Animals Act
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SOS	Southern Ocean Sanctuary
TPA	Trade Practices Act

1 The Animal Welfare Legal Regime

– a critical overview

How codes of practice and statutory exemptions defeat animal cruelty provisions

1. The animal protection statutes of the various Australian States fail to protect the overwhelming mass of animals, some half a billion annually. They do this by exemption of various practices or classes of animals from their cruelty offence provisions.

Indeed, the role of most State Departments responsible for administering local animal protection statutes has been characterised by their participation in formulating codes of practice usually or mostly favouring producer interests over animal welfare.

Compliance with these codes constitutes a defence or exemption in nearly all States to the offence provisions of the statute:

- VIC, sections 6 and 7; *Prevention of Cruelty to Animals Act* 1986;
- SA, section 43, *Animal Welfare Act* 1985;
- WA, section 25, *Animal Welfare Act* 2002, and regulation 6, *Animal Welfare (General) Regulations* 2003;
- QLD, sections 13 to 16 and 40, *Animal Care and Protection Act* 2001;
- ACT, sections 20 (and 21 and 24), *Animal Welfare Act* 1992;
- NT, sections 79(i)(a) (and 24 and 25), *Animal Welfare Act* 2000;
- NSW, section 34A(1) and (3), *Prevention of Cruelty to Animals Act* 1979, regulation 19 and Schedule 21, *Prevention of Cruelty to Animals (General) Regulations* 2006, although there are also regulations instead of codes for certain animal industries such as hen egg production.

2. Take the Queensland *Animal Care and Protection Act* 2001. By section 38 it defines an 'offence exemption'. Then by section 40 it provides that compliance with the requirements of a code of practice is an offence exemption. Thus acts or omissions which would satisfy the offence provisions of section 18, or breach the duty of care prescribed by section 17, are made legal.

These defences or exemptions are predicated on the low animal welfare standards prescribed by such codes. The codes then are an acknowledgment that the cruelty offence provisions would otherwise stand to apply.

3. Animal welfare societies have long contended that these codes of practice by reason of being otherwise unenforceable, were no more than 'window dressing'. As a result, a few States promulgated regulations which made different codes of practice enforceable. For example, South Australia's *Animal Welfare Regulations* 2000 by regulation 10 require compliance with nominated codes of practice for nominated activities: see Schedule 2; see also similarly Queensland's *Animal Care and Protection Regulation* 2002, especially regulations 2 and 3, and Schedule 1.

Some States promulgated in particular regulations as to hens, breach of which can give rise to prosecution: see for example:

- Victoria's *Prevention of Cruelty to Animals (Domestic Fowl) Regulations* 2006 (SR No 143 of 2006);
- Queensland's *Animal Care and Protection Regulation* 2002, especially regulations 5 to 27;
- Western Australia's *Animal Welfare (Commercial Poultry) Regulations* 2008;
- South Australia's *Animal Welfare Regulations* 2000, regulations 13L to 13O; and
- Tasmania's *Animal Welfare Regulations* 1993, regulation 6.

However, similar welfare standards apply under these regulations to those prescribed by the codes. For example, Victoria's domestic poultry regulations still provide for the confinement of

an animal to a battery cage with a floor space area less than an A4 sheet of paper.

Only Tasmania limits compliance with a code of practice to animals used in research, making such compliance a condition of an animal research licence: section 30(3)(b), and also sections 28(b), 30(2) and 32(b), *Animal Welfare Act 1993*.

Further, whole classes of animals can be simply excluded: for example, feral animals: as an instance, see section 6(1)(d), Victoria's statute.³ The State animal welfare legal regime will be examined later in this chapter.

Australian Animal Welfare Strategy

4. The federal department of agriculture has conducted under its auspices a program involving stakeholders called the Australian Animal Welfare Strategy. This program's object is to harmonise relevant state and territory animal protection laws and to establish Standards and Guidelines or regulations instead of codes of practice. These Standards and Guidelines or regulations would enable prosecution for their breach whereas codes have only acted as a defensive shield. The strategy is not a program for meaningful law reform. For example, it does not examine the question of whether standards are adequate. In particular, the question of the widespread exemptions or defences created by codes of practice or other legislative exemptions is not part of this review. This is not perhaps surprising where the federal department is a major player in creating such exemptions or defences by way of national model codes of practice.

Standards and Guidelines will be developed by Animal Health Australia, comprising federal and state departments of agriculture. These departments are the standard bearers of producer interest. Their conflict of interest in purporting to regulate animal welfare is patent.

³ See further 'The Challenge Posed by Feral Animals' by Graeme McEwen, ALRC Reform journal, issue 91, summer 2007/8 (<http://www.austlii.edu.au/au/other/alrc/publications/reform/reform91/9.html>).

Federal impediments to reform

5. **Second**, there are federal impediments to reform. Any reform by way of, for example, legislative abolition of sale and production of battery hen eggs by a State or Territory legislature faces the all but insuperable impediment presently posed by the *Mutual Recognition Act 1992* (Cth), which enshrines national market competition policy principles. It requires unanimous agreement of the Commonwealth and the States and Territories for a new exemption for any law to be created: see for example section 47. Existing exemptions are listed in a Schedule to the Act. Accordingly, a de facto veto is conferred upon only one participant in respect of any new exemption, where, of course, in such an instance, a department of agriculture will hold sway in any decision. There is a way around this statutory impediment however. This issue is examined in detail in Chapter 5, 'Constitutional Law issues in Animal Law', but is also examined on a preliminary basis later in this chapter.

The lack of enforcement of animal protection statutes

6. **Third**, animal protection statutes so far as they extend remain largely unenforced. Needless to say, a law largely unenforced stands to be a law unobserved. This matter turns on, first, leaving principally a charity with limited resources, the RSPCA, to enforce a wide-ranging public interest statute; second, deficient powers of inspection; and, third, the failure of State departments responsible for administration of their local statute to discharge a meaningful investigative or prosecutorial role.

Exclusion of private prosecution

7. There is the further question of enforcement arising from the denial of private prosecutions in Victoria and Western Australia. In addition, with the passage on 29 November 2007 in New South Wales of the *Prevention of Cruelty to Animals Amendment (Prosecutions) Bill 2007*, the right of private prosecution was removed. The written consent is now required of the Minister for Primary Industries or his Director General, which is viewed as an unlikely prospect.

The conflict of interest of departments responsible for animal protection statutes

8. There is the additional difficulty that a Department of Primary Industries in, for example, New South Wales or Victoria, views itself as the ‘friend’ of industry or producer interests. There is of course nothing wrong with that, except that in the administration of a public interest statute, it gives rise to a self-evident conflict of interest. This also explains the failure by those departments to enforce their animal protection statutes.

Or, again, there is the difficulty that the responsible department is ‘culturally’ indifferent. For example, in Western Australia recently it was only by reason of an order nisi for a writ of mandamus in the WA Supreme Court that the responsible Department, the Department of Local Government and Regional Development, agreed to investigate an animal welfare society’s complaint about cruelty in respect of a shipment of live sheep bound for the Middle East. In the result, the charges were found proven by the Magistrate, but the accused were acquitted (wrongly in my view) on the basis that an operational inconsistency existed under section 109 of the Australian Constitution between the federal and State legal regime. This is taken up in Chapter 3, ‘Live Animal Exports’.

The deficient live animal export legal regime

9. **Fourth**, there are the problems posed by a Commonwealth legal regime for the export of live animals. Not only are the laws relevantly deficient, but they lack clarity and are unnecessarily complex. This in turn hampers law enforcement. The Commonwealth legal regime relies upon two principle statutes: the *Export Control Act* 1982 and the *Australian Meat and Livestock Industry Act* 1997 together with a bundle of subordinate instruments and State animal protection legislation. Further, the federal agencies (the federal department of agriculture and its delegate, the Australian Quarantine and Inspection Service) play no meaningful role in investigation or prosecution of breaches. In addition, there appears to be little enforcement consequence for an exporter which engages in breaches of the legal regime. No review appears to be made of whether to grant further permit applications or renewal of export licences. This is examined in

more detail in Chapter 3, 'Live Animal Exports'.

A further question goes to the extra-territorial reach of State animal protection statutes in respect of the trade. This is also dealt with in Chapter 3.

Federal legislation and the Australian Constitution

10. Different provisions of the Australian Constitution may be relevant to animal welfare cases. This is especially so where provisions of certain federal statutes may be invoked to challenge the conduct of animal societies seeking reform. For example, the secondary boycott provisions of the *Competition and Consumer Act* 2010 were invoked by wool growers in connection with the threatened boycott of Australian wool products by People for the Ethical Treatment of Animals: this is examined in detail in Chapter 4, 'Secondary Boycotts'.

Not surprisingly, the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 is another relevant federal statute. For example, the decision by the Full Court of the Federal Court of Australia in 2006 in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 to grant an interlocutory, and later, a perpetual injunction against a Japanese whaling company whaling within the waters of Australia's Whale Sanctuary was sourced in section 475 of the Commonwealth Act. The Australian Whale Sanctuary had been declared in 2000 under that Act.

Further federal statutory provisions include the section 18 of the *Australian Consumer Law* prohibiting misleading and deceptive conduct by a person; and the conferral of 'standing to sue' under the Act upon 'any person' to seek an injunction or a declaration in respect of such conduct. The misleading and deceptive conduct provisions of the *Australian Consumer Law* are discussed later in the chapter.

As to the Australian Constitution, it appears that in particular the implied freedom of political communication and sections 92 and 109 are particularly relevant. These are explored in detail in Chapter 5, 'Constitutional Law Issues in Animal Law'.

Standing to sue or prosecute

11. **Sixth**, the advantage of the conferral under the *Competition and Consumer Act* 2010 of standing to sue upon any person (even potentially a stranger to the proceeding) in respect of such conduct means that the firewall of 'standing to sue' criteria denoted in case law do not have to be satisfied by an animal society. The new *Australian Consumer Law* came into operation on 1 January 2011, so that there is now one consumer law rather than as formerly a federal consumer law under the former *Trade Practices Act* 1974 on the one hand and State Fair Trading Acts on the other. Formerly where it was sought to invoke a right or claim against an individual, reliance was placed upon the relevant State Act, whereas in the case of a corporation, the federal Act was relied upon. This distinction from 1 January 2011 ceases to arise.
12. It is also pertinent to note that a right of private prosecution exists in Queensland, Tasmania and South Australia. However, 'standing to sue' criteria still need to be satisfied as a threshold question. Standing to sue is examined in Chapter 2, 'Three Key Challenges in Strategic Public Interest Litigation'.

In New South Wales, as noted earlier, the written permission is required of the Primary Industries Minister or Director General.

The State animal protection statutes otherwise designate particular persons such as an RSPCA inspector, a municipal officer, or a member of the police force, for example, as persons authorised to bring prosecutions: see for example in the case of Victoria, section 18(1), *Prevention of Cruelty to Animals Act* 1986:

"(1) The following persons are general inspectors-

(a) any member of the police force; and

(b) any person who is-

(i) an inspector of livestock appointed under the [Livestock Disease Control Act 1994](#); or

(ii) a full-time or part-time officer of the Royal Society for the Prevention of Cruelty to Animals-

and who is approved as a general inspector by the Minister in writing; and

(c) Any person who is an authorised officer under [section 72](#) of the [Domestic Animals Act 1994](#) and who is approved as a general inspector by the Minister in writing, but only in respect of an alleged offence committed or a circumstance occurring in the municipal district for which that person is an authorised officer."

Wild and feral animals

13. **Seventh**, there arises under federal and State laws the question of management of wild and feral animals. This is examined in detail in chapter 6, 'Wild and Feral Animals'.

Truth in labelling

14. **Eighth**, there is the question of 'truth-in-labelling' for food products, particularly as to how the animals were raised. This goes to the question of information to enable an informed consumer choice. For example, more eggs labelled as 'free-range' are sold in Australia each year than are produced.

On 28 January 2011 a federal parliamentary committee of enquiry into food labelling presented its Final Report entitled *Labelling Logic*.⁴ Although acknowledging the changing attitudes of consumers to food labelling and animal welfare, the Final report only recommended that:

'...the relevant livestock industries consider the benefit of establishing agreed standards under the auspices of Standards Australia and New Zealand for terms related to animal husbandry (e.g. 'free range', 'barn laid' and 'caged' in the case of poultry).⁵

Pending any law reform however, reliance will most likely need to be placed on the misleading and deceptive conduct provisions of the *Australian Consumer Law*: see for example the *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

4 <http://www.foodlabellingreview.gov.au/internet/foodlabelling/publishing.nsf/content/labelling-logic>.

5 The BAWP submission to the Food Labelling Review may be accessed at www.bawp.org.au. 'Voiceless' also produced a detailed publication a few years back, which may be accessed at voiceless.org.au.

International

15. **Ninth**, the World Trade Organisation Rules provide for a breach by way of a Technical Barrier to Trade, so that consideration needs to be given to whether such a system of food labelling may be treated as a Technical Barrier to Trade. However, where the labelling is directed to a question of animal health, it should not give rise to such a Technical Barrier to Trade. Such food labelling can be persuasively argued to be directed to the animal's health.

Also at the international level, we see the suit by Australia of Japan for breach of the international whaling convention in respect of Japan's alleged breach of the scientific whaling exemption. This is before the International Court of Justice. Non-government organisations have no standing to be heard before the ICJ, whether as an intervener or as *amicus curia*. This case is dealt with in Chapters 8 and 9.

16. Further, there are international instruments which ultimately may stand to impact upon animal welfare, but in practice this is presently minimal, save perhaps in respect of endangered species, *Convention on International Trade in Endangered Species*. This in turn is reflected in the listing of species and the conferral of remedies under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

The OIE

17. In addition, there is an international body known as the OIE. This body was established in 1924 pursuant to an international Agreement to fight animal diseases at a global level. OIE stands for Office International des Epizooties. In May 2003 the Office became the World Organisation for Animal Health but kept its historical acronym OIE. The OIE is the intergovernmental organisation responsible for improving animal health rather than animal welfare, worldwide. In view of what the OIE says is the close relationship between animal health and animal welfare, it now claims to be the leading international organisation for animal welfare. However, given the diverse nature of its member country membership, this means

such standards, so far as they exist, are diluted. For example, in the case of ritual slaughter, the OIE standards do not prescribe pre-stunning of the animal concerned. Yet such pre-stunning is a prerequisite for the humane slaughter of the animal. The scientific literature on this is compelling. For example, a sheep can remain conscious for up to 20 seconds after its throat is cut. Accordingly, one should be wary of claims by industry bodies that their practices comply with standards prescribed by the OIE.

Otherwise, the principal relevance of the OIE standards arises from its Terrestrial Animal Health Code affecting international trade in animals, such as Australia's export of live animals. That Code aims to assure the sanitary safety of international trade in terrestrial animals and their products through measures to be adopted by veterinary authorities of importing and exporting countries. These measures in turn are directed to avoidance of agents 'pathogenic' for animals or humans. The OIE website is www.oie.int.

State Animal Welfare Legal Regime

The definition of 'animal'

18. In Victoria by way of example an 'animal' is defined in section (3) in these terms:

"(3) In this Act, other than [Part 3](#), animal means-

(a) a live member of a vertebrate species including any-

(i) fish or amphibian; or

(ii) reptile, bird or mammal, other than any human being or any reptile, bird or other mammal that is below the normal mid-point of gestation or incubation for the particular class of reptile, bird or mammal; or

(b) a live adult decapod crustacean, that is-

(i) a lobster; or

(ii) a crab; or

(iii) a crayfish."

Two things may be briefly said about this definition. First, invertebrates are excluded, with the consequence that squid or octopus are excluded. Yet the scientific literature points to the

sentience of these species.

Second, it will be seen that by paragraph (b) a lobster, crab or crayfish is included. These inclusions were made by a 1995 amendment. Section 6 provides for the matters to which the Act does not apply. Subsection (1)(g) provides that the Act does not apply to:

"(g) *Any fishing activities authorised by and conducted in accordance with the Fisheries Act 1995.*"

Presumably this exclusion does not affect the inclusion of such crustacea in the definition of 'animal' on the basis that they have already been caught or fished. Appended to this chapter are 'Guidelines on Fish and Crustacea Welfare for Marketing and Preparation for Human Consumption'. These may be guidelines only, but the provisions of sections 9 and 10 of the Act would now apply to fish and crustacea where they are marketed and prepared for human consumption. It will be seen for example that the manner in which fish and crustacea should be killed is specified, and in respect of crustacea, that it is unacceptable to put live crustacea in boiling water.

The cruelty provisions

19. The cruelty offences prescribed by the different State and Territory statutes are broadly similar in their effect. For example, Victoria prescribes a variety of general and very specific offences. Section 9(1) of the Victorian Act is in the following terms:

"9. *Cruelty*

(1) *A person who-*

- (a) *wounds, mutilates, tortures, overrides, overdrives, overworks, abuses, beats, worries, torments or terrifies an animal; or*
- (b) *loads, crowds or confines an animal where the loading, crowding or confinement of the animal causes, or is likely to cause, unreasonable pain or suffering to the animal; or*
- (c) *does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal; or*
- (d) *drives, conveys, carries or packs an animal in a manner or position or in circumstances which subjects or subject, or is likely to subject, it to unnecessary pain or suffering; or*
- (e) *works, rides, drives or uses an animal when it is unfit for the purpose with the result that unreasonable pain or suffering is caused to an animal; or*

- (f) *is the owner or the person in charge of an animal which is confined or otherwise unable to provide for itself and fails to provide the animal with proper and sufficient food, drink or shelter; or*
- (g) *sells, offers for sale, purchases, drives or conveys a calf, which appears to be unfit because of weakness, to be sold or purchased or to be driven or conveyed to its intended destination; or*
- (h) *abandons an animal of a species usually kept in a state of confinement or for a domestic purpose; or*
- (i) *is the owner or the person in charge of a sick or injured animal and unreasonably fails to provide veterinary or other appropriate attention or treatment for the animal; or*
- (j) *other than in accordance with the [Catchment and Land Protection Act 1994](#), the [Wildlife Act 1975](#) or the [Drugs, Poisons and Controlled Substances Act 1981](#), intentionally administers to an animal or lays a bait for the animal containing-*
- (i) *a poison; or*
- (ii) *any other substance which, when administered to that type of animal, has a harmful effect on the animal; or*
- (k) *uses spurs with sharpened rowels on an animal; or*
- (l) *carries out a prohibited procedure on an animal-*

commits an act of cruelty upon that animal and is guilty of an offence and is liable to a penalty of not more than, in the case of a natural person, 120 penalty units or imprisonment for 12 months or, in the case of a body corporate, 600 penalty units."

- Paragraph (a) is a remnant from an earlier time in animal welfare legislation directed to protecting animals from overt cruelty.
- Paragraph (b) would apply to intensively produced animals but for the different codes of practice. This may be said subject to the qualification adopted in paragraph (b) of 'unreasonable' pain or suffering, which will be dealt with shortly.
- Paragraph (c) is a general catch-all provision which, once again, qualifies pain or suffering by the word 'unreasonable'.
- In paragraph (d) 'pain or suffering' is qualified by the word 'unnecessary'. Once again that type of qualification will be dealt with shortly.
- Paragraph (e) qualifies 'pain or suffering' by the word 'unreasonable'.
- Paragraph (f) in its operation is confined to persons who are the owner or a person in

charge of an animal. Questions of food, drink or shelter are qualified by the phrase 'proper and sufficient'. That phrase may invite argument in a prosecution.

- Paragraph (g) is specific to a calf.
- Paragraph (i), like paragraph (f), applies only to persons who are the owner or in charge of the animal. Once again, it may be seen in respect of a failure to provide veterinary attention or treatment, the question becomes whether the failure was 'unreasonable'. There is a further question of what may be such other attention or treatment and in what respect it may be 'appropriate'.
- Paragraph (j) in its reference to the *Catchment and Land Protection Act 1994* refers principally to the exemption of feral animals from protection. The reference to the *Wildlife Act 1975* refers to exemptions for protection of wildlife under that statute, such as the declared open season for duck shooting, or the commercial killing of kangaroos. These questions will be dealt with in detail in Chapter 6, 'Wild and Feral Animals'.
- Paragraph (k) is self-evidently very specific.
- The reference in paragraph (l) to a prohibited procedure is to a procedure defined in section 3 in these terms:

"prohibited procedure means any of the following-

- (a) the procedure of cropping the ears of a dog, unless the procedure is done by a veterinary practitioner for the purpose of having a therapeutic effect on the dog; or*
- (b) the procedure of debarking a dog, unless the procedure is done by a veterinary practitioner and in accordance with the Code of Practice as to the debarking of dogs; or*
- (c) the procedure of docking the tail of a dog or horse, unless the procedure is done by a veterinary practitioner for the purpose of having a therapeutic effect on the dog or horse; or*
- (d) the procedure of grinding, clipping or trimming the teeth of a sheep using an electrical or motorised device, unless the procedure is done by a veterinary practitioner for the purpose of having a therapeutic effect on the sheep; or*
- (e) the procedure of removing the claws of a cat, unless the procedure is done by a veterinary practitioner for the purpose of having a therapeutic effect on the cat; or*
- (f) the procedure of removing the venom sacs of a reptile, unless the procedure is done by a veterinary practitioner for the purpose of having a therapeutic effect on the reptile; or;*

(g) *the procedure of thermocautery or firing of a horse."*

20. New South Wales by contrast relies principally on “an act of cruelty” (section 5). So does Queensland (section 18), although specific provisions provide for acts or omissions taken to be an act of cruelty. South Australia relies on a catch-all provision stipulating “a person who ill treats an animal is guilty of an offence”: section 13(1). Specific instances are then prescribed in section 13(2).

Aggravated cruelty

21. Section 10 of the Victorian Act provides for an act of aggravated cruelty, turning on the death or serious disablement of an animal. In turn, this may expose the person convicted under section 12 in respect of 'serious offences' to a penalty disqualifying the person from being in charge of an animal for a period (not exceeding 10 years) of a kind or class specified in the order. However, section 12 by referral to ‘serious offences’ rather than ‘offences of aggravated cruelty’ should enable such penalties to be imposed in respect of convictions under section 9 which are found to be of a 'serious nature'.

‘Unreasonable’, ‘unnecessary’, pain or suffering

22. Nearly all statutes rely on such general concepts as “*unreasonable* pain or suffering” or “*unnecessary* pain or suffering”: see for example:
- section 9(1)(b), (c) and (e), Victoria’s *Prevention of Cruelty to Animals Act* 1986;
 - section 13(2)(a) and (g), South Australia’s *Animal Welfare Act* 1985 (“unnecessary pain”);
 - section 18(2)(a), Queensland’s *Animal Care and Protection Act* 2001 (“pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable”); or section 24(1)(a) and (b), NSW’s *Prevention of Cruelty to Animals Act* 1979 (“unnecessary pain”);
 - sections 9(2)(e) and 9(3)(b)(ii) and (c)(ii), Western Australia’s *Animal Welfare Act* 2002 (“unnecessary harm”);
 - sections 7 and 8(i) Tasmania’s *Animal Welfare Act* 1993 (“unreasonable and unjustifiable

pain or suffering”);

- section 6(3)(a), Northern Territory’s *Animal Welfare Act* (“unnecessary suffering”).

23. This type of qualification has been described as a practical test rather than a legal principle (see *Dee v Yorke* (1914) 78 JP 359), with a balance to be struck between the legitimate object of the act committed and the consequences for the animal (*Ford v Wiley* (1889) 23 QBD 203: see Halsbury’s *Laws of Australia*, [200-225] under ‘Animals’).
24. But it is difficult to appreciate the justification for imposing upon the Courts the resolution of such a supervening policy issue by way of a case by case exercise of judicial discretion. Rather, one would think the starting point in formulating policy would be to address whether or not an act or omission is humane. If, for example, in administering an injection to a sensitive joint to relieve pain or treat an ailment, a person suffers pain, then that would not be viewed as an act of cruelty. Accordingly, it is suggested that, in terms of cruelty offences, the focus should be on the concept of cruelty as such and that notions of “unreasonable” pain or suffering should be disregarded. Different statutes, as it is, proscribe the ill-treatment or harm of an animal, as a starting point.

Statutory defences

25. Taking again Victoria’s statute as an example, provision is made for certain defences to acts of cruelty or aggravated cruelty. Section 9(2) in respect of a charge under subsection (1) affords a defence to an owner of the animal in these terms:

"(2) *It is a defence to a charge under subsection (1) against an owner of an animal to prove that, at the time of the alleged offence, the owner had entered into an agreement with another person by which the other person agreed to care for the animal.*"

First, it will be seen that the onus lies upon the owner to prove the agreement. Second, it will be seen that the agreement must be one by which the other person agrees to care for the animal instead of the owner. In one sheep cruelty prosecution the owner alleged in evidence that she agreed with her son that he would assist her in caring for the animals. The defence failed

because she did not assign the care of the animals to her son.⁶ Section 11 provides further defences in respect of an act of cruelty or aggravated cruelty in these terms:

"In any proceedings against a person in relation to an act of cruelty under section 9, or an act of aggravated cruelty under section 10, it is a defence if the person-

- (a) acted reasonably; or*
- (b) reasonably omitted to do an act-*

in defending himself or herself or any other person against an animal or against any threat of attack by an animal."

However, this defence is confined to where an animal attacks or threatens to attack the person concerned, and is thus limited in scope.

Duty of care

26. Certain State animal protection statutes, such as that of Victoria and New South Wales are called a 'prevention of cruelty to animals' act. This reflects the early genesis of animal welfare protection laws in addressing overt acts of cruelty. Such statutes point up that they, together with their counterparts in the other States, do not underpin or promote the humane treatment of animals across-the-board. Instead, the focus is on prevention of cruelty. Yet cruelty connotes only one element at the end of a spectrum of matters by which an animal's welfare may be undermined. This raises then the question of whether a duty of care should be introduced by statute for persons in charge of animals, and in a manner whereby it is not negated or diminished by a code of practice. As to a duty of care, section 17(1) and (2), *Animal Care and Protection Act 2001* (Qld) for example provides:

- "(1) A person in charge of an animal owes a duty of care to it.*
- (2) The person must not breach the duty of care."*

See also section 6, *Animal Welfare Act 1993* (TAS).

⁶ Mansbridge v. Nichols (2004) VSC 530 (17 December 2004).

Further comment on codes and statutory exemptions

27. When one turns to the codes of practice, the manner in which they usually favour the interests of the producer over the animal's welfare is apparent. This inevitably results in the codes providing for low animal welfare standards.

For example, the Code of Accepted Farming Practice for the welfare of poultry permits the confinement of a battery hen to a floor area about three quarters the size of an A4 sheet of paper. Such enduring close confinement would ordinarily fall within one of the statute's cruelty offences. As such confinement complies with the relevant code of practice, however, the statute does not apply.

28. In Victoria's statute, for example, section 6(1)(c) provides that the Act does not apply to:

“(c) any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice..” [emphasis added]

The Act by section 3(1) defines a “farm animal” to mean, amongst other things:

“if kept for or used in connection with primary production – cattle, sheep, pigs, poultry, goats and deer...”.

This means, for example, that intensively confined pigs and poultry can be in effect exempted from the Act's reach. Yet animal welfare societies contend that this is where acute suffering occurs and on a daily basis. And in enormous numbers. Australia-wide, some 250,000 to 300,000 sows suffer ongoing confinement each year in a gestation stall or farrowing crate. Some 11 million birds are confined annually as battery hens. Some 480 million meat chickens are intensively confined annually.

29. Who is responsible for creating these “codes of practice”? In each State it is the Minister for Primary Industries or Agriculture and his department, the very persons usually charged under the local statute with its administration and enforcement.

30. Codes were originally produced by the self-styled “Animal Welfare Committee” (bereft of animal welfare representation) within the Australian Primary Industries Ministerial Council

System, now known as Standing Council on Agriculture. It now in effect ratifies draft national model codes. Like its federal and state counterparts, the Victorian Department is a member of the “Animal Welfare Committee”. In Victoria, these codes have been then incorporated into the local legal regime by the Governor in Council upon the recommendation of the Minister: see section 7. Section 7(1), (2) and (3) is in these terms:

- (1) *The Governor in Council, on the recommendation of the Minister, may make, vary or revoke Codes of Practice-*
 - (a) *specifying procedures for the keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals; or*
 - (b) *about the premises, facilities, equipment or conditions at any premises to which licences granted under [Part 3](#) apply; or*
 - (c) *the constitution, procedures and processes of animal ethics committees.*
- (2) *A Code of Practice may apply, adopt or incorporate (with or without modification) any matter contained in any document, code, standard, rule, specification or method issued, formulated, prescribed, adopted or published by any authority or body as issued, formulated, prescribed, adopted or published at the time the Code is made or at any time before then.*
- (3) *Subject to subsection (4), a Code of Practice or a variation or revocation of a Code of Practice must as soon as possible after it has been made be published in the Government Gazette."*

The reference in subsection 1(b) to 'Part 3' refers to the Part dealing with scientific procedures.

As it is, by their own terms, each code is only “a set of guidelines” and provides only for “minimum standards”, not proper standards or those otherwise prescribed by the relevant State animal protection statute. In the ‘Forward’ to each Code the objective of the Primary Industries Ministerial Council is expressed in these terms:

“to develop and promote sustainable, innovative and profitable agriculture, fisheries/aquaculture, food and forestry industries.”

There is nothing wrong of course with that objective, but not a mention is made of animal welfare.

31. The bias of the codes on threshold welfare questions is, it has to be said, patent. Take the model Domestic Poultry Code, 4th edition. Its introduction tritely observes:

"It is noted that there are particular behaviours such as perching, the ability to fully stretch and to lay eggs in a nest that are not currently possible in certain (caged) poultry housing systems. It is further noted that the ability to manage disease is influenced by the housing system. These issues will remain the subject of debate and review."

Matters central to the almost universally acknowledged bleak existence of the battery hen are thus put on hold. Indeed, the preface to the model code notes:

"The following Code will be further reviewed in 2010, although an earlier review will be implemented if technologies offering significant welfare benefits are available. Similar statements appear in the later Victorian Code published in December 2003."

Despite the urging of animal societies, there was a point blank refusal in 2010 to initiate a review of the codes. The Australian Animal Welfare Strategy is cited as the reason. However, it will be recalled from earlier in the chapter (paragraph 4) that the Australian Animal Welfare Strategy only seeks to provide for similar animal welfare thresholds in the proposed new Standards and Guidelines to those already provided for in the codes.

32. A list of the national model codes of practice appears in each code. They are pervasive in their reach across the different classes of animals and different practices. *In this respect, it will be seen how the Commonwealth de facto plays already a primary role in animal welfare in Australia (in addition to its regulation also of the live animal trade) and that these national model codes with their low welfare standards in effect regulate the welfare of some half a billion animals annually.*

The further consequence of otherwise unenforceable codes has been the systematic subverting of the reach of State animal protection statutes over the last 25 years or so.

These two points raise a real question of public interest. Wide-ranging local statutes enacted to remedy a perceived mischief have been denuded of their pith and substance so far as most animals are concerned and instead replaced by national model codes of practice prescribing low animal welfare standards for the overwhelming mass of animals in order to serve producer interests.

33. Section 6 of the Act provides for the matters to which the Act does not apply. It is in these terms:

"(1) This Act does not apply to-

- (a) the slaughter of animals in accordance with the [Meat Industry Act 1993](#) or any Commonwealth Act1; or*
- (b) except to the extent that it is necessary to rely upon a Code of Practice as a defence to an offence under this Act the keeping, treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals (other than a farm animal or class of farm animals) which is carried out in accordance with a Code of Practice; or*
- (c) any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice; or*
- (d) anything done in accordance with the [Catchment and Land Protection Act 1994](#); or*
- (e) the treatment of any animal for the purpose of promoting its health or welfare by or in accordance with the instructions of a veterinary practitioner; or*
- (f) the slaughter of a farm animal on a farm if-

 - (i) it is slaughtered for consumption on that farm; and*
 - (ii) it is slaughtered in a humane manner; and*
 - (iii) it is not slaughtered for sale; and*
 - (iv) it is not slaughtered for use in the preparation of food for sale; and**
- (v) it is not removed from that farm; or*
- (g) any fishing activities authorised by and conducted in accordance with the Fisheries Act 19952.*

- (1B) This Act, except [Part 3](#), does not apply to anything done in accordance with the [Wildlife Act 1975](#).*
- (2) In subsection 6(1)(f) farm has the same meaning as in the [Meat Industry Act 1993](#).*
- (3) For the purpose of determining whether or not subsection (1) or (1B) applies to a particular case, a specialist inspector may exercise a power set out in [Part 2A](#)."*

It will be noted in subsection (1)(b) and (c) how a code of practice operates as a defence or exemption to the offence provisions.

34. Sections 13 to 15C of the Victorian Act provide specifically for offences arising out of baiting and luring (section 13), trap-shooting (section 14), selling traps (section 15), setting or using

traps (section 15AB), dogs on moving vehicles (section 15A and section 15B) and, breeding of animals with heritable defects (section 15C and Schedule containing a table of diseases caused by heritable defects).

Mutual Recognition Act 1992 (Cth)

35. A Greens member of the ACT Legislative Assembly introduced a Bill in 2007, the *Animal Welfare Amendment Bill 2007*, proposing an amendment to the *Animal Welfare Act 1992* (ACT) to prohibit the keeping of hens in battery cages for egg or carcass production. The Bill did not therefore attempt to prohibit the sale of battery hen eggs.

The question arose whether the proposed law would fall within the ‘mutual recognition principle’ of section 9, *Mutual Recognition Act 1992* (Cth). Section 9 provides:

“The mutual recognition principle is, subject to this Part, goods produced in or imported into the first State, that may lawfully be sold in that State either generally or in particular circumstances, may, because of this Act, be sold in the second State either generally or in particular circumstances (as the case may be), without the necessity for compliance with further requirements as described in section 10.”
[emphasis added]

In other words, the principle is that goods which may be sold in one State or Territory may be sold in a second State or Territory, regardless of different standards applying to goods in the relevant jurisdictions.

The proposed law did not fall within the kind of laws which by section 11 are permissible exceptions to section 9’s ‘mutual recognition principle’. Section 11 (1) and (2) provide:

(1) The mutual recognition principle is subject to the exceptions specified in this section.

(2) The first exception is that the principle does not affect the operation of any laws of the second [State](#) that regulate the manner of the sale of [goods](#) in the second [State](#) or the manner in which [sellers](#) conduct or are required to conduct their business in the second [State](#) (including laws set out in the examples below), so long as those laws apply equally to [goods produced](#) in or [imported](#) into the second [State](#).

Accordingly, the question became whether the proposed law if enacted would fall within the ‘mutual recognition principle’. If it did, it would be invalid; if it did not, it would be valid, or at least not invalid by reason of the *Mutual Recognition Act 1992* (Cth).

36. In summary, members of the Barristers Animal Welfare Panel who gave advice in the matter, concluded that the proposed law would not fall within the ‘mutual recognition principle’. This was because, in brief summary, ‘Part II- Goods’ deals with goods *however* produced in a State and their sale in another, so that if those goods, however produced, may be lawfully sold in one State, they can be sold in another without unreasonable sale impediments. If the Bill had been enacted, the goods that lawfully could be sold would have remained unchanged. But in the ACT the means by which the goods could have been produced would have been more limited.
37. If, on the other hand, the Bill had restricted the *sale* of the goods, then it would have fallen within the ‘mutual recognition principle’ and been invalid.⁷

So, legislative abolition of the *sale* or, the sale and production, of battery hen eggs, for example, would contravene the ‘mutual recognition principle’ enacted in recognition of agreed national competition policy principles, and thus be invalid, failing the unanimous agreement of the Commonwealth, the States and the Territories to create an exemption. Attempts to achieve such agreement in the past have failed. Such agreement may be more readily achieved if the Commonwealth were to lead the way in seeking a further exemption for any law to the *Mutual Recognition Act 1992* to those laws already provided for: see section 14(2) and Schedules 1 and 2.

Enforcement – the underlying failings

38. The question of enforcement will be dealt with in Chapter 10 ‘Challenges of prosecution and enforcement’. For the present, it is sufficient to note that enforcement of what remains of each local statute’s protective reach is left in substantive respects to the RSPCA, a charity with limited resources. A wide-ranging public interest statute remains largely unenforced and thus unobserved. In an age in which individual or corporate producers may be backed by a producer body fighting fund, it is difficult to appreciate how a charity can also be expected to risk an adverse costs outcome in a difficult or protracted prosecution. Only the State has the resources

⁷ A copy of the Opinion is available at the Barristers Animal Welfare Panel website at www.bawp.org.au.

necessary to enforce a public interest statute, especially such a wide-ranging one. The responsible departments should do so, but their enforcement record is, to say the least, modest.

There is the further difficulty of the self-evident conflict of interest of a department of primary industries or agriculture remaining in charge of enforcement and administration of the statute, despite viewing itself as the ‘friend’ of industry. Or, there is the difficulty of the ‘cultural’ indifference of a Department, such as in the case of the West Australian Department of Local Government in the live sheep export case, *Department of Local Government and Regional Development (Prosecutor) and Emmanuel Exports Pty Ltd (ACN 008 676 131), Graham Richard Daws and Michael Anthony Stantion (Accused)*; Magistrates’ Court of Western Australia (Criminal Jurisdiction), judgment delivered 8 February 2008. It took the Department some 18 months from the time the complaint was brought to its notice before charges were filed just prior to expiry of the limitation period. During much of this time, the Department’s then Director-General sought to avoid taking action on purported jurisdictional grounds, consulting in turn each of the federal Attorney-General's Office and the West Australian State Solicitor's Office.

39. One interim solution, for example would be to assign responsibility for the administration and enforcement of the local statute to each State Attorney-General’s Department. The key matters of any animal protection statute turn on enforcement of provisions or tasks substantially legal in nature. This would then remove the conflict of interest or cultural indifference which presently permeates State Departments responsible for enforcement of these statutes.

Reform – a national animal welfare statutory authority

40. Another and long-term preferred solution, for example, would be to create a national animal welfare statutory authority. As most animal businesses are conducted by company vehicles (whether for taxation reasons or to limit liability), the Commonwealth’s corporations power could be relied upon to regulate them, having regard in particular to the expansive interpretation of the corporations power by the High Court of Australia in the *WorkChoices* case. In addition, there are of course a number of relevant Commonwealth heads of power that may be called in

aid, including:

- (a) the trade and commerce power (section 51(i));
- (b) the corporations power (section 51(xx));
- (c) the territories power (section 122);
- (d) the posts and telegraph power (section 51(v));
- (e) the power in respect of Commonwealth instrumentalities and the public service (section 52).

And of course there is section 109.

Alternatively, a model could be adopted, such as that adopted in the case of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999*. It will be appreciated that the Commonwealth has no express powers under the Constitution in respect of environmental matters. But the sharing of responsibility for environmental matters under that Act reflected the cooperative federalism of the *Intergovernmental Agreement on the Environment* signed by the Commonwealth and all States and Territories in 1992.

Deficient powers of inspection

On the detection of offences, the vital power to permit random inspection of premises (such as a battery hen shed) lies, for example, under Victoria's statute, tightly controlled by the Minister for Primary Industries or his delegate: section 24L. Section 24L is in these terms:

A specialist inspector may, for the purposes of [Part 2](#), this Part or regulations under this Act, and with the prior written authority of the Minister-

(a) enter premises (that is not a person's dwelling), in or on which an animal or animals are housed or grouped for any purpose; and

(b) inspect any animal, plant, equipment or structure on the premises; and

(c) observe any practice being conducted in connection with the management of an animal or animals on the premises.

This power is exercised sparingly.

Otherwise, for an RSPCA or (say) police inspector to have the necessary "reasonable

grounds” to enter premises under different statutes would need a departing employee to make a complaint (infrequent) or the cooperation of the relevant producer (unlikely).

Inspectors’ other powers of inspection are also materially deficient. This is dealt with in Chapter 10, ‘Challenges of prosecution and enforcement’.

Livestock Management Act 2010 (Vic)

41. In Victoria on 1 January 2011 the *Livestock Management Act* 2010 came into operation. The express purpose of the Act is ‘to regulate livestock management in Victoria’: see section 1.
42. Section 4(1) of the Act provides that “subject to this section, nothing in this Act affects the operation of...” various Acts, including the *Prevention of Cruelty to Animals Act* 1986, “...or anything done or required to be done under those Acts...”. However, by section 4(3) it is a defence to an offence under the *Prevention of Cruelty to Animals Act* 1986 if the person was carrying out “...a regulated livestock management activity and acting in compliance with a prescribed livestock management standard”. Accordingly, if the prescribed livestock management standard were to be lower in a material respect than that provided for by a code of practice sanctioned by the *Prevention of Cruelty to Animals Act* 1986, a defence under the *POCTA Act* would be even more readily achieved.

“Livestock management activity” is defined in section 3 to mean any activity that relates to the “...health, husbandry or bio-security of livestock during any stage of the livestock’s life...”. “Livestock management standard” means a standard published under section 9 of the Act or any other published standard relating to the management of livestock.

Section 6 stipulates that a livestock operator must comply with all prescribed livestock management standards.

43. By section 7(1) “a livestock operator” (as defined in section 3, but including “a person in charge” of livestock, a term which in turn is defined also in section 3) is required to carry

out a “systematic risk assessment” of the livestock management activity. By section 8 a systematic risk assessment must, amongst other things, contain “an assessment of the likely risks to animal welfare and details of control measures to ensure that...the risks... are minimised.”

44. However, where a livestock operator carries out a regulated livestock management activity under an “approved compliance arrangement”, the livestock operator is not required to comply with section 7 or 8, or any regulation that creates an offence for failing to comply with a prescribed livestock management standard.
45. A “controlling authority” is defined by section 3 to mean “a person or statutory body that is responsible for a compliance arrangement. In paragraph 93 of the Victorian Department of Primary Industries document *‘The Livestock Management Act - a new approach to livestock regulation in Victoria’*, it is explained that a “controlling authority” means the owner of a particular compliance arrangement (e.g. an industry body, a company/business an individual or other entity). Thus it would seem that industry bodies such as those representing chicken producers, egg producers, pork producers and livestock transporters would qualify as a “controlling authority.” Alternatively, it would seem that the particular business operator could be a “controlling authority”. A controlling authority may apply to the Minister for Agriculture under section 12(1) for approval of a compliance arrangement. By section 13 a compliance arrangement must contain, amongst other things:

“(e) verification arrangements designed so that a controlling authority will ensure, as far as is practicable, that the compliance arrangement is complied with...”.

Apart then from such “verification arrangements” proposed by the business operator for compliance by his own business, it is left to the Secretary to the Department of Primary Industries to monitor compliance by the business operator with the approved compliance arrangement: see section 17. By section 23 the Secretary may delegate to another public servant any power of the Secretary under the Act, so that in practice this is likely to be

monitored by a DPI officer well down the chain of command.

(A similar power of delegation is also conferred on the Minister by section 22.)

46. An inspectorate comprising public servants (presumably DPI officers) is provided for under Part 5, including their powers. The powers are provided for in a manner where property rights in certain circumstances prevail over animal welfare.
47. The limited circumstances in which the Minister (or his delegate) may revoke or suspend the approval of a compliance arrangement are set out in section 20; see also section 21.
48. In summary, the Act provides for two compliance regimes. First, a regime in respect of livestock operators without a compliance arrangement where inspection and offences will apply. Second, in respect of a co-regulatory scheme of monitoring where an approved compliance arrangement is in place.

At the time of writing, no Victorian Standards have been promulgated as regulations, although it is proposed to introduce standards for livestock land transport and by adoption of the Pig Code (to be restyled Victorian Standards for the Welfare of Pigs). Other standards will follow.

49. The *Livestock Management Act* 2010 was developed after consultation with members of industry working groups and other stakeholders representing industry, namely, poultry (egg/chicken meat), dairy, cattle/sheep, pork processing and livestock transport. A workshop of key stakeholders was held in April 2008. Instead of incorporating proposed Standards under the *Prevention of Cruelty to Animals Act* 1986 or by amending that Act to add a new part - 'Duty of Care', the workshop supported apparently the development of a "*Livestock Management Act*" providing for a co-regulatory approach.

In paragraph 44 of the DPI document explaining the Act, it is said that "most regulatory breaches do not appear to regulators to deserve serious legal punishment...".

Private prosecution

50. The denial or removal of the right of private prosecution under an animal protection statute (Victoria, Western Australia and now New South Wales) inhibits the prospect of in particular ‘test’ cases as to the protective reach of the statute (such as the recent well-publicised case in New South Wales concerning the solitary circus elephant ‘Arna’ and whether she suffered by reason of her solitude): it is unlikely that such a case would be mounted by the organisations or persons authorised to prosecute by the Victorian or New South Wales statutes. Further, it is difficult to see how such test cases could be characterised as contrary to the public interest or unnecessary where addressing questions as to the pain or suffering of an animal.

51. In terms of the New South Wales Act, it can be said that just as the Commonwealth Director of Public Prosecutions has the power to take over and discontinue a private prosecution brought in relation to a Commonwealth offence, so too does the New South Wales Director of Public Prosecutions in relation to a New South Wales indictable offence. The DPP's power could be extended in this respect to prescribed summary offences, such as those provided for in an animal protection statute. Indeed the former Commonwealth Attorney-General, the Hon Darryl Williams, said in his Second Reading Speech on the *Crimes and Other Legislation Amendment Bill 1996*, 4 December 1996:

“Those provisions were originally enacted for the purpose of deterring private prosecutions brought in inappropriate circumstances, particularly for offences related to national security or international treaty obligations. However, since establishing the Office of the Commonwealth Director of Public Prosecutions the retention of those provisions is difficult to justify. That is particularly so now that the Director of Public Prosecutions has the power to take over and discontinue a private prosecution brought in relation to a public offence.”

Accordingly, the NSW DPP's power under section 9, *Director of Public Prosecutions Act 1999* (or as simply amended to extend the power to summary offences under the animal protection statute) would have been sufficient to address any concerns raised in the Second Reading Speech of the Bill, and would have conferred the advantage of not appearing to politicise the process of prosecution by making a private prosecution subject to the consent of a political representative.

52. In addition, the notion expressed in the Second Reading Speech by Mr Michael Daley, Parliamentary Secretary, that the Bill is necessary “...to remove any encouragement to deliberately or inadvertently trespass to obtain evidence” fails to acknowledge two key matters, first, that well established principles exist by which Courts determine whether to admit or exclude illegally obtained evidence and, second, laws exist for protection of private or public property from trespass, with appropriate penalties. Accordingly, the objects of animal protection under the statute should not be surrendered or subverted where adequate legal measures exist to deal with evidence so obtained.

53. The further suggestion in Mr Daley’s Second Reading Speech that in the past six years there were “several” unsuccessful private prosecutions, including where two were withdrawn, is arguably not a substantive ground for removing the right of private prosecution: even the remoteness of the DPP in the prosecution of offences was not a check, for example, on major miscarriages of justice in England, such as ‘The Guilford Four’ or ‘The Birmingham Six’ or for that matter, in Australia (for example certain recent well publicised cases in Western Australia). In any event, the statement as to ‘several’ unsuccessful prosecutions is thought to be wrong.

Further, with only ‘several’ private prosecutions in ‘the past six years’, it can only be concluded that such trespass is not so much directed toward private prosecutions as to the trespasser’s presumed object of exposing to public view some particular practice, or to achieve some other object unrelated to private prosecution. Indeed, one or more constructive alternatives to the Bill may have been to enhance the powers of inspection of authorised officers in order that public confidence could exist as to matters the object of such trespass.

Commonwealth legal regime for the export of live animals – a critical overview

54. The Commonwealth legal regime is dealt with in Chapter 2, ‘Live Animal Exports’.

Briefly though, an inspection of the Commonwealth legal regime indicates there is no Commonwealth intention to “cover the field” (see *Ex parte McLean* (1930) 43 CLR 472 at 483).

Notwithstanding that, as a matter of law, a “direct operational inconsistency” can still occur between Commonwealth laws and the State law. Indeed, in the *Emmanuel Exports case*, the Magistrate found that there was a direct operational inconsistency between Commonwealth and State laws, leading to the acquittal of the defendants on section 109 grounds in respect of charges otherwise found to be proven.

55. Second, the Standards themselves are expressed in a discursive way, thereby not lending themselves to law enforcement (or perhaps observance in different respects by the industry). Otherwise, matters about the Commonwealth legal regime are examined in detail in Chapter 3, ‘Live Animal Exports’.

Misleading and deceptive conduct under the *Competition and Consumer Act 2010*

56. The question of standing to sue under the *Australian Consumer Law* is dealt with in Chapter 3, Three Key Challenges in Strategic Public Interest Litigation.
57. The misleading and deceptive conduct provisions of the *Australian Consumer Law* may be relevant in a number of ways. The former section 52, *Trade Practices Act 1974* is now reposed (as of 1 January 2011) in section 18 of the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010*). Whilst not the only misleading and deceptive provision, section 18 of the ACL for example prohibits a person, in trade or commerce, from engaging in misleading and deceptive conduct. The terms of the former section 52 have been retained, save that ‘person’ has been substituted for ‘corporation’. Accordingly, case law on section 52 (and the mirror provisions in State and Territory Fair Trading Acts) remain relevant.

As noted in Chapter 3, ‘Three Key Challenges in Strategic Public Interest Litigation’, an intensive producer of animal products may market them on the basis that the animals were raised in enriched conditions, when in fact they were not. A declaration under the *Australian Consumer Law* of misleading and deceptive conduct would not only correct a public wrong, but would also stand to create a more informed consumer choice. Strategically speaking, this would

impeach the basis on which customer allegiance was built and thus, by exertion of market power, perhaps lead to a more humane change in producer practices.

Further, a proceeding for misleading and deceptive conduct under the *ACL* has two further advantages. First, by comparison with a prosecution under an animal protection statute in respect of one or comparatively few animals, a proceeding under the misleading and deceptive conduct provision enables a case to be made against major players within an industry. Second, such a proceeding also side-steps the difficult problems of proof which confront a prosecution where codes of practice provide for low animal welfare standards.

58. In *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010) the Federal Court declared that the respondents had misled the public by labelling and selling cartons of eggs labelled ‘free range’ when a substantial proportion of the eggs were produced by caged hens. The ACCC alleged against the first respondent breaches of sections 52, 53(a), 55 of the *Trade Practices Act* 1974 and alleged against the second and third respondents breaches of section 55 of the Act. North J at [31] said:

“The conduct involved a high level of dishonesty. The conduct was also extremely difficult to detect because, once the eggs were placed in the cartons, it was impossible to determine whether they were free range or not...Further, the conduct amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.”

59. Frequently however, in the case of marketing animal products, misleading and deceptive conduct may arise by the silence of the producer on material matters. A classic example is ‘the half-truth’. This is not the place to rehearse the law on misleading and deceptive conduct by silence, or otherwise. However, a compendious statement of relevant cases on misleading and deceptive conduct by silence may be found in *Omston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASCA 76 (1 April 2011), including a consideration of the recent High Court decision on silence in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31.

Appendix

Guidelines on Fish and Crustacea Welfare for Marketing and Preparation for Human Consumption

Your responsibility

Fish and crustacea may experience pain and stress. For this reason, the humane treatment of these animals is now legally enforced. Handling and killing of fish and crustacea in the catering and restaurant trade as well as the holding for retail must be conducted humanely.

Legislation

The Victorian Prevention of Cruelty to Animals Act 1986 was amended in 1995 to include protection of fish and crustacea once they are caught and delivered to wholesale traders. The penalty for cruelty to animals is \$6000 or 6 months imprisonment.

Handling

Fish and crustacea must be transported and held in conditions which do not cause pain or distress. This keeps the animals healthy and improves product quality.

Containers

- Ensure holding containers are of adequate size and design to avoid physical restraint and damage to the animal.
- Do not overcrowd animals.
- Do not mix incompatible species.
- Do not tie the limbs of crustacea. Where necessary claws may be tied to prevent injury or cannibalism.

Water

- Maintenance of good water conditions in holding tanks and containers involves:
 - water purification and filtration;
 - regular water testing;
 - avoidance of rapid change in temperature and water quality; and
 - adequate aeration

Signs of poor conditions include:

- foam on the water surface;
- cloudy water; or
- slime and algal growth on the tank walls.

Humane killing of fish and crustacea

All live animals to be used for food must be killed humanely.

Fish

Keep handling of fish prior to killing to a minimum. A skilled person should then kill the fish (including eels) by a fast, heavy blow to the head and/or spiking (using a narrow-bladed knife to penetrate and then destroy the brain).

Crustacea

Unacceptable

These methods are unacceptable because they cause pain and suffering to the animal:

- Separating the tail from the head of live crayfish or similar animals.
- Removing tissue or flesh from live animals.
- Putting live crustacea in boiling water.
- Serving live crustacea to diners.

Acceptable

Salt water/Ice slurry method: This applies to all crustacea for human consumption, whether eaten raw (sashimi) or cooked. When the body temperature of crustacea is reduced, their activity slows and they eventually become insensible. If the body temperature is reduced further, the animal will die without suffering. It is therefore recommended that live crustacea be immersed in an 'ice-slurry' for a minimum of 20 minutes before any further processing. The animal is assumed dead if no movement is detected when handled. There should also not be any movement of the pincers or any eye reflex in crabs, and crayfishes' tails should hang limply. If in any doubt, or if the operator prefers, in addition to the ice slurry, a skilled operator may then rapidly destroy the animal's nerve centres (pithing).

How to make an ice slurry

Note - Australian research has shown that the immersion of crayfish in slush ice for up to 18 hours causes no loss in edible quality of the tail flesh.

1. Fill a container with crushed ice, then add salt water; with an ice to water ratio of 3:1 (consistency of wet cement) and a temperature of minus 1 degree Celsius.
 2. Ensure there is adequate ice to maintain the correct temperature throughout the process.
- These Guidelines were prepared by the Victorian Animal Welfare Advisory Committee, in consultation with the Restaurant and Caterers Association of Victoria and produced and distributed by the Bureau of Animal Welfare. Colour brochure format copies of these guidelines can be provided by contacting the Customer Service Centre.

2 Three Key Challenges in Strategic Public Interest Litigation

The three challenges

1. Any number of challenges may confront the lawyer briefed in strategic public interest litigation. But there are three central challenges. These challenges arise because the law is still evolving, and because, in particular, private interest principles and thinking still inhibit superior courts from extending or applying legal principles in a more flexible manner to address public interest concerns. The three challenges are:
 - (a) first, the question of whether the party, usually a NGO, has standing to sue or locus standi;
 - (b) second, whether the party should be required to give the usual undertaking as to damages in order to obtain an interlocutory injunction where enforcement is sought of the law of the land or the public interest; and
 - (c) third, the use which a person may make of information which comes into their possession which exposes a public interest matter, but which that person knows to be confidential. Ordinarily, such a person would be under a duty at law not to publish it: *Price Albert v Strange* (1849) Vol 1 Mac&G 25; 41 ER 1171; *Duchess of Argyle v Duke of Argyle* [1967] Ch 302; *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109, 206, 268; or for example in Australia *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1, 10. Typically, a person seeking to protect confidential information will apply for an interlocutory injunction on the grounds of breach of confidence and/or say breach of copyright. Having regard to the establishment in England for some time now of a countervailing ‘public interest defence’ to such an application, the question arises as to whether such a ‘public interest defence’ can be said

to exist in Australia, or whether it remains at least arguable in the Federal Court or an ultimate appellate court such as the Full Federal Court or the High Court. In round terms, it would appear that the argument is not open in Victoria or South Australia by reason of decisions by the Courts of Appeal in these States. It would appear to be open to be argued in New South Wales, having regard to observations by NSW Court of Appeal judges. In any event, even if the public interest defence is not open, there are narrower defences which may be relied upon in a given case to defeat such an application. These will be examined when this third challenge is dealt with in more detail later in the chapter.

The first challenge: standing to sue

Boyce's case

2. The starting point is the statement by Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 that a plaintiff can sue without joining the Attorney General in respect of a public right in two instances. The first limb of the *Boyce* rule, about whether a private right of his own is interfered with, is rarely invoked. The second limb, according to Buckley J, was this:

“... where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.”

Plainly, such a rule on standing to sue was directed to guarding against enforcement proceedings by the officious intermeddler, or busybody. The *Boyce* rule prevailed in Australia until the 1980s.

ACF v Commonwealth

3. The next relevant principal case was *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 143; (1980) 28 ALR 257. The ACF applied for declarations and injunctions challenging approvals given under legislation for development of the resource and tourist area of Queensland. The Commonwealth applied to strike out the proceeding, alleging the ACF had no standing to sue. At first instance, the proceeding was struck out, and on appeal, the High Court held that the ACF had no relevant special interest and thus standing. Gibbs J said that the *Boyce* expression ‘special damage peculiar to himself’ should be regarded as equivalent to

“having a special interest in the subject matter of the action” , but that “ a ‘special interest’ “does not mean a mere intellectual or emotional concern’. Gibbs J said:

“A private citizen who has no special interest is incapable of bringing proceedings ... unless of course, he is permitted by statute to do so ...

The breakthrough in Onus v Alcoa of Australia Ltd

4. A short time later, in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, Lorraine Onus, a member of an Aboriginal people applied for injunctions in the Victorian Supreme Court to protect Aboriginal relics under threat from construction of a smelter at Portland that Alcoa was obliged to construct by agreement with the State of Victoria. Ms Onus was denied relief at first instance and on appeal to the Full Court on the basis that she had no standing. On appeal to the High Court, it was held that Ms. Onus had standing. Her standing turned on a question of fact and degree, and in particular that the Aboriginal people were the custodians of the relics and actually used them, so that there was more than a mere intellectual or emotional concern.

North Coast Environmental Council Inc v Minister for Resources

5. The next major case was *North Coast Environmental Council Inc v Minister for Resources* [1994] FCA 1556. The North Coast Environmental Council had sought a written statement setting out the findings, evidence and reasons for the Minister’s decision to grant a licence to a sawmiller to export wood chips. The Minister said that the Council had no standing to sue because it was not a ‘person aggrieved’ under the relevant section of the *Administrative Decisions (Judicial Review) Act*. Sackville J held that the Council did have standing, and listed five matters favouring the existence of standing. These included that the Council was a peak environmental organisation; was recognised by the Commonwealth and New South Wales governments; had received Commonwealth funding; and had made relevant submissions on forestry management issues. These matters pointed to more than a mere ‘intellectual or emotional concern’.

Environment East Gippsland Inc v VicForests

6. Most recently Osborn J of the Supreme Court of Victoria in *Environment East Gippsland*

Inc v VicForests [2010] VSC 335 (11 August 2010) found that the plaintiff had the special interest necessary to confer standing by reason of, in particular, that it had been engaged on an ongoing basis in the consultative process undertaken with respect to the formulation of the relevant Forestry Management Plan; it was an actual user of the relevant coupes, thus exhibiting a greater degree of interest than that of members of the public; it had made relevant submissions to the Department of Sustainability and Environment; and had received from government a financial grant in recognition of the plaintiff's status as a body representing a particular sector of the public interest: see paragraph [80], and generally paragraphs [70] to [88]. Osborn J referred with approval at [77] to Sackville J's decision in *North Coast Environmental Council Inc v Minister for Resources*.

Standing to sue under the *Australian Consumer Law*

7. One further and important point on standing. If a proceeding were to be brought for misleading and deceptive conduct under the *Australian Consumer Law*, then no such standing to sue issues should arise. For example, an intensive producer of animal products may market them on the basis that the animals were raised in enriched conditions when in fact they were not. A declaration under the *ACL* that there had been misleading and deceptive conduct would not only correct a public wrong, but also stand to create a more informed consumer choice. Strategically speaking, this would impeach the basis on which customer allegiance was built and thus perhaps, by the exertion of market power, lead to a more humane change in producer practices.

8. Section 232 (2), *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act* 2010) provides that the Federal Court may grant injunctive relief where, on the application of the regulator "or any other person", it is satisfied that a person has engaged, or is proposing to engage, in conduct in contravention of, amongst others, a Chapter 2 provision (such as section 18 prohibiting misleading and deceptive conduct by a person, the new equivalent of the former section 52, *TPA*). The *Australian Consumer Law* commenced as of 1 January 2011. (This

injunctive power under the former *Trade Practices Act* 1974 was conferred by section 80).

In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, the applicant was a stranger to the dispute, having suffered no loss or damage by reason of the respondent's conduct. In its capacity as a corporate person, the applicant simply invoked the jurisdiction conferred on the Federal Court by section 80 (broadly the former equivalent of section 232, *Australian Consumer Law*), and 163A.⁸ The respondent challenged the applicant's standing to bring the proceeding, as well as the validity of section 80 and section 163A so far as they conferred such standing. The High Court determined the appeal on the basis that standing existed in the applicant.

9. Further, Bowen CJ had previously observed in *Phelps v Western Mining Corp Ltd* (1978) 20 ALR 183 that the purpose of section 52 is to protect the public from being misled or deceived. *Phelps* was approved in *Truth About Motorways*. It was observed in *Truth About Motorways* that an application for injunctive relief under section 80 is, in its nature, one for the protection of the public interest; and the same may be said of section 163A: per Gleeson CJ and McHugh J at [17].

The Attorney General rule

10. There is a general rule that only the Attorney-General may institute proceedings for a public wrong, doing so ex officio or on the relation of a private citizen. As observed by Gaudron J in *Truth About Motorways*, the 'constitutional' nature of that rule in Britain derives from the status of the Attorney General in British law. But there is no equivalent constitutional basis for the rule in Australia. That is because the office of Attorney General is well understood in our legal system and is not an office recognised by the Constitution. It is thus simply in Australia a rule of the common law. As a rule of the common law, it can thus be abrogated by

⁸ Section 163A of the former Trade Practices Act 1974 provided that "a person" may institute a proceeding in the Federal Court seeking a declaration in relation to the operation or effect of, amongst others, a provision of (the former) Part V consumer protection provisions.

the parliament so as to allow any person to represent the public interest and thus institute legal proceedings with respect to a public wrong: see further per Gaudron J paragraphs 37 to 41. The general rule is subject to exceptions, such as the common law exception of obtaining standing to sue where a special interest is established; the absence of a standing to sue barrier under the TPA's consumer protection provisions; or where say the general rule is abrogated by the parliament. This is a further point to keep in view when considering UK cases on the Attorney General rule or the Crown in the UK, which will be examined shortly.

The second challenge: the undertaking as to damages

Save in 'special' or 'exceptional' circumstances, undertaking required

11. The second challenge is the question of whether a party can be exempted from the usual undertaking as to damages for the grant of an interlocutory injunction. In *Blue Wedges Inc v Port of Melbourne Corporation* [2005] VSC 305 (9 August 2005), a case about a course of dredging of Port Phillip Bay, an interlocutory injunction was refused because of the failure of the applicant to offer the usual undertakings as to damages. Mandie J at paragraph [11] observed that such an undertaking was required "... *save in exceptional circumstances*", relying upon what was said by Heydon J in an interlocutory injunction application in the High Court in *Combet v Commonwealth of Australia* (see [2005] HCA Tran 459 (29 July 2005) at [1530] to [1645]). In any event, His Honour found that the balance of convenience did not favour the plaintiff. In Young, Croft & Smith 'On Equity', the learned authors at [16.430] state that "*It is only in special circumstances that the undertaking is to be excused ...*"

Other circumstances in which undertaking not required

12. The learned authors also state, in summary, that where the Crown or a party representing the Crown is suing to protect the public interest, an undertaking as to damages may not be exacted: see *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd* [1998] FCA 819 (14 July 1998; (1998) 84 FCR 512; see also *Optus Networks Pty Ltd v City of Boroondara* [1997] 2 VR 318, at 330ff. The learned authors also state that where there is

sufficient public interest and a statutory injunction rather than an equitable injunction is sought, a Court may only require a limited undertaking: *Century Metals and Mining NL v Yeomans* (1988) 85 ALR 54.

The Crown's exemption when suing in the public interest

13. Turning to the first of the two principles stated by the learned authors about the Crown suing to protect the public interest, Lindgren J of the Federal Court in *Giraffe World* discharged a Mareva injunction because the Commission refused to give an undertaking as to damages. In the course of his reasons, Lindgren J traced the origin and history of the rule exempting the Crown from being required to give an undertaking as to damages, beginning with *Attorney General v Albany Hotel Company* [1896] 2 Ch 69. His Honour noted that the decision in that case “appears to have been based on a practice rather than on any legal rationale.” Some 18 months before *Giraffe World*, Ormiston JA as a member of the Court of Appeal in *Optus Networks Pty Ltd v City of Boroondara*, had similarly observed to Lindgren J that the exemption for the Crown came to be later justified on the basis that the Crown could not be made liable in damages in an ordinary action. Lindgren J noted that this rationale disappeared in England on the passing of the *Crown Proceedings Act 1947* and that in relation to the Crown in right of the Commonwealth, comparable provisions were to be found in sections 56 and 64 of the *Judiciary Act 1903* (Cth).

14. His Honour then appeared to note that the scope of the exemption for the Crown was cut down in *Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL), so that in cases of the Crown seeking to enforce (by interlocutory injunction) proprietary or contractual rights, it should be required to give the usual undertaking as to damages. His Honour further noted that it was held that the Crown, when suing to enforce the law of the land, should not necessarily be required to give an undertaking as to damages.

It may be said that the House of Lords in *Hoffmann-La Roche* removed the former Crown exemption, creating instead a new limited principle that a discretion only exists in the Court in appropriate circumstances to not require the undertaking where the Crown sues to enforce the

law of the land. In any event, *Hoffmann –La Roche* was followed in Australia in *Commonwealth v John Fairfax & Son Ltd* (1980) 147 CLR 39, a decision of Mason J.

Criticism of the Crown’s exemption

15. Like Lindgren J in *Giraffe World*, Ormiston JA in *Optus Networks* said at [321]:

“Nevertheless, since those decisions it has been thought that the Crown is still not obliged to give an undertaking where it does seek interim relief in the course of seeking compliance with the general law, that purpose forming a new basis for an ‘exemption’ which had lost its practical foundation when the Crown became liable to suit as if it were an ordinary litigant.”

Lindgren J noted in *Giraffe World* that there was no reason why a distinction should be drawn between the Commonwealth seeking to protect a proprietary or private right, and a private citizen, now that the Crown was not immune from liability in damages. Ormiston JA in *Optus Networks* noted how the new rationale for not requiring the Crown to give an undertaking as to damages had been criticised, and at 321 how “many of the criticisms are not lacking in logic”. No doubt this criticism is justified, given that the inception of the Crown’s exemption came to be anchored in something which was later removed. Indeed, in England between the passing of the *Crown Proceedings Act* in 1947 and the *Hoffmann-La Roche* decision of the House of Lords in 1975, it would appear that no legal rationale for the Crown exemption existed. That said, the new limited principle of a discretion only in the Court from 1975 where the Crown sues to enforce the general law, could be better justified in the circumstances of a given case where, without more, the competing public interest factors are sufficient. For it is difficult to see why this discretion should turn on the status of the Crown instead of the public interest as such. If it were otherwise, it would become permissible for others to apply to invoke the Court’s discretion.

Finally, in *Giraffe World*, Lindgren J concluded that there was no reason why the ACCC should not be required to give the usual undertaking as to damages as a condition of the continuation of the Mareva relief because it was not under a *duty* to apply for compensation on behalf of the various persons in a representative proceeding. This question of ‘duty’, as will be seen, has also

assumed a relevance when considering whether to extend the court's discretion (to not require the usual undertaking) from the Crown to, in addition, public authorities suing to enforce the law of the land.

16. Against this background, the question becomes whether by analogy it could be argued, having regard to *Hoffman-La Roche*, that where a person or say a NGO sues to enforce the law of the land, for example, under a public interest provision like the new section 18 of Schedule 2 of the *Trade Practices Act* (the former section 52), or by reason of establishing standing to sue, it should not be required in an appropriate case (in the exercise of the court's discretion) to give an undertaking as to damages as the price of an interlocutory injunction.

Extending the Crown's exemption to a municipality or other public authorities seeking law enforcement

17. In *Optus Networks*, in brief summary, Optus wished to install cables in the City of Boroondara in Melbourne. It contended it was exempted from State planning laws by regulations under the *Telecommunications Act*. The City of Boroondara sought and obtained an interlocutory injunction restraining the cable installation. Optus appealed, offering to give an undertaking on various matters, such as not to cut tree branches exceeding a certain diameter. This undertaking was thought by the Court of Appeal to offer sufficient protection for the City pending trial, and of the kind the Court might otherwise have imposed by way of interlocutory injunction: Ormiston JA at 322; Charles JA at 340 and Callaway JA at 341. This case considered the obligation, if any of the City or a municipality to give an undertaking as to damages as the price for obtaining interlocutory relief. The appeal was allowed and the injunction was dissolved on the basis of the Optus undertaking.

18. There was some focus in the case on the House of Lords decision in *Kirklees M.B.C. v Wickes Building Supplies Ltd* [1993] AC 237. Optus argued that the House of Lords decision should not be followed so that a municipality or other public authority should be required in Australia to give an undertaking as to damages as the price of interlocutory relief, even though it

was under a legal duty to enforce the law. *Kirklees* concerned a borough council seeking to restrain by injunction Sunday trading in breach of the *Shops Act 1970*. As noted by Charles JA at [332], the House of Lords held in *Kirklees* that there was no rule that the Crown was exempt from giving an undertaking in damages in law enforcement proceedings, but that the Court had a discretion to not require the undertaking and that the discretion extended to public authorities seeking law enforcement in appropriate circumstances. As also noted by Charles JA at [322] after considering *Hoffman-La Roche*, Lord Goff of Chieveley said of that case at 274 – 275:

“... I do not read the speeches in the Hoffman-L Roche case as conferring a privilege on the Crown in law enforcement proceedings. On the contrary, I read them as dismantling an old Crown privilege and substituting for it a principle upon which, in certain limited circumstances, the court has a discretion whether or not to require an undertaking in damages from the Crown as law enforcer. The principle appears to be related not to the Crown as such but to the Crown when performing a particular function. It is true that, in all the speeches in that case, attention was focused on the position of the Crown, for the obvious reason that it was the position of the Crown which was in issue in that case. But the considerations which persuaded this House to hold that there was a discretion whether or not to require an undertaking in damages from the Crown in a law enforcement action are equally applicable to cases in which some other public authority was charged with the enforcement of the law.

... in these circumstances, I for my part see no material distinction between the council in the present case and the Crown in Hoffman-La Roche. Nor do I feel compelled to depart from that conclusion by the fact that, under the present practice, a local authority which acts as a relator in a relator action is required to give an undertaking in damages even though it is so proceeding in order to enforce the law in the public interest ... In my mind, the position of the local authority as relator cannot be decisive of the present case. The essential question is whether the Court’s discretion to require an undertaking in damages in law enforcement cases is confined to cases in which the Crown is plaintiff, or should be held to apply to other public authorities exercising the function of law enforcement in the circumstances specified in the Hoffman-La Roche case. In my opinion, for the reasons I have given, it should be held so to apply.” [emphasis added]

Should the public interest be weighed in the exercise of the Court’s discretion?

19. The question arises then whether a person suing to enforce the public interest, and who establishes or has standing to sue, should not be also subject to the Court’s discretion to not require an undertaking in damages in an appropriate case. Why as a matter of basic principle should the discretion stop with the Crown and public authorities? The considerations which persuaded the House of Lords in *Hoffman-La Roche* to hold that there was a discretion can be noted in brief terms. Lord Diplock regarded as important the fact that the injunction involved enforcing a public right and not a private right (at 363B). Lord Cross of Chelsea spoke of the public interest in seeing the law being enforced (at 371A). Lord Cross of Chelsea further noted

the consequence for the public interest if the injunction were refused.

20. The fact that in *Hoffman-La Roche* both Lord Diplock and Lord Goff of Chieveley placed particular emphasis on the duty owed to the public by the person seeking to enforce the law should, it is respectfully suggested, only weigh as an additional factor as to why the Court's discretion should be exercised to not require an undertaking as to damages. It should not mean that the Court's discretion cannot be exercised in a case where there are sufficient public interest factors to weigh only because the applicant is otherwise not the Crown or a public authority, but instead some other person who establishes or has standing to sue.

21. Charles JA also noted in *Optus Networks* at 333 what Lord Goff of Chieveley said in *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* [1991] 1 AC 603. By way of brief background, in *Factortame*, law enforcement proceedings were taken against a party which was acting or threatening to act in a manner involving a clear breach of UK law. At 673 Lord Goff of Chieveley said:

“Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that ‘one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed’: see Smith v Inner London Education Authority [1978] 1 All E.R. 411, 422 per Browne L.J. ... Like Browne L.J. I incline to the opinion that this can be treated as one of the special factors referred to by Lord Diplock in the passage from his speech from which I have quoted. In this context, particular stress should be placed on the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and the duty placed upon certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience. So if a public authority seeks to enforce what is on its face the law of the land, and the person against whom such action is taken challenges the validity of that law, matters of considerable weight have to be put into the balance to outweigh the desirability of enforcing, in the public interest, what is on its face the law, and so to justify the refusal of an interim injunction in favour of the authority, or to render it just or convenient to restrain the authority for the time being from enforcing the law.” [emphasis supplied in quote]

This reasoning about the balance of convenience is compelling. It could equally apply, it is respectfully suggested, to persons other than public authorities ‘performing duties to the public’ who seek to enforce the law of the land and have standing to sue. What was said above concerning the question of a duty to enforce the law is repeated, namely, it should only be an

additional factor to weigh in the exercise of a Court's discretion. While the remarks of Lord Goff of Chieveley were directed to the question of the balance of convenience, it is respectfully suggested that they could equally extend to the Court's discretion to not require an undertaking in damages. That said, the refusal of a plaintiff to proffer an undertaking may also weigh in the court's determination of the balance of convenience.

22. Certainly, the rule as to an undertaking in damages exists to avoid the obvious injustice to a defendant who may win at trial. But in a case concerning the public interest, there should also be weighed the injury to the public interest pending trial and not just the injustice that may be caused to a successful defendant. Assume for example that in a case the injury to the public interest pending trial was the extinguishment of four endangered species or the cutting down of parts of a forest, which on the face of a law were protected. Is that not a matter to be weighed against any injury to a successful defendant? The difficulty is that the rule requiring an undertaking in damages stems from protecting the position of a defendant in private interest disputes and that this thinking continues to inhibit the exercise of the Court's discretion in public interest cases.

Prima facie presumption where defence denies what is on the face of it the law of the land

23. In this respect what Lord Cross of Chelsea said at 371 in *Hoffman-La Roche* (also referred to by Charles JA in *Optus Networks* at 334) is instructive. First, Lord Cross said that it may be fair enough that the Crown should be required to give an undertaking in damages where the defendant says that what he is doing or proposing to do is not prohibited by the law in question, for there is “*no prima facie presumption that the defendant is breaking the law.*” But Lord Cross also said that where, as in that case, the defence was that “*what is on the face of it the law of the land is not in fact the law*”, he agreed with Lord Diplock that the position was quite different. Lord Cross continued:

“In such a case what the defendant is doing or proposing to do is, prima facie, a breach of the law and if he is allowed to continue his course of conduct pending the trial because the Crown is deterred from applying for an interim injunction by the necessity of giving an undertaking in

damages the result will be – if the defendant loses at trial – that those for whose benefit the order was made will be deprived of the benefit of it for the period, which may be considerable, between the starting of proceedings and the eventual decision – the period during which the defendant will have been pursuing a course of conduct which contravenes what throughout appears to be eventually shown to have always been the law. It is, I think, only in exceptional circumstances that the Courts should countenance the possibility of such a result.”
[emphasis added]

Charles JA viewed these reasons as persuasive. But it is respectfully suggested that the reasons could equally apply to plaintiffs other than the Crown or a public authority. The observation as to ‘exceptional circumstances’ at the end of the passage is particularly striking.

The waiver of the undertaking in certain environmental cases

24. The foregoing considerations were exemplified in *Environment East Gippsland Inc v VicForests (No 2)* [2009] VSC 421 (29 September 2009), a decision of Forrest J of Victoria’s Supreme Court. The question was whether security should be given in addition to the undertaking as to damages by the plaintiff. Security was sought because VicForests contended that the undertaking was inadequate and further contended that the plaintiff should lodge a substantial sum with the Court as security. Pausing there, as a general observation, it may be noted that most NGOs lack the resources to proffer the undertaking, even though otherwise they may have access to authoritative and specialist expertise on their issues of concern.

25. Forrest J declined to order Environment East Gippsland to provide such security in addition to the undertaking as to damages. After canvassing relevant principles as to the purpose of requiring an undertaking as to damages in paragraphs [12] to [18], His Honour continued (at [19]):

*“... in the vast majority of cases involving private litigants, the question of an appropriate undertaking and/or the need for a security will be of considerable importance in determining whether to grant the injunction. However in proceedings involving public interest issues, that consideration may not be as great. There is a line of authority in the Land and Environment Court of New South Wales to this effect. For instance, in *Ross v State Rail Authority of NSW*,⁹ Cripps CJ said:*

“Where a strong prima facie case had been made out that a significant breach of an environmental law has occurred, the circumstance that an applicant is not prepared to give the usual undertaking as to damages is but a factor to be taken into account

9 (1987) 70 LGERA 91, 100.

in considering the balance of convenience.””

26. At paragraph [20] Forest J referred to what Stein J said in *Osblack v Richmond River Council and Irongates Developments Pty Ltd* (1994) 82 LJERA 236, 343, namely:

*“For justice to be administered through open standing provisions it was and remains necessary for the Court to review any unreasonable procedural barriers to public participation. One such example is the traditional requirement for an applicant to give an undertaking as to damages upon an application for an interlocutory injunction. The requirement had its origins in private litigation in order to do justice to strike a balance between the competing private interests. However, applicants in public interest litigation have no private interest in the proceeding. Their prime motivation is to seek to uphold the public interest in the rule of law. In *Ross v State Rail Authority*, Cripps J held that in recognition of the public interest nature of the litigation the offering of an undertaking for damages was but one factor to be considered in the balance of convenience. *Ross* has been repeatedly followed in the Court in public interest cases.”*

27. Finally, at [21], Forest J noted what Preston CJ said in *Tegra (NSW) Pty Ltd v Gundagai Shire Council* [2007] NSWLEC; (2007) 160 LJERA 1 [29], namely:

“The appropriateness of requiring an applicant to give an undertaking as to damages may vary depending on the nature of the proceedings. In public interest, environment proceedings, it may be less appropriate.”

This line of authority no doubt stems from the fact that public interest cases come before the NSW Land and Environment Court on an ongoing basis. In contrast, the starting point for Victoria’s Supreme Court is the Full Court observation in *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 386 at 559, *“the usual undertaking as to damages is the price that must be paid by almost every applicant for an interim or interlocutory injunction.”* That case of course was a private dispute between a bank and its customer.

Modification of the undertaking where there is a sufficient public interest and a statutory injunction is sought

28. It will be recalled that reference was made earlier to the principle that where there is sufficient public interest and a statutory injunction rather than an equitable injunction is sought, the Court may only require a limited undertaking: *Century Metals and Mining NL v Yeomans*. *Century Mining* involved an application under the *ADJR Act* to restrain disposal of assets by a liquidator and the grant of a licence to Elders Resources Ltd by the Minister to mine for

phosphate. French J accepted that there was a risk of loss to both the liquidator and Elders arising from delay due to the proceeding but, weighing public interest factors, only required a more limited form of undertaking as to damages. At page 59 French J noted:

“Elders Resources Ltd contends ... the present case is one whose consequences are entirely commercial. I cannot accept that proposition. There is a significant element of public interest intermingled with contending private interests in this case ...

It is not, in my opinion, appropriate in such a case to hamper the exercise by the applicant of its right for review by requiring that it, in order to preserve the subject matter of the litigation, offer to the Commonwealth and the liquidator an unrestricted undertaking as to damages in the usual form.”

Whilst obviously each case will turn on its own facts, it is arguable that it is but a short step in a case where there are strong countervailing public interest factors to suggest the undertaking as to damages should be not merely modified, but instead not required. Further, the court’s exercise of discretion should not turn in the ordinary course on whether the injunction is statutory or equitable.

The third challenge: is there a ‘public interest’ defence?

29. Turning now to the third challenge, the question of whether there may be a ‘public interest’ defence to justify publication of confidential information, or a breach of copyright if publication has taken place, begins with the rule known as the ‘iniquity’ rule. For example, a defendant could contend that there is no confidence recognised by the law in circumstances of iniquity. This stems from the old case of *Gartside v Outram* (1856) 26 LG Ch 113. In that case an employer claimed confidentiality of a trade secret where the obligation upon the employee related to information about the fraudulent conduct of his employer. Wood V-C said (at 114):

“The true doctrine is, that there is no confidence as to the disclosure of iniquity.”

In a given case of iniquity then the claimed confidential information will lose its confidential character because it concerned an iniquity. The information must contain or disclose some form of wrongdoing. If the event or practice affects the community as a whole, then there are grounds for justifying a general disclosure through, for example, the media or by publication of a book: see Gurry ‘On Breach of Confidence’ (1984, Oxford University Press, at p.345); see

also *Australian Football League v Age Company Ltd* (2006) VSC 308 (30 August 2006) per Kellam J at [67] – [68]; *Church of Scientology v Kaufman* [1973] RPC 635. What gives rise though to an iniquity? This will be examined shortly.

The UK position

30. Second, in the UK it is well established that there is a public interest defence. It was, for example, summarised in this way by Powell J in *Westpac Banking Corporation v John Fairfax Group Pty Ltd* (1991) 19 IPR 513 at 525:

“I turn, then, to the question of the public interest. As I indicated in Spycatcher [Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd (1987) 8 NSWLR 341, at 382], it seems to me the law in this area has now progressed to the stage where the so called ‘iniquity rule’ has been subsumed in a more general rule, namely, that publication of otherwise confidential material might be permitted in cases in which there is shown to have been some impropriety which is of such a nature that it ought, in the public interest, be exposed.”

31. In the United Kingdom, Griffiths LJ in *Lime Laboratories v Evans* [1985] QB 526, said:

“The first question to be determined is whether there exists a defence of public interest to actions for breach of confidentiality or copyright, and if so, whether it is limited to situations in which there has been serious wrongdoing by the plaintiff – the so-called ‘iniquity’ rule. I am quite satisfied that the defence of public interest is now well established in actions for breach of confidence and, although there is less authority on the point, that it also extends to breach of copyright: see by way of example Fraser v. Evans [1969]1 Q.B. 349; Hubbard v. Vosper [1972] 2 Q.B. 84; Woodward v. Hutchins [1977] 1 W.L.R 760 and British Steel Corporation v. Granada Television Ltd. [1981]A. C. 1096. I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called ‘iniquity’ rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be so exposed. No doubt it is in such circumstances that the defence would usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information.” [emphasis added]

See also *Fraser v. Evans* [1969]1 QB 349,362; and *Hubbard v Foster* [1972] EWCA Civ 9; [1972] 2 QB 84, 95. The genesis for this public interest defence in the UK is *Gartside v Outram*, although the case also supports the iniquity rule.

The Australian debate

32. In Australia there has been some debate on whether there is a public interest defence

where the duty of confidence is equitable as distinct from contractual. That equity will recognise an obligation of confidence independent of contract is now well established: see for example *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* [1984] HCA 73; (1984) 156 CLR 414, at 437-438 per Deane J. On the other hand, Gummow J, when a member of the Federal Court, was highly critical of the public interest defence, developed as it was on the basis of the dictum in *Gartside v Outram*. In *Corr Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) FCA 266; (1987) 14 FCR 434 455-456 and in *Smith-Kline & French Laboratories (Australia) Limited v Secretary Department of Community Services and Health* [1989] FCA 384; (1990) 22 FCR 73, 110-111 Gummow J said that in Australia the principle should be limited to information which revealed a recognised ‘iniquity’. In the *Corr Pavey Whiting & Byrne* case, Gummow J concluded that *Gartside v Outram* did not support a public interest defence to breach of confidence, concluding at 454:

“From this consideration of *Gartside v Outram* I conclude that that case provides insufficient basis for a ‘public interest defence’ of the kind that, in its name, has been developed in the recent English authorities. The truth as to what *Gartside v Outram* decided is less striking and more readily understood as a basic principle. It is that any court of law or equity would have been extremely unlikely to imply in a contract between master and servant an obligation of the servant’s good faith to his master required him to keep secret details of his master’s gross bad faith to his customers.” [emphasis added]

Pausing there then, Gummow J first confined *Gartside v Outram* to whether such a term would be implied in the contract.

33. Gummow J then continued as to what principle *in equity* flowed from *Gartside v. Outram* , and in doing so excluded any principle concerned with (express) *contractual* protection of confidence (at paragraph [455-456]):

“Finally, if there be some other principle of general application required by *Gartside v Outram* it is in my view of narrower application than the ‘public interest defence’ expressed in English cases. Such a narrow principle would not be concerned with contractual protection of confidence. Where the plaintiff asserts a contractual right, the law of contract supplemented by equitable defences where equitable relief is sought, sufficiently deals with the situation. Any principle of the kind I am now considering would be applied in equity where there is no reliance on contractual confidence. That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third

party with a real and direct interest in redressing such crime, wrong or misdeed.” [emphasis added]

Accordingly, where an applicant relies upon an express contractual term protecting confidential information, Gummow J’s principle would not apply. Victoria’s Court of Appeal in *Cowell & Ors v British American Tobacco Australia Services Ltd & Ors* [2007] VSCA 301 (14 December 2007), albeit by obiter dicta, expressed support for the circumstances in which confidentiality may not be enforced in equity in terms of the iniquity principle developed by Gummow J in *Corr Pavey Whiting & Byrne*. The Court of Appeal said in the joint judgment:

“*Since the jurisdiction to enjoin the publication for use of privileged information is limited to such equity as may inhere in the confidentiality of the communication, ordinary principles dictate that injunction ought not to go at the suit of an applicant who comes to equity with unclean hands or where the subject matter of the communication ‘is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.’*”

Suffice to say Kaye J as a judge at first instance in *British American Tobacco Australia Limited v Gordon & Ors (No 3)* [2009] VSC 619 (24 December 2009) considered that in view of this Court of Appeal decision in particular he should apply the principle stated by Gummow J in *Corr Pavey Whiting & Byrne*: see paragraph [115]. Further, the narrower view of the iniquity defence had already been adopted by another judge at first instance, namely, Kellam J in *Australian Football League v Age Company Ltd* (2006) VSC 308 (30 August 2006).

34. In addition, the Court of Appeal of South Australia in *Sullivan & Ors v Sclanders & Anor* [2000] SASC 273; (2000) 77 SASR 419 expressly adopted and applied Gummow J’s narrow view of the iniquity defence. *Sullivan’s* case involved an associate of Sclanders, one of two business partners, engaging in removal of documents from a suitcase of the other business partner, Sullivan, in an underhand way. The documents were photocopied and forwarded to Sclanders, who claimed they revealed a pattern of behaviour on the part of Sullivan to deprive him of his business entitlements. Sclanders failed in his attempt to obtain a declaration that he was entitled to disclose the documents.

35. On the other hand the position is more open in New South Wales where in *David Syme & Co Ltd v General Motors-Holden Ltd* [1984] 2 NSWLR 294 Samuels JA at [309] agreed with the remarks of Denning MR in *Woodward v Hutchins* [1977] 1 WLR 760 at 764 that:

“In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest of knowing the truth.”

Woodward v Hutchins has been said to be the ‘high water mark’ of the public interest defence in the UK. At 310 Samuels JA continued:

“It therefore seems to me, in finally determining the matter, that the parties before us were correct in perceiving their dispute to depend upon a balance of competing interests. I deal with the matter on that footing.”

36. In very brief summary, Street CJ, on the other hand, noted that the law on the question of the public interest defence was unsettled. Huttley AP at 305 – 306 concluded that it was not a case in which the right of confidentiality was destroyed by iniquity.

37. The approach adopted by Samuels JA in *David Syme* was taken up by Kirby P in *Attorney General for the United Kingdom v Heinemann Publishers Ltd*. It will be recalled this case concerned the publication of a book about the activities of MI5, the British spy agency. Kirby P, whilst concluding that the Court of Appeal had no jurisdiction to hear an application to enforce a public foreign law, nevertheless went on to discuss the respondent’s defence of public interest. Kirby P at 170 adopted Megarry V-C’s definition of ‘public interest’ in *British Steel Corporation v Granada Television Ltd* (1981) AC 1096 at 1113, namely, *“something which is of serious concern and benefit to the public.”*

His Honour further said that the word ‘iniquity’ in *Gartside v Outram* did not express a principle but rather was *“simply an instance of the wider category of the public interest in disclosure which may sometimes, even if rarely, outweigh the public interest of confidentiality and secrecy.”*

The *Spycatcher* case went on appeal to the High Court, but the High Court disposed of the appeal without having to consider the public interest defence.

38. Otherwise, in *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1980) 147 CLR 39; 32 ALR 485, the Commonwealth sought an interlocutory injunction to restrain the publisher of the Age and Sydney Morning Herald newspapers from publishing extracts from a book and from documents of defence and foreign policy matters, both of which were produced by Commonwealth Government departments. Amongst a number of arguments, the Commonwealth submitted that it was the owner of the copyright in the documents and that the book contained confidential information. Rejecting most of the Commonwealth's arguments, Mason J however found that the plaintiff had made out a prima facie case of copyright infringement. His Honour observed at (496-7, ALR):

“It has been accepted that the so called common law defence of public interest applies to disclosure of confidential information. Although copyright is regulated by statute, public interest may also be a defence to infringement of copyright ... Assuming the defence is to be available in copyright cases, it is limited in scope. It makes legitimate publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been acknowledged that the defence applies to disclosure of things done in breach of national security, breach of the law (including fraud) and to disclosure of matters which involve danger to the public.” [emphasis added]

The defendants submitted that damages were an adequate remedy and that no injunction should issue. Mason J said (at 497 of the ALR):

“Infringement of copyright is ordinarily restrained by injunction, and this is because Equity has traditionally considered that damages are not an adequate remedy for infringement. Of course this does not mean that damages are an adequate remedy in every case or that an injunction should be granted to restrain every infringement.”

In this respect, in Victoria for example, it has since been established that when considering the balance of convenience in an injunction application, the proper test is not whether damages are an adequate remedy, but whether it is just in all the circumstances that the plaintiff should be confined to his remedy in damages: see *State Transport Authority v Apex Quarries Limited* [1998] VR 187,193.

39. Returning then to the ‘public interest’ defence in Australia, in *A v Hayden (No 2)* [1984] HCA 67; (1984) 156 CLR 532 Gibbs CJ, by obiter dicta, noted that the scope of the iniquity rule in *Gartside v Outram* had been expanded to mean misconduct generally. Gibbs CJ expressed the

view that a weighing up of the nature of the offence and the public interest in disclosure was required. Very briefly, His Honour took a narrow view of the public interest defence.

40. Further, Kaye J in *British American Tobacco Australia Limited v Gordon & Ors (No 3)* [2009] VSC 619 (24 December 2009) in the course of a compendious and helpful review of the authorities on the public interest defence, noted at paragraph [107] that in *Esso Resources Limited v Plowman* (1995) 183 CLR 10 Brennan J observed “*that in determining the scope of an implied obligation of confidentiality a party will not be taken to have intended that it would keep information confidential if that party had an obligation, albeit not a legal obligation, to satisfy a public interest knowing what is contained in the information. On the other hand, Mason CJ (with whom Dawson and McHugh JJ concurred) noted that the precise scope of the public interest exception remained unclear*” (at page 61). [emphasis added]
41. The foregoing state of the authorities, and especially the dicta in the High Court, suggests that a public interest defence could be raised, strategically speaking, in the Federal Court. This could be done, for example, by way of seeking a declaration as to an entitlement to disclose information. It would appear that the question still remains arguable at a Federal Court or High Court level.

What other defences may be taken?

42. Assuming however that the public interest defence is not the law in Australia, what other defences may be taken? First, it will be recalled that the public interest defence has generated much discussion where the confidentiality obligation is relied upon in the exclusive jurisdiction of equity, or as an implied term of a contract. In the case of an obligation relied upon in equity, the fact that the subject matter of the confidence is some form of wickedness can be viewed as relevant in three ways. The first concerns whether the obligation of confidence exists at all. Here Gummow J’s articulation of the principle as affirmed in Victoria’s Court of Appeal, becomes relevant, namely, where the existence or real likelihood of an iniquity exists in the sense of a crime, civil wrong or serious misdeed of public importance. Further, the confidence must be relied upon to prevent disclosure to a third party with a real and direct interest in

redressing such crime, wrong or misdeed.

43. Second, there is the standard ploy of mounting an attack that the claimed confidential information lacks the necessary quality of confidential information in any event. There is a deal of law on that subject.
44. The third way is to raise the equitable defence of unclean hands. Once again Victoria's Court of Appeal noted this defence at paragraph [34] of *Cowell's* case: see also generally *Ag Australia Holdings Ltd v Burton & Anor* [2002] NSWSC 170 (3 May 2002) per Campbell J; *Denbirst v Edwards* [1983] 1 NSWLR 34 at 51; *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552 at 561; *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (supra) at 383-384; *Corr Pavey Whiting & Byrne* at 456-457.
45. If the obligation of confidence relied upon is said to arise from an implied term in a contract, the wickedness of the conduct sought to be kept confidential is relevant to whether the implication of confidentiality is made: see *Gartside v Outram*; *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61 at [28] and the helpful judgment of Campbell J in *Ag Australia Holdings Ltd* (supra) at [195] as to the rules of implication.
46. In the case of an express term in a contract, some public policy argument will be required to defeat enforcement. Campbell J in *Ag Australia Holdings Ltd* at [196] gave as an example that public policy would make void an express contract to keep secret the committing of a widespread and serious fraud. In *A v Hayden (No 2)* (supra) the High Court held that the confidentiality obligation in an employment contract was unenforceable because it would obstruct the administration of the criminal law and thus would be contrary to public policy. Further, an injunction application could be met also by a defence of unclean hands.

3 Live Animal Exports

The trade with Egypt: a case example

1. In February 2006 the Australian Minister for Agriculture, Peter McGauran suspended the live trade in animals to Egypt. This followed a public outcry with the 60 Minutes program exposé of the shocking treatment of cattle prior to slaughter at Cairo's major abattoir, Bassateen. There were media reports too on the abuse of Australian sheep in the lead up to the *Eid Al Adha* (*Feast of Sacrifice*) in Cairo, where sheep were shown trussed and loaded into car boots in a region known for soaring temperatures, or tied atop vehicles, before later having their throats cut by untrained and unskilled private purchasers.
2. In October 2006 the Australian Government permitted live animal exports to Egypt on the basis that two Memoranda of Understanding ("MOU") had been signed by the two governments. The principal MOU is on Handling and Slaughter of Australian Live Animals. This MOU requires that international animal welfare guidelines (but not standards) established by the World Animal Health Organisation, known as OIE, apply to the handling of Australian livestock, namely, sheep and cattle. In addition, there are some specific handling requirements for Australian cattle, but not for sheep.
3. The OIE guidelines however are lower than the standards prevalent in Australia. For example, no pre-stunning is required before killing. Killing, according to Halal prescription, is by slitting the throat and bleeding out the animal.

Memoranda of Understanding

4. A Memorandum of Understanding is in foreign office parlance, 'a convergence of will'. No stipulated consequences ensue for its breach. It is unenforceable. The Egyptian Government requested, apparently, that its terms be kept confidential. The Australian Government, anxious for the trade to resume, agreed. The terms of the MOUs were thus not exposed to public scrutiny, despite their purported public interest objects.

The principal Memorandum of Understanding enabled though the trade's initial resumption, which the Minister and Australian Government were embarrassed into suspending by reason of the 60 Minutes exposé of the animals shocking ill-treatment in Egypt.

The MOU breaches on the first resumed shipment

5. By media release dated 13 February 2007, the Minister acknowledged there had been "some appalling cases of animal cruelty detailed in a report released late last year by animal welfare group Animals Australia". Video footage had been taken by Animals Australia of such breaches in December 2006, and given to the Minister and the industry in early 2007. This report documented eye witnessed breaches by the hundred of the provisions of the Australia/Egypt MOU. These breaches arose from the first and only shipment of sheep aboard the *Maysora* after resumption of the trade to Egypt. Destined originally for Israel, some 40,000 sheep were ultimately unloaded in Egypt.

Despite the federal Department's promises, no Departmental official met the first resumed shipment at dock or elsewhere. The live animal exporter's veterinarian aboard the ship had got off at Jordan, only two days sailing time from Egypt, despite the obligation upon the exporter to have a veterinarian stay the journey and attend the animals' disembarkation.

Only some 20,000 or so were sent to the abattoir, a shocking process as it was by reason of uncaring handling and Halal killing without pre-stunning. But worse, some 20,000 were sold to private purchasers, who for ritual slaughter purposes have no butchery skills.

As a result, Mr. McGauran wrote to his Egyptian counterpart in March 2007 asking for a report on those alleged breaches. In the interim, with no reply from his Egyptian counterpart, the trade was informally suspended by the Minister.

6. Whilst the trade was thus suspended, by a media release of 13 February 2007 Mr McGauran said that:

“... A ban on live animal exports would remove any incentive for Egypt to work with Australia to improve animal handling standards.”

Some three months later (23.5.2007) a Departmental officer, Mr Morris, appeared at an Estimates hearing before the Standing Committee on Rural and Regional Affairs and Transport (available at: <http://www.aph.gov.au/hansard/senate/commtee/S10252.pdf>) and in his answers one finds the limited means proffered by and available to any Australian Government attempt to improve animal handling standards in Egypt, and the almost insuperable difficulties posed by Egyptian sovereignty once the animals were unloaded dockside at the port of destination.

The limited endeavour of government to protect welfare

7. As to what Australia does to “try to influence the countries in the region to improve their handling conditions and the slaughter/feedlot conditions in those countries”, Mr. Morris continued (and his answer is interleaved with paragraphs):

“We do that through a combination of:

- (a) “the efforts that Dr. Kiran Jobar makes in terms of travelling around the region”;*
- (b) “the money we put in through the technical cooperation money”;*
- (c) “as well as working very closely with industry – Meat and Livestock Australia and LiveCorp, who also allocate money for doing technical cooperation activities and capacity building in the region”.*”

Finally Mr. Morris noted:

“It is very much a joint effort between us and industry in terms of trying to improve those standards.”

In this respect, there is seen a government which looks to work in tandem with an industry which has always sought to perpetuate the trade. This is the Australian government’s starting

point.

8. It was plain from further testimony by Mr Morris (page 30 of the transcript) that the role of Australia's representative to improve animal handling standards in Egypt was dealt with by him in the course of covering market access and other issues in some 14 or 15 other countries, apart from Egypt, right across the Middle East region. Since then, the Australian Meat & Livestock Corporation and Livecorp have arranged for further representatives to work in the Middle East with importers in an endeavour to improve animal handling standards. That said, sales are still made direct to private purchasers, and no pre-stunning accompanies ritual slaughter.

9. From further testimony by Mr Morris (at in particular pages 35-36 of the transcript), it is apparent that the Australian Government was prepared to only monitor at least "the first couple of shipments" of cattle under the MOU with Egypt. This would not suggest a commitment to the long-term challenge of improving treatment of Australian export animals in Egypt. Moreover, the Minister's wish to "improve" animal handling methods and for Egypt to "*more* humanely handle sheep" cannot be taken to be directed to securing humane outcomes as such.

Further, in relation to sheep, Mr Morris' testimony indicated a reluctance to suggest that home or private slaughter be prohibited by way of only authorising export to Egypt of sheep bound for abattoir slaughter. The reason for this reluctance was expressed to be because of the precedent it may set for trade with other Middle Eastern countries. This suggests the focus was upon export dollars rather than welfare. At least abattoir slaughter for cattle has been agreed with Egypt. That said, the manner of abattoir slaughter could not be viewed as remotely humane, despite the Australian Government's attempts to improve methods of slaughter.

The nine MOUs with Middle East Countries

10. Presently, there are seven MOUs with Middle Eastern countries: the United Arab Emirates in December 2004; Kuwait in March 2005; Eritrea in April 2005; both Saudi Arabia and Jordan in May 2005; Egypt in October 2006; and Libya most recently in May 2007. Unlike the other

countries, there are two MOUs with Egypt. The first is the standard one that Australia has signed with other countries, requiring that all animals be unloaded regardless of the health conditions. These MOUs with all these countries are solely directed to avoiding the problem that was posed by the *Cormo Express* which in January 2004 had carried some 100,000 sheep stranded on board the vessel for more than two months. It was unable for many weeks in Middle Eastern waters to find a country to permit it to dock and unload its animals. *None* of these MOUs provide for welfare standards.

The second MOU with Egypt travels beyond these single MOUs with other countries. As stated earlier, this further MOU requires Egypt to apply OIE guidelines in the treatment of animals unloaded into Egypt for sheep and cattle. In addition, it also has some specific provisions for cattle as to their handling. These extend to tracing the animals from arrival through to slaughter, requirements as to use of slaughter boxes and slaughter facilities, and so on.

The ending of the trade in animals with Egypt, save for cattle to one port only

11. Ultimately, by an executive order of 29 November 2008, *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008*, the Australian government permitted cattle to be exported to and slaughtered at one port of destination only in Egypt, Al Sokhna. This order in effect replaced the previous relevant MOU about handling and slaughter.. The order also prevented in effect the export to Egypt of any other animal species.

The welfare stages in the live animal export chain

12. The live animal trade comprises:
 - their long transport to dock;
 - their conditioning dockside to pellet feed;
 - their loading;
 - their extended voyage with high mortality numbers, and even higher numbers of animals that survive the journey only to arrive ill or in a poor, sub-standard and emaciated condition;

- their manner of disembarkation;
- their manner of treatment upon being unloaded;
- their handling before slaughter; and
- the manner of their slaughter.

The prelude to the *Emanuel Exports case*: the struggle to have the evidence investigated and charges laid

13. The live export ship, the *MV Al Kuwait*, left Fremantle on 11 November 2003 with a shipment of 100,000 live sheep. When the ship docked in Kuwait City 16 days later, evidence was gathered “on the spot” by video as to, amongst other things, the condition of the sheep disembarking and their subsequent treatment at dock and beyond. The video was taken by an Animals Australia representative.
14. Animals Australia then formally lodged a complaint with the office of the Director-General of the Department of Local Government and Regional Development in West Australia, the person empowered to bring proceedings under the *Animal Welfare Act 2002* and with ultimate responsibility for securing its enforcement. During the period June to November 2004 the complaint was sent by the Director-General to the West Australian State Solicitor for advice as to jurisdictional issues. Animals Australia believes that the State Solicitor’s advice was that no jurisdictional impediments existed to the complaint’s investigation. Then, the Director-General advised Animals Australia that she had decided to obtain advice from the office of the federal Attorney-General as to jurisdictional issues.

Eventually, on 24 January 2005 Animals Australia applied in the West Australian Supreme Court for a writ of mandamus against the Director-General, that is to say, a prerogative writ to compel a public officer to perform their duty. On 28 January 2005 the West Australian Supreme Court granted an order nisi. In April 2005 the West Australian State Solicitor advised Animals Australia that the West Australian Government was investigating the complaint.

Ultimately, charges were laid in November 2005 shortly before the time to do so expired, and some two years after the alleged offence.

The trial took place in February 2007. The decision of Magistrate CP Crawford was handed down a year later on 8 February 2008.

The Emanuel Exports case

15. In summary, the Court first found that during the *MV Al Kuwait's* journey with a shipment of 13,163 fat, adult sheep (classed as A class wethers and Muscat wethers), ex-Fremantle through Australian territorial waters (24 hours from 1800 hours on 11 November 2003) to ports in North Africa, the risk of them suffering inanition and salmonellosis was such that it constituted cruelty to those animals because they were transported in a way that was likely to cause them unnecessary harm contrary to subsections 19(1) and (3), *Animal Welfare Act 2002* (WA).

16. The Court held that the Commonwealth legislation and associated legislative instruments constituted a regime for regulating the transport of sheep by sea for the purpose of export. The Court further held that the regime did not, and was not intended, to “cover the field” (see *ex parte McLean* (1930) 43 CLR 472 at 483) but that nevertheless there was an “operational inconsistency” between Commonwealth law and the AWA: see paragraph 192, reasons for judgment. This is because, and only because, of the Court’s conclusion that the Commonwealth regime permitted the export of fat sheep by sea in the month of November. The company had obtained a Commonwealth permit which authorised these exports and, the Court held that it followed that any attempt by the State of Western Australia to make such exports under the Commonwealth export permit a criminal offence on welfare grounds produced an “operational inconsistency”. This had the result, it was held, that the State law was inconsistent with section 109 of the Constitution. See paragraphs 189 to 203, reasons for judgment.

In particular, the following may be noted from paragraph 193 of the Court’s reasons:

“ ... Certainly the AWA does not in terms prohibit the export of fat sheep in November to the Middle East. Emanuel obtained an export licence and permit from the Commonwealth to do just that. Thus while the State maintains the likelihood of unnecessary harm to fat sheep shipped in November, made the exercise cruel, the relevant Commonwealth Officer was satisfied, *inter alia*, of the adequacy of the consignment management plan and the welfare of the animals. A veterinarian accredited by a Commonwealth Agency, AQIS for the purpose, certified all classes of sheep to be healthy and fit to undertake the export journey. Arguably that certification is not inconsistent with the State’s construction of the AWA.” [emphasis added]

Further, the Court said at paragraph 194:

““The Commonwealth regime contemplated, indeed permitted export of fat sheep by sea, in November. Emanuel complied with the requirements of the Commonwealth and secured an export licence and permit. What was, and is, permitted under Commonwealth law, namely the export of fat, adult sheep in November, is made unlawful under the AWA due to the likelihood of unnecessary harm. The exercise of the right, or authority acquired by Emanuel to export sheep, including fat adult sheep, in November would be made criminal if the AWA is given effect, as argued by the State. This is a case of “operational inconsistency”, see *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44 at [201] and *Victoria v Commonwealth* (“the Kakariki”) (1937) 58 CLR, 618.” [emphasis added]

The central plank of the court’s reasoning

It appears that the central plank of the Court’s reasoning is that, once the company secured an export licence and permit from the Commonwealth, the company had an absolute legal right to export the sheep in question; a legal right that could not be modified, restricted, or made criminal if exercised, by virtue of the State animal welfare act. See paragraphs 173, 174, 191, 194-6 and 199.¹⁰

Taken together the export license and permit were conditional, not absolute

17. But the Commonwealth export licence and permit did not confer an absolute legal right to export the sheep in question. There are two key points, only the first of which I will note here, namely, the Commonwealth export licence and permit, taken together, were conditional, not absolute. The operation of the export licence conditions did not cease upon grant of the export permit, and still obliged the permit holder to comply with mandatory animal welfare requirements of the State legislation. This was noted by the Court at paragraph 156 of the reasons for judgment. Put another way, whether or not the export permit by its terms was

¹⁰ The author gratefully acknowledges the contribution of Dr. C. Pannam QC, with whom he authored a joint memorandum of advice on the question.

untrammelled,¹¹ the exporter remained subject to the relevant export licence conditions “until exported animals are unloaded at their destination”:¹² see Regulation 9, *Australian Meat and Live-stock Industry (Export Licensing) Regulations* 1998, in paragraph 22 below.

18. Section 10, *Australian Meat and Live-stock Industry Act* 1997 conferred power upon the Secretary to grant a licence to export livestock from Australia. Section 15 provided:

“An export licence is subject to any conditions that are prescribed by the regulations, in addition to the conditions to which the export licence is subject under this Act.”

19. Regulation 9 of the *Australian Meat and Live-stock Industry (Export Licensing) Regulations* 1998 by sub regulation (3) provided:

“The live-stock export licence is subject to the condition that the holder must have regard to the mandatory animal welfare requirements prescribed by the relevant standards body at all times until exported animals are unloaded at their destination.”

The “Standards Body” was the Australian Livestock Export Corporation Ltd. It is this corporation which published in March 2001 the *Australian Live-stock Export Standards*.

20. Paragraph 1.3 of the Standards provided inter alia:

“Animal Welfare Legislation and Codes of Practice

The animal welfare legislation in each State and Territory specifies the mandatory animal welfare requirements that must be met in that State or Territory. Export preparation must also be in accordance with relevant Codes of Practice.

The Australian Live-stock Export Standards is the national Code of Practice for the live-stock export industry.”

21. To borrow substantially from the language employed by the High Court majority in its reasons in *Commercial Radio Coffs Harbour v Fuller* [1986] 161 CLR 47 at 56-8,¹³ the construction of the Commonwealth laws leads to the conclusion that they do not purport to state exclusively or exhaustively the law with which the export of live sheep must comply. Indeed, the laws plainly depend upon compliance with State animal welfare legislation. The relevant statutes and regulations prohibit export of live sheep without a licence and a permit.

11 Not having sighted a copy, it is not known.

12 There is left to one side here the question of extra-territorial reach of the Regulation.

13 This case was referred to at p.2 of the Court’s reasons for judgment as a case referred to in the judgment. However, an inspection of the reasons would suggest it does not appear to have been referred to.

The prohibition was removed upon a grant of a licence and a permit, subject to certain conditions.

In the case of an export licence, failure to comply with these conditions may result in a failure to renew the licence and an offence under section 52(3), *Australian Meat and Live-stock Industry Act 1997* where a condition was contravened “*either intentionally or being reckless as to the condition*”.

A licence conferred on the grantee a conditional only permission to export animals.

22. In the case of an export permit issued dockside when the consignment was loaded, there was nothing in the Commonwealth laws which suggests that the export permit conferred an absolute right or positive authority to export live sheep so that the grantee, because it has a permit, is immune or exempt from the obligation to comply with State laws imposed by the conditions of the export licence (granted under another and complementary Commonwealth law).

Afterall, an export permit endured for no more than 72 hours in respect of a particular consignment of sheep on a specified export journey, whereas an export licence endured for at least one year, and was capable of renewal: see sections 21 and 22, *Australian Meat and Live-Stock Industry Act 1997*. The conditions of an export licence thus remained in force in respect of all steps in the chain of export over a lengthy period, including beyond the time of grant of the export permit. The export licence conditions unequivocally acquired observance by the licence holder of the mandatory animal welfare requirements required by the Australian Standards as a condition of the export licence. Thos requirements included compliance with mandatory animal welfare requirements “*that must be met in that state or territory.*” In other words, these requirements had to be addressed and satisfied on an ongoing basis, notwithstanding the grant of a 72 hour export permit. Despite the short duration of the export permit (72 hours), its reach was in effect extended by making an export licence a precondition to the grant of the export permit. Though different legislative creatures, they were thus entirely complimentary

and intended to be so.

23. Indeed, the *Export Control Act* 1982 by section 5 left room for the operation of laws, both State and Commonwealth. It provided:

“This Act is not intended to exclude the operation of any other law of the Commonwealth or any law of a State or Territory insofar as that law is capable of operating concurrently with this Act.” [emphasis added]

Further, Order 8(f) of the Export Control Orders specifically required an authorised officer to be satisfied that an export licence was held before he could issue an expert permit.

The export licence required the holder to observe the Standards (and thus State and Territory laws) “...*at all times until exported animals are unloaded at their destination*”, and thus at least also subsequent to the grant of the export permit [emphasis added]. The *Australian Meat and Livestock Industry Act* 1997 provided for a detailed monitoring and enforcement regime to establish compliance with export licence conditions. The Commonwealth laws then were intended to operate within the setting of other laws of which the grantee of a permit was required to comply.

The operation inconsistency test for sec. 109

24. Accordingly, subsections 19(1) and (3), *Animal Welfare Act* 2002 (WA) pass both of the tests enunciated by Mason J in *New South Wales v Commonwealth and Carlton* (1983) 151 CLR 302 at 330, 45 ALR 579 at 598:

“[The ‘alter, impair or detract from’] test may be applied so as to produce inconsistency in two ways. It may appear that the legal operation of the two laws is such that the State law alters, impairs or detracts from rights and obligations created by the Commonwealth law. Or it may appear that the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Commonwealth law. In each situation there is a case for saying that the intention underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect.”

The Keniry Report, and amendments to the Commonwealth legal regime

25. In August 2003 the *Cormo Express* sailed haplessly in steamy Middle Eastern waters (after a long

journey), unable for some weeks to dock and unload its cargo of some 100,000 sheep. Following this calamity the Keniry Review was commissioned by the federal government. It was announced by the federal Minister for Agriculture on 30 March 2004. The Keniry Review recommended, in brief summary, greater federal government regulation of the trade. The Commonwealth legal regime in place at the time of events giving rise to the earlier *Emmanuel Exports case* was as a result substantially revised. Prior to the Keniry Review, the trade was substantially more self-regulating. The Government's response was to amend the *Australian Meat and Live-Stock Industry Act 1997* and the *Export Control Act 1982*. These amendments were made by the *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Bill 2004* to provide, in summary, for increased government regulation of the live animal export trade.

The present Commonwealth legal regime

26. To assist in navigating the complexities of the Commonwealth legal regime, set out below is a broad overview of its principal elements, namely

- the *Australian Meat and Livestock (Standards) Order 2005* as amended (and made by the Secretary under section 17 of the Act) by Order 3.1 provides:

“The holder of a live-stock export licence must not export live-stock except in accordance with the Australian Standards for the Export of Livestock” (Version 2.1, November 2006).

- by section 17(1), *Australian Meat and Live-stock Industry Act 1997* the Secretary may make written orders or given written directions not inconsistent with the regulations to be complied with by the holder of an export licence; and importantly, by section 17(5)(a) an export licence is subject to “the condition” that the holder of the licence must comply with orders made under this section;
- accordingly, compliance with the *Australian Meat and Livestock (Standards) Order 2005* is a “condition” of any export licence;
- further, section 8(3), *Export Control Act 1982* makes it an offence to export prescribed goods “in contravention of the conditions”, “sheep” having been declared to be

prescribed goods under the *Export Control (Animals) Order* 2004, Regulation 1.04(a)); and it may be concluded that the “conditions” referred to in section 8(3) can only be construed as including conditions to which a live-stock export licence under the *Australian Meat and Live-stock Industry Act* 1997 is subject;

- the Australian Standards for the Export of Livestock (Version 2.1, November 2006) are directed to health and welfare outcomes for livestock in the major steps along the export chain and incorporate State and Territory animal welfare legislation; and taking Standard 1 by way of example, it may be noted that it provides in common with the other Standards inter alia that:

“These Standards are relevant to each stage of the livestock export chain and should be reflected in relevant quality insurance programs. Livestock sourced for export must meet any requirement under a law of a state or territory. State and territory governments are responsible for ensuring that these jurisdictional requirements are met under respective state and territory legislation. AQIS must be satisfied that importing country requirements and the Standards have been met before issuing a health certificate and export permit.

Further details regarding roles and responsibilities and the export chain process are outlined in the Australian Position Statement on the Export of Livestock (www.daff.gov.au/livestockexportstandards.com.au).”

- the Standards (by reason of the last sentence in the quotation from Standard 1) expressly incorporate by reference the Australian Position Statement on the Export of Livestock to the extent it outlines further details regarding roles and responsibilities and the export chain process; and the Australian Position Statement on the Export of Livestock (published November 2006, the same month in which the Standards were published) by reason of its repeated references to the application of State and Territory government animal welfare legislation (see for example paragraphs 3.1, 4.1, 6.1, 6.2 and 6.6) puts beyond any doubt that State legislation applies;
- the Commonwealth export licence and export permit do not confer an absolute legal right to export sheep because, taken together, they confer a right to export which is conditional, not absolute; and the licence holder remains obliged to comply with the Australian Standards for the Export of Livestock not only before the grant of the

export permit, but also after the grant of the export permit but in respect of State legislation only for so long as and to the extent State jurisdiction extends offshore;

- no direct operational inconsistency under section 109 of the Constitution arises between the State law and the Commonwealth laws: if however a State law was amended with the effect of making the actual export of a particular consignment of sheep by sea (or taking antecedent steps taken in the chain of export) a criminal offence on welfare grounds, a direct operational inconsistency would arise;
- Standards 4 and 5 provide for the transfer to the master of the vessel of responsibility for the management and care of the animals from the time the sheep arrive at the port of loading to the port of disembarkation and thus raise the question whether these provisions exclude the exporter's possible responsibility under State legislation from the time the sheep arrive at the port of loading;
- although not free from doubt, it would appear that the exporter continues to be obliged to comply with the Standards, despite such provision, during the voyage;
- in particular, because the Standards require the exporter to engage an accredited stock person to achieve its obligation to ensure inter alia adequate onboard management and care of livestock during the voyage and in turn require the stock person to be "responsible for providing appropriate care and management of the livestock on board during the voyage", it may be concluded that the responsibilities of the stock person as the exporter's agent satisfy the test for 'a person in charge': the Tasmanian statute provides in sections 6 and 7 that the person have "the care or charge of an animal";
- by parity of reasoning, the same may be said of the "competent animal handlers" required to be provided by the exporters and thus act as the exporter's agents in "ensuring" the humane loading of the animals.¹⁴

14 There is posted to the BAWP website www.bawp.org.au copies of two memoranda of advice by Dr C Pannam QC and the author: the first of which deals with the question of whether the Magistrates' erred in law in the Emanuel Export case in concluding that there was an operational inconsistency with commonwealth laws on the part of the West

Commonwealth legal regime: some criticisms

27. The Commonwealth legal regime for the export of live animals is a ‘mish mash’ of two statutes, *Australian Meat and Live-stock Industry Act 1997* and the *Export Control Act 1982*; Regulations such as the *Australian Meat and Live-stock Industry (Export Licensing) Amendment Regulations 2005 (No 1)*; Orders such as the *Export Control (Animals) Order 2004*, *Export Control (Orders) Regulations 1982*, a *Australian Meat and Live-stock Industry (Standards) Order 2005* (as amended up to *Australian Meat and Live-stock Industry (Standards) Amendment Order 2008 (No 1)*), *Australian Meat and Live-stock Industry (Export of Live-stock to Saudia Arabia) Order 2005*, and *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt Order 2008)*; *Australian Standards for the Export of Livestock (Version 2.2, November 2008)*¹⁵ and the *Australian Position Statement; Navigation Act 1902; Marine Orders Part 43 Cargo & Handling Livestock Issue No 6*; and local statute, such as Western Australia’s *Animal Welfare Act 2002*, which by section 19(1) provides that a person must not be cruel to an animal, and by subsection (3)(a) provides:

“Without limiting subsection (1), a person in charge of an animal is cruel to an animal if the animal:
(a) is transported in a way that causes, or is likely to cause, it unnecessary harm.”

Some 80% of Australia’s 4 million live sheep exports annually are shipped ex-Fremantle.

Animal welfare standards stand or fall at the stroke of a pen

28. The first point to be made is that, local statutes apart, animal welfare standards stand or fall by the administrative fiat of the Secretary of DAFF. They do not endure as if reposed in a statute, for example. Item 2 of ‘Schedule 1-Amendments’ of the *Australian Meat and Live-stock Industry (Export Licensing) Amendment Regulations 2005 (No 1)* now requires compliance with standards which “may be specified in an order made by the Secretary under section 17 of the Act”. It will be recalled

Australian Animal Welfare Act 2002 (subsections (19)(1) and (3)), with the consequence that the Act or those provisions were invalid or inoperative under section 109 of the Constitution. The second and later opinion dated 21 April 2008 concerned whether particular sections of the Tasmanian Animal Welfare Act 1993 were excluded by Commonwealth laws from possible application to steps in the chain of export of live sheep from Tasmania. It will be remembered that the Commonwealth laws were changed between those that applied in the Emanuel Exports case and the date of this second opinion by reason of the Keniry Report and the amendments to the two principal Commonwealth statutes.

¹⁵ Prior to publication of this e-book, the *Australian Standards for the Export of Livestock (Version 2.3, April 2011)* were published.

that the Standards were so specified in an Order made by the Secretary under section 17 of the Act, namely, Order 3(1), *Australian Meat and Live-Stock Industry (Standards) Order 2005* (as amended up to *Australian Meat and Live-stock Industry (Standards) Amendment Order 2008* (No 1)), in these terms:

“The holder of a live-stock export licence must not export live-stock except in accordance with the Australian Standards for the export of live-stock.” (Version 2.2, November 2008)

As stated earlier, Section 17(5)(a) of the Act makes compliance with this Order a “condition” of any export licence.

As it is these Standards which incorporate State and Territory animal welfare legislation, State and Territory jurisdiction in animal welfare may be liable also to stand or fall by the administrative fiat of the Secretary of DAFF.

In any event, whereas these Standards are now prescribed by the Secretary, previously (up until 2004) they were published by the Australian Livestock Corporation Limited, despite its self-evident conflict of interest. Such was the degree of self-regulation of the trade.

Conflict of interest of DAFF

29. Not only is it unsatisfactory that animal welfare standards are not prescribed in an enduring manner, but it is also unsatisfactory that a Department or agency subject to a self-evident conflict of interest should prescribe such standards. Nothing is known of any prosecutions or disciplinary proceedings or action taken of any substance by DAFF or its delegate, AQIS. Indeed, AQIS documents obtained under FOI applications show that, despite AQIS claims that it had made “full reports” of “high mortality investigation reports” on its website, these claims were untrue: in fact, AQIS had ‘sanitised’ its reports by deleting evidence of export licence breaches by its “clients”, namely export licence holders. AQIS has since rectified this.

The failure to enforce

30. Or again, there are grounds for believing that AQIS does not prosecute or relevantly enforce

export licence breaches. For example, AQIS “Export Advisory Notice” (no. 2007-16) (obtained under an FOI application) refers to audits of live exporters, identification of shortcomings in those audits, and requests for “corrective action”. Audit reports are rated as “acceptable”, “marginal”, or “unacceptable”. According to the Notice, the sanction applied with marginal or unacceptable audit outcomes is no more than an increase in “*audit frequency and supervision of consignments*”. Not even export licence renewal would appear to be put in jeopardy.

A case example of the conflict of interest and attitude to enforcement: the sanction of ritual slaughter without pre-stunning

31. Again, the federal department, DAFF, in conjunction with the Victorian Minister for Primary Industries and his Department in 2007 publicly sanctioned the continuance in Victoria of ritual slaughter (slitting the throat) of sheep, without pre-stunning, for the purposes of an export program to the Middle East by an abattoir in country Victoria, despite the barbarity of such slaughter without pre-stunning. Prior to this coming to light in 2007, it was not thought to be taking place in Australia on the basis that it would be contrary to Australia’s animal welfare laws. However, DAFF without any public notice had granted permission for this to occur.

Remarkably, once the matter became public knowledge, the Victorian Minister stated he would arrange a Departmental review of whether such slaughter was inhumane. Nothing further has been heard since. Yet the British Government-appointed Animal Welfare Council more than 20 years ago urged it be banned on the ground that it was particularly inhumane.

The actions of DAFF and the Victorian Department would suggest that welfare considerations were, and remain, subsidiary, even when confronted by Australia’s animal welfare standards. It will be appreciated that live sheep or other animals transported to the Middle East are slaughtered by ritual slaughter without pre-stunning, one of the many reasons the trade is opposed by animal welfare societies.

An alternative – establish an independent agency to prescribe standards and enforce

them

32. Examination should be made of whether an independent agency should be established to prescribe animal welfare standards in a more enduring manner and to be responsible for their enforcement. It is difficult to see any public interest reason which dictates the trade cannot be administered by DAFF on the one hand, whilst animal welfare standards are prescribed and enforced by an independent agency on the other.

The Standards are discursively expressed, thus not lending their provisions to enforcement

33. Next, the Standards themselves are expressed in a discursive way, thereby not lending themselves to law enforcement (or perhaps observance in different respects by the industry).

The AQIS accredited veterinarians are paid by the exporters

34. Next, AQIS accredited veterinarians are charged with inspecting sheep before loading. This is undertaken dockside. They complete a declaration that they have inspected the animals and are satisfied they are healthy and fit to undertake the export journey. In the *Emmanuel Exports* case the Magistrate in her reasons for judgment at paragraph 187 noted that in evidence, Robinson, while not recalling the relevant shipment, said that the inspections team would stand on each of the individual races from the industrial truck to observe the sheep as they pass single file down the race. The Court noted that “*over 103,000 sheep were loaded over 10 and 11 November 2003 before departure....*” and that she inferred that “*Grandison [the AQIS accredited veterinarian] observed the sheep momentarily, as they passed in the race, dockside on their way on board*”. [emphasis added]

Although these veterinarians are AQIS accredited, their fees are paid by the exporters. Examination should be made of whether, for example, such veterinarians should be subject to loss of accreditation or penalties where they do not discharge their obligations properly. After all, the public interest is at stake: the fitness of sheep to travel the some three week journey to the Middle East is a vital one in terms of sheep welfare in the chain of export. The

veterinarians sign-off is also a precondition to the grant of an export permit for the loaded consignment to leave port.

Are the exporters ‘a person in charge’ during the voyage?

35. Next, in the *Emmanuel Exports* case the question was ventilated of whether the exporter, Emmanuel, was a “person in charge” of the sheep transported by reason of the agency of the onboard stockman. It will be recalled that section 19(3)(a), *Animal Welfare Act 2002 (WA)* (see paragraph 27 above) is directed to “a person in charge of an animal”. The Magistrate noted in her reasons for judgment that Emmanuel argued that the onboard stockman, Norman House, was engaged by KLTT (the importer), not it, and that the master of the ship, not Emmanuel, was in control of the ship and sheep: see paragraph 25, judgement. The former *Australian Livestock Export Standards* specifically required an exporter to ensure that there was a suitably experienced stock person on board with a duty of care for the animals: see paragraph 29, judgement. The defence submitted that the master and crew were in control: see paragraph 34, judgement. In paragraph 35 in particular, the Magistrate set out her reasons as to why House satisfied the legal test, despite ownership having passed to KLTT dockside at Fremantle, and Emmanuel having no financial interest in the sheep during the voyage (see paragraph 37, judgement).

36. Under the new Standards prescribed by the Secretary, DAFF, ‘Standard 4 – Vessel Preparation and Loading’ provides that once loading begins the master of the vessel assumes responsibility for the management and care of the livestock to the point of disembarkation. Standard 4.16 provides that:

“As the livestock for export are loaded on the vessel at the port of export, responsibility for the livestock transfers to the master of the vessel...”

Whilst a legal argument can be mounted that the exporter remains liable for the welfare of the stock during the voyage, it is plain the matter is not free from doubt. It will be recalled that the argument would run that the exporter is obliged by Standard 5 to engage an accredited stock person to ensure the onboard care and management of the livestock is adequate to maintain

animal health and welfare. Thus, it would be suggested, the accredited stock person acts as the exporter's agent, and in this way, the exporter remains liable as the person in charge of the animals.

This last point illustrates the lack of clarity and deficiency in the present Standards on a very important question of welfare, namely, the welfare of the animals during the voyage. This is so in circumstances where 'Standard 5 – Onboard Monitoring of Livestock' provides that the Standard applies "... *until the last animal is unloaded at the port of disembarkation.*"

Relevant State animal protection statutes should be legislated to operate extra-territorially

37. Although it is not altogether free from doubt, State animal welfare laws are intended to be part of the Commonwealth legal regime for the export of live animals. There is no provision in the *Animal Welfare Act 1993* (Tas), the *Animal Welfare Act 2002* (WA) and the *Prevention of Cruelty to Animals Act 1986* (Vic) which suggests the statute operates extraterritorially. Western Australia, Tasmania and Victoria are the principal states from which live sheep exports are made. The cruelty provisions of those statutes should be legislated to apply to the fate of the animals beyond State waters. The legal principles and how they apply are now considered.

The extra-territorial operation of State animal welfare legislation

38. 'Standard 5 – Onboard management of livestock' provides that:
- "Onboard management covers the period from the time the first animal is loaded onto the vessel until the last animal is unloaded at the port of disembarkation";*
- thus raising the question of the extraterritorial operation of State animal welfare legislation expressly incorporated by the Standards.
39. Taking the Tasmanian *Animal Welfare Act 1993* as an example, the steps in reaching a conclusion would appear to be as follows:
- (a) so far as the application of the State animal welfare legislation is concerned, there is the common law presumption that State legislation is intended not to operate

extraterritorially¹⁶ so that, in the absence of a clear contrary intention, State criminal jurisdiction in respect of statutory offences extends only to offences committed within the State's territory: Carney on The Constitutional Systems of the Australian States and Territories (published Cambridge University Press, 2006), paragraph 7.8.1 (at p.238);

- (b) no provision in the *Animal Welfare Act* 1993 (Tas) suggests the statute operates extraterritorially;
- (c) however Tasmania (like other States) has extended its criminal jurisdiction to offences partly committed within its territory, with the effect that this statutory extension confers jurisdiction where at least one element of the offence occurs within the jurisdiction, or where an event or the act which caused the event occurred within the jurisdiction: see *Criminal Law (Territorial Application) Act* 1995 (Tas), sections 3 and 4; see also Carney (supra) at 240;
- (d) the definition of "crime" in section 3, *Criminal Law (Territorial Application) Act* 1995 (Tas) does not extend though to an offence under the *Animal Welfare Act* 1993 (Tas), but the Tasmanian parliament could of course give consideration to amending the definition of "crime" for it to do so;
- (e) the *Criminal Law (Territorial Application) Act* 1995 defines "the State" in section 3 to include:

“(a) the territorial sea adjacent to the State; and

(b) the sea on the landward side of the territorial sea that is not within the limits of the State.”

By section 5(a), *Coastal Waters (State Powers) Act* 1980 (Cth) each State's general legislative powers under its Constitution are extended to the making of laws inter alia over its adjacent territorial sea not within State territory, and by sections 3 and 4 the territorial

¹⁶ The common law doctrine that crimes are committed in a single place – the crime is local – has proven to be unsustainable in the face of crimes extending beyond more than one jurisdiction, such as conspiracy offences, environmental offences and computer offences: Carney (supra) at 239.

sea adjacent to each State is defined as the ‘coastal waters of the State’ and is confined to three nautical miles, despite the expansion in Australia’s territorial sea to 12 nautical miles in 1990¹⁷: see further Carney (supra) at 214;

- (f) prior to that statutory extension of State legislative capacity, the High Court held by majority in the *Seas and Submerged Lands Act* case (*New South Wales v Commonwealth* (1975) 135 CLR 337) that the territory of the States ended at the low-water mark, the States having unsuccessfully argued inter alia that they had dominion over the territorial sea of three miles (see further Carney (supra) at 212);
- (g) in considering whether to amend the definition of “crime”, it may be noted that State parliaments may legislate extraterritorially where a sufficient connection¹⁸ or nexus exists between the State and the extraterritorial effect of the law: see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; Carney (supra) at 210, 220-222: according to the High Court, this test of sufficient connection is to be applied liberally so that even a remote or general connection would be sufficient: see further *Union Steamship Case* (supra) at 14, *Port MacDonnell Professional Fisherman’s Association Inc v South Australia* (1989) 168 CLR 340 at 372 and *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 at [9], 22-3, [123] 58-9;
- (h) with the requisite connection established, State laws may also operate over the high seas – beyond the territorial sea, as commonly occurs for purposes of fishing regulation, criminal law, and maritime industrial relations: see Carney (supra) at 237; although the

17 As from 20 December 1990 by Proclamation under section 7, Seas and Submerged Lands Act 1973 (Cth): Commonwealth Government Gazette No. S297, Tuesday 13 November 1990.

18 Dixon J enunciated in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, at 375, a classic statement of the sufficient connection test:

“The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.”

definition of “the State” in section 3, *Criminal Law (Territorial Application) Act* 1995 for the purposes of that Act confined jurisdiction to the territorial sea and not beyond it (see further Carney (supra) at 235;

- (i) otherwise, sections 7 and 8, *Animal Welfare Act* 1993 (Tas) proscribe the doing of things, or omitting to do any duty, which is “reasonably likely to result” (section 7) or “likely to cause” (section 8) unreasonable or unjustifiable pain or suffering to an animal;
- (j) accordingly, it can be argued that the question of likelihood is able to be determined at the time that the thing is done or the duty is omitted to be done, which in the case of export of sheep to the Middle East may be open to be determined at the point of embarkation, and before the vessel leaves State waters and thus State jurisdiction;
- (k) otherwise, to the extent section 8 proscribes doing an act or omitting to do a duty which “causes” such pain or suffering to an animal, the pain or suffering caused would need to have occurred whilst the vessel remained within State waters (see further Carney (supra) at 235-7).

4 Secondary Boycotts

PETA's threatened boycott of Australian wool products

1. In the course of a 60 Minutes program broadcast in Australia on 21 November 2004, Ingrid Newkirk as President of People for the Ethical Treatment of Animals, a United States based animal society, complained about the mulesing procedure performed on Australian sheep. In relation to PETA campaigns generally, she stated:

“We stopped NASA from sending monkeys into space. We stopped General Motors from crash testing animals. We stopped about 550 cosmetics companies from testing in rabbits’ eyes. They all said we wouldn’t succeed. But we’re tenacious and we’ll give it a go.”

2. The prelude to that interview included a letter on 11 August 2004 from Ingrid Newkirk to then Australian Prime Minister John Howard, stating:

“We have written to you several times over the last few years concerning the extreme suffering of Australian Merino sheep as result [sic] of mulesing and live export... Our members now demand... that we take steps similar to those used in our successful efforts against other industries in which cruelty to animals has run rampant...”

We are about to launch a worldwide campaign against the Australian Merino Wool industry, which will continue until your government takes action to end mulesing and live exports. To that end, we will announce an international boycott of Australian wool in October ...

And, of course, we will abandon the campaign if you are willing to pledge to end mulesing and live exports.”

AWI files in the Federal Court

3. PETA publicly announced its threatened boycott of Australian wool products. Shortly before the 60 Minutes program was screened, Australian Wool Innovation Limited filed on 9 November 1994 in the Federal Court of Australia an application and statement of claim in

respect of the threatened boycott. Australian Wool Innovation claimed that it represented some 30,000 Australian wool growers. At that point, there were only four of the eventual ten respondents to the application, namely, three American citizens ordinarily resident in the USA and the Virginia incorporated company, People for the Ethical Treatment of Animals.

4. The application and statement of claim were served on Ingrid Newkirk while she was visiting Australia and, the service of the documents was screened as part of the 60 Minutes program. (Leave to serve the originating process outside the jurisdiction, that is to say, outside Australia, had not been sought.)
5. The further procedural steps including the addition of Australian respondents is set out in paragraphs 2 and 3 of the judgment of Heerey J in *Australian Wool Innovation Limited v Newkirk* [2005] FCA 290 [22 March 2005]. In the result, an amended statement of claim was filed on 11 March 2005 and shortly following that the sufficiency of the statement of claim was challenged in a court hearing. Judgment was delivered on 22 March 2005.
6. At this time PETA had more than 800,000 members, some of whom were Australian, and had gross revenues just short of US \$30 million per annum.

The AWI claim

7. The statement of claim, in summary, claimed that PETA and relevant officers engaged in misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* and that accessorial liability arose under section 75B because of allegations that Ms Newkirk in particular was knowingly concerned in contraventions of section 52; and that PETA breached sections 45D and 45DB of the *Trade Practices Act* prohibiting secondary boycotts based upon conduct which occurred in Australia, and overseas.

It was further alleged that PETA at all material times carried on business in Australia. This was necessary because the secondary boycott allegations made against PETA included conduct in concert outside Australia. Section 5(1), *Trade Practices Act* extends Part IV of the Act to the engaging in conduct outside Australia by bodies corporate carrying on business within Australia.

It is well settled that unless by the operation of section 5 the Act is extended to conduct outside Australia, the Act deals only with conduct within Australia: see paragraph 15, judgment.

The term “body corporate”¹⁹ is not defined in the Act. In short, a body corporate is a corporation. According to Miller’s Annotated Trade Practices Act:

“The term encompasses any office or group of people recognised at law as having separate legal personality. Corporations, whether incorporated under the Corporations Act 2001 or by special statute, come within the definition.”

Section 45D alleged breaches

8. The section 45D breaches alleged against the first to tenth respondents were based on conduct which took place within Australia. The breaches alleged against the fourth, fifth, sixth, seventh, eighth and tenth respondents were in addition on the basis that they engaged in conduct outside Australia. These respondents were PETA, PETA officer Jodie Buckley, Animal Liberation (based in NSW) and two of its members and, finally, a Victorian resident, also a member of Animal Liberation in Victoria.

The basis on which claims were made against individuals for engaging in conduct outside Australia once again turns on section 5 of the Act. Section 5 extended Part 4 of the Act to engaging in conduct outside Australia by citizens or persons ordinarily resident in Australia.

Summary – Australian wool production chain

9. Paragraph 12 of the judgment sets out the steps in the Australian wool production chain. In summary, the steps were:
- Australian wool growers and wool exporters to wool processors or their intermediaries, which turn the wool into useable yarn;
 - then to textile and garment manufacturers, which in turn manufacture fabric or garments;

19 It should be noted that section 45D(3) provides that:
“Subsection (1) applies if the fourth person is a corporation.”

Subsection (4) provides that:

“Subsection (1) also applies if:

- (a) the third person is a corporation and the fourth person is not a corporation; and
- (b) the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.”

- garment manufacturers supply retailers, or if they are also retailers, sell to consumers;
- and
- retailers sell Australian wool garments to consumers.

Alleged object of conduct

10. It was then alleged in the amended statement of claim that the conduct (set out in paragraphs 9 and 10 of the judgment) was calculated:

- to deter consumers from acquiring Australian wool garments from retailers (including garment manufacturers who were also retailers);
- in summary, to deter retailers, manufacturers and wool acquirers acquiring the relevant wool product from the relevant supplier in the Australian wool production chain.

Terms of sections 45D, 45DB and 45DD

11. Section 45D(1) provides:

“In the circumstances specified in subsection (3) or (4), a person must not, in concert with a second person, engage in conduct:

(a) that binds or prevents:

(i) a third person supplying goods or services from a fourth person (who is not an employer of the first person or the second person); and

(ii) a third person acquiring goods or services from a fourth person (who is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.”

Paragraph (a)(i) providing for hindering or preventing a third person supplying goods or services can be put to one side for the present because the AWI case was about hindering or preventing the third person acquiring. The *Hahnhauser* case was a case about hindering or preventing the supply of goods, in that case sheep, and this will be examined later in the chapter.

12. Key phrases of s.45D(1) include:

- “in concert”;
- “engage in conduct”;
- “hinders”;
- “prevents”;
- “purpose”;
- “likely to have the effect”;
- “causing substantial loss or damage”.

The meaning of such phrases will be examined shortly as they have been judicially considered.

13. Further, section 45D(2) provides:

“A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.”

This has also been judicially considered.

14. Section 45DB provides:

“(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.

(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.”

15. Section 45DD relevantly provides:

“(4) A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:

(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection; and

(b) engaging in the conduct is not industrial action”.

16. One would expect in the ordinary course in an animal law case that the ‘third person’ under

section 45D(1)(a)(ii) would be consumers and that the fourth person would be a corporation.

The three key legal issues for analysis

17. In terms of section 45D, three key legal issues may arise for analysis. The first is whether conduct of the kind in question stands to be in breach of section 45D. Depending on the nature of the body which seeks advice, the second may be whether the exemption, for conduct the dominant purpose of which is substantially related to consumer protection, would apply and in particular, what is the meaning of ‘environmental protection’ [emphasis added]. This will be examined later in the chapter. The third key legal issue is whether, failing the application of section 45DD, alternatively, in any event, section 45D in respect of such conduct stands to be read down where, and to the extent, it would infringe the implied freedom of political communication under the Constitution.

Section 45D conduct

18. Turning then to the **first key legal issue**, the relevant part of section 45D requires the conduct to satisfy two conditions.

The first condition (section 45D(1)(a)(ii)) is that the conduct actually hinders or prevents a third person acquiring goods or services from a fourth person.

The second condition (section 45D(1)(b)) is that the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person. “*Purpose*” and “*effect*” are expressed conjunctively, not as alternatives. Accordingly, one without the other would be insufficient to give rise to a breach of section 45D: see for example *Australian Builders’ Labours’ Federated Union of Workers - Western Australian Branch v J-Corp Pty Ltd* (1993) 42 FCR 452; 114 ALR 551; (1992) 44 IR 264.

19. The term “engage in conduct” is defined in section 4(2)(a) to mean, inter alia, “... doing or refusing to do any act.”
20. Section 45D requires the first and second persons to act “*in concert*”. Before turning to the

meaning of acting “in concert”, what is the meaning of “*person*”? It is not defined in the Act. Instead, section 22(a) of the *Acts Interpretation Act* 1901 (Cth) provides:

“... ‘*persons*’ and ‘*party*’ shall include a body politic or corporate as well as an individual.”

The use of the word “person” means that individuals (who are not employees of the third person as acquirer(s) or the fourth person as the target) and companies will be caught by the operation of section 45D: see section 45D(1)(a); and see further Australian Trade Practices Reporter, Volume 1, CCH at p.3,062. Accordingly, it would follow that individuals who are employees of the first or second person, or other individuals who are not employees of the acquirer or the target, stand to be caught by the operation of section 45D. In *J-Corp Pty Ltd v Australian Builders’ Labours’ Federated Union of Workers – Western Australian Branch v J-Corp Pty Ltd* 42 FCR 452; 114 ALR 551; (1992) 44 IR 264 the declaration by the primary judge was that the union had acted in concert with its members and others as the second person: see (ALR) p.552. Assuming then that the state of mind of an interest group is that of a person such as a senior or chief executive officer by way of example (and not other employees), then it seems to follow that an employee may act in concert with the interest group as its employer.

Certainly the interest group must act in concert with another, whether another person by way of an organisation or an individual.

In short, the definition, except where specific exclusion is made for employees of the third or fourth persons, does not define “person” or use the word in a fashion which turns upon capacity, such as employment.

21. Acting in concert involves knowing conduct, the result of communications between the parties and not simply simultaneous actions occurring spontaneously: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 42 FLR 331 at 337; 27 ALR 367; (Full Federal Court). It involves “contemporaneity and community of purpose”: *J-Corp* (supra); *Epitoma Pty Ltd v Australasian Meat Industry Employees’ Union* (1984) 3 FCR 55 at 58-59; 54 ALR 130 at 738.

The temporal relationship of the acts comprising the relevant conduct need only be sufficiently close to be consistent with the notion of “concert”: *Flower Davies Wemco Pty. Ltd. v Australian Builders Labourers’ Federated Union of Workers (WA Branch)* [1987] ATPR 40-757 at 48, 205 per French J; *Concrete Constructions Pty. Ltd. v Plumbers and Gas Fitters Employees Union of Australia* (1987) 15 FCR 31 at 52-3; 1987 ATPR 40-776 at 48, 305 (Wilcox J).

22. The term “prevents” suggests a total cessation of dealings between the third person and the target: *Heydon on Trade Practices Law* at [10-130]; *Australian Wool Innovation Ltd. v Newkirk* (2005) ATPR 42-053 at para. 34.

More relevantly, the term “hinders” means “in any way affecting to an appreciable extent the ease of the usual way of supply of goods or services”: *J-Corp* (supra); *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 45-6; 99 ALR 275 where Mason CJ adopted the forgoing meaning as originally stated by Lord Dunedin in *Tenants (Lancashire) Ltd. v C.S. Wilson Pty. Ltd.* [1917] AC 495 (H.L.) at 514; and which was later followed by the Full Federal Court in *J-Corp*.

To prevent or hinder can involve conduct engaged in by threat or verbal intimidation, and not just physical interference: *Australian Broadcasting Corporation v Parish* (1980) 43 FLR 129; 29 ALR 228.

23. “Purpose” as referred to in section 45D(1) is the operative subjective purpose of those engaging in the conduct in concert: *Tillmanns* (supra) (Full Federal Court) per Bowen CJ.

In *Tillmanns* (supra) Deane J (then a Federal Court Justice) said at 348:

“... the question ... whether conduct was engaged in for a “purpose” mentioned in s 45D(1) of the Act is, to adopt the words of Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 444-5, to be answered not by reference to whether it was appreciated that the relevant conduct might have the specified effect but by reference to the real reason or reasons for, or the real purpose or purposes of, the conduct and to what was in truth the object in the minds of the relevant persons when they engaged in the conduct in concert. In so far as the union was concerned, its purpose must, of course, be determined by reference to the purpose of those through whom it acted.”²⁰ [emphasis

²⁰ In *News Ltd v South Sydney District Rugby League Football Club Clt* [2003] HCA 45 ; 215 CLR 563; 200 ALR 157; 77 ALJR 1515 (13 August 2003), a case concerning ‘purpose under s45 and s4D of the Trade Practices Act 1974 Gleeson J [18] observed: “the distinction between purpose and effect is significant. In a case such as the present, it is the

added]

It is sufficient if the purposes of the actor include a prohibited purpose: see *Heydon on Trade Practices* at [10.170]. The prohibited purpose need not be substantial or dominant: see section 45D(2). Section 4F(2)²¹ provides that the section does not apply for the purposes of, inter alia, section 45D(1) and 45DB(1).

24. The critical purpose is the immediate purpose for which the conduct itself is engaged in which hinders or prevents acquisition. This may not be the ultimate purpose for which the parties may act in concert: see *Heydon on Trade Practice* at [10.200]. By way of example a distinction was drawn between immediate and ultimate purpose by Smithers J in *Wribass Pty Ltd v Swallow & Anon* (1979) ATP 40-101 where the immediate purpose was to cause the target to cease trading on Saturday morning by injuring its business, and the ultimate purpose was to maintain work-free Saturdays generally.
25. As to the purpose of causing loss which is “substantial”, in *Tillmanns* Bowen CJ (with whom Evatt J agreed) said (at 338-9 IFLR):

“The word “substantial” would certainly seem to require loss or damage that is more than trivial or minimal. According to one meaning of the word the loss or damage would have to be considerable ... However, the word is quantitatively imprecise; it cannot be said that it requires any specific level of loss or damage. No doubt in the context in which it appears the word imports a notion of relativity, that is to say, one needs to know something of the circumstances of the business affected before one can arrive at a conclusion whether the loss or damage in question should be regarded as substantial in relation to that business”. [emphasis added]

In *Tillmanns* Deane J said at 348(FLR)

subjective purpose of News and ARL in including the fourteen team term, that is to say, the end they had in view, that is to be determined...purpose is to be distinguished from motive. The purpose of conduct is the end sought to be accomplished by the conduct. The motive for conduct is the reason for seeking that end. The appropriate description or characterisation...may depend upon the legislative or other context in which the task is undertaken.”

21 “4F References to purpose or reason

- (1) For the purposes of this Act:
....
- (b) a person shall be deemed to have engaged or to engage in conduct for a particular purpose or a particular reason if –
- (i) the person engaged or engages in the conduct for purposes that included or include that purpose or for reasons that included or include that reason, as the case may be; and
- (ii) that purpose or reason was or is a substantial purpose or reason.
- (2) This section does not apply for the purposes of subsections 45D(1)...45DB(1)...”

“The word “substantial” is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase “substantial loss or damage”, it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. ...

In the context of s 45D(1) of the Act, the word “substantial” is used in a relative sense in that, regardless of whether it means large or weighty on the one hand or real or of substance as distinct from ephemeral or nominal on the other, it would be necessary to know something of the nature and scope of the relevant business before one could say that particular, actual or potential loss or damage was substantial. As at present advised, I incline to the view that the phrase, substantial loss or damage, in s 45D(1) includes loss or damage that is, in the circumstances, real or of substance and not insubstantial or nominal. It is, however, unnecessary that I form or express any concluded view in that regard since the ultimate conclusion which I have reached is the same regardless of which of the alternative meanings to which reference has been made is given to the word “substantial” in s 45D(1)”. [emphasis added]

Suffice to say in *Rural Press Limited v ACCC* [2002] FCAFC; (2002) FCR 236; 193 ALR 399; the Full Court referred to the proper construction of the term “substantial” as being the subject of “inconclusive debate”.

26. As to the ingredient “likely” in the phrase “would have or be likely to have the effect”, in *Tillmanns* Bowen CJ (with whom Evatt J agreed) said (at 339-40):

“The word “likely” is one which has various shades of meaning. It may mean “probable” in the sense of “more probable than not” – “more than a 50 per cent chance”. It may mean “material risk” as seen by a reasonable man “such as might happen”. It may mean “some possibility” – more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified”.

Deane J canvassed “likely” at 346-8, concluding:

“... that, in the context of s 45D(1), the preferable view is that the word “likely” is not synonymous with “more likely than not” and that if relevant conduct is engaged in for the purpose of causing loss or damage to the business of the relevant corporation, it will suffice, for the purposes of the subsection, if that conduct is, in the circumstances, such that there is a real chance or possibility that it will, if pursued, cause such loss or damage. Whether or not such conduct is likely (in that sense) to have that effect is a question to be determined by reference to well-established standards of what could reasonably be expected to be the consequence of the relevant conduct in the circumstances. In determining the answer to that question, it will be relevant that the persons engaging in the conduct did so with the purpose of causing such loss or damage”. [emphasis added]

‘Purpose’ then will be also relevant in that regard, according to Deane J. Presumably the question of purpose would be determined first. Otherwise, in respect of the last two sentences in the above passage from Deane J’s judgment, the court’s determination may fail to heed Dixon CJ’s observation as to the “seldom helpful and always dangerous” precept that a man is

“presumed to intend the reasonable consequences of his act”: see *Stapleton v R* (1952) 86 CLR 358 at 365; *Parker v R* (1963) 111 CLR 610, at 632; and see further *J-Corp* at 563 where Lockhart and Gummow JJ refer to Dixon J’s observation with approval in relation to the question of how the primary judge fell into error on the purpose of the union’s chief executive (as the person through whom it acted).

27. It may be that an interest group would not have a purpose in particular campaigns or other conduct of causing damage or injury to a target corporation or business. For it is one thing to highlight a deficient practice so that the object of consumer awareness and thus protection may be served. It is another to seek to injure a business. For example, a prohibited purpose would be manifest if a letter were sent to the “target” threatening to publish matter and stage demonstrations at its commercial premises that would harm its trade, unless the “target” agreed to cease a certain practice (assuming “substantial” loss or damage was intended).
28. For in a given case, a subsidiary “purpose” may be entertained of causing damage to the target business as a means of securing the primary purpose of a change on the part of the target in a perceived deficient practice, or course of conduct: see *Jewel Food Stores v Amalgamated Milk Vendors Association Inc.* (1989) 24 FCR 127; 91 ALR 397, at 405 ll.11-21. That the *means* by which a purpose is sought to be achieved can be characterised as a co-existing purpose is, it seems, settled: see *Jewel Stores* at 404-5.
29. A plaintiff of course must establish a causal link between the relevant purpose and the substantial damage sustained by the business. In a given case, at the time application is made (say) for an interlocutory injunction, no damage, let alone damage of a substantial kind, may have occurred, other than an apprehension that such damage will or may ensue. But in the case of a large financial institution, such as a bank, for example, the possibility exists that at trial in a given case this may be difficult to prove.

That said, the observations of Heydon on Trade Practices Law at [10.230] need to be weighed,

namely,

“A purpose of causing substantial loss or damage has usually, but not always, not been hard to establish. Indeed, the purpose of causing a substantial loss or damage has been easier to find than a purpose of substantially lessening competition: in this respect s 45D experience accords with s 45 and s 47 experience”.

30. It may be that in a given case the question of ‘purpose’ is easier to satisfy than the question of ‘effect’. If, for example, a boycott were urged of a “target’s” products, it may be that the ‘purpose’ test would likely be satisfied, given that a boycott connotes exerting financial injury upon a supplier. On the other hand, it may be that a boycott would be unlikely to have the ‘effect’ in a given case of causing substantial loss or damage to the target’s business where, for example, the target is a bank with an enormous and diverse customer base. Or, it may be thought a boycott would be unlikely to have such an ‘effect’ where it is unlikely to appeal in practice to consumers such as, for example, against a debt collection agency with alleged unfair practices, or a transport company with a monopoly of particular transit routes. Each case will turn on its own facts. Each case may also in turn depend upon the particular practice targeted and public opinion at the time.

Australian Wool Innovation Ltd v Newkirk [2005] FCA 290 (22 March 2005)

31. This *AWI* case was one of two reported interlocutory applications in the proceeding where the sufficiency of the applicant’s pleading was attacked. Given the number of key terms in section 45D(1) (see paragraph 12 above) which need to be satisfied by an applicant, this is not surprising. A statement of claim must allege the material facts necessary for the purpose of formulating a complete cause of action: see *Bruce Odhams Press Ltd* [1936] 1 KB 697 AT 712. The well-settled distinction between material facts and particulars is also set out in this case at 712-713. Particulars serve the purpose of informing the other party of the case it has to meet.
32. In the *AWI* case the amended statement of claim was struck out, with liberty to re-plead. The pleading foundered on a number of bases, and in particular because the pleading repeated the language of the *Trade Practices Act* rather than alleging the facts which brought the claim within

the Act; failed to plead any facts which, if proven, would establish that a respondent acted ‘in concert with the second person’ in contravention of section 45D; failed to plead facts alleging an actual hindrance or prevention of the supply or acquisition of the goods or services in question (as required by section 45D), instead only pleading facts which no more than suggested “the possibility that hindrance or prevention might occur”; failed to plead that there was in fact any effect to an appreciable extent on the ease of the usual way in which *consumers* acquired Australian wool garments from retailers; failed to plead facts which, if proven, would show that retailers had been hindered or prevented from acquiring Australian wool garments from garment manufacturers; failed to plead any facts to show the causal link between the conduct in allege breach of the TPA and the loss and damage alleged to have been suffered; and failed to plead any facts which could establish that the purpose and the likely effect of the conduct within Australian was for the purpose and likely to have the effect of inducing the foreign wool processor not to buy Australian wool.

The foregoing points up the potential hurdles in pleading and proof which an applicant faces in a secondary boycott proceeding. Key terms in section 45D(1) thus stand to be potential ‘tripwires’ for an applicant. Conversely, they highlight the nature of the grounds of attack which may be open to a respondent.

33. A further attack was made upon the sufficiency of the pleading in the *AWI case* in *Australian Wool Innovation Ltd v Newkirk* (No 2) [2005] FCA 1307 (16 September).

The case of ‘picketing’

34. What if the client proposes to engage in picketing a certain group of suppliers with the possibility of targeting one company in particular? The establishment of a picket line (outside a building site) was considered by the Full Federal Court in *J-Corp*. The union instructed those participating in the line to not physically stop anyone from crossing the line or explicitly to direct or request anyone not to cross the line. However, a number of suppliers declined to enter the site whilst the picket was in place. Two questions arose on appeal. Did the union

engage in conduct which hindered or prevented the supply of goods or services to J-Corp (the building company) by other persons? Was the conduct engaged in for the purpose of causing substantial loss or damage to the business of J-Corp? In relation to the second question, it was submitted by the union that there was no evidence, or no sufficient evidence, that the relevant actor, the union's chief executive, had such a purpose. For at first instance it had been found as a matter of fact that there was a convention within the union that no industrial action, especially action involving interruption of supplies, could be taken without his prior approval.

35. In the majority judgment, Lockhart and Gummow JJ discussed what defined a 'picket' (555-7, ALR). Lockhart and Gummow JJ noted the 'picket' had been used by the English Court of Appeal in *Hubbard v Pitt* [1976] QB 142:

"... to describe an orderly and peaceful collection of persons outside particular premises in circumstances where there was no obstruction, molestation or intimidation of persons entering the premises, the object of the picket being the communication of information".

36. They noted that "besetting" includes:

"the occupation of a roadway or passageway through which persons wish to travel, so as to cause those persons to hesitate through fear to proceed, or, if they do proceed, to do so only with fear for their own safety or the safety of their property: Dollar Sweets Pty. Ltd. v Federated Confectioners Association of Australia [1986] VR 383 at 388-9."

37. The majority Justices agreed with the primary judge in his view that, in considering the usage of a term such as "picket line" in the particular situation of that litigation, "*regard should be paid to surrounding circumstances to determine what the word would reasonably have conveyed to those who heard it used*". [emphasis added] This in turn the majority said would have a significant bearing upon the issue of hindering by the union. The majority Justices noted that the evidence showed that a number of suppliers declined to enter the site because, told there was a "picket line" in place, the expression meant that there would be, colloquially speaking, a "hassle" in getting through to deliver their supplies, and that it was best not to persevere.

38. In particular, they noted the primary judge's observation (at page 561, ALR) as follows:

“In my opinion, there can be little doubt in this case that to the drivers of vehicles bringing goods and services to J-Corp at Rivervale the existence of a picket line involved at least a request, and probably a direction, that they should not enter. In the absence of any express disclaimer or advice that the line could be crossed, it was so understood by those participating and those drivers who approached the site”. [emphasis added]

Save for the words emphasised, the majority Justices found this passage was well based upon the evidence. They concluded (at page 561, ALR) that the activities of the picket line affected to an appreciable extent the ease of the usual way of the supply of goods to J-Corp at the Rivervale site, and therefore, within the meaning of the statute hindered that supply. They found it unnecessary in light of that conclusion to determine whether this extended beyond “hindering” to prevention of supply.

It is surprising that the majority Justices should find there was ‘hindering’ in that case based upon the subjective perceptions of the suppliers concerned, none of whom appear to have attempted to cross the picket line (see the passage relied upon in the primary judge’s judgment at 560, ALR). Further, the instructions by the union to those participating in the line were clear: see paragraph 36 above. This is dealt with by Spender J at 566, ALR (ll.10-26). Justice Spender first pithily observed:

“...the conduct of the alleged contravener is not necessarily to be equated with somebody’s understanding of what that conduct might be. I am here referring, for example, to what might be a person’s reaction to simply seeing a person outside a building site wearing a BLF T-shirt.”

Spender J continued (correctly in my view):

“In an attempt to clarify the point I am trying to make, take the example of a lone protester outside a furniture shop bearing a placard which says: “This shop makes furniture out of Amazonian rain forest timber. Please shop elsewhere.” A prospective customer might, on reading the placard, be persuaded to shop elsewhere. Another prospective customer, on seeing the protester carrying a placard, might go away because he or she did not want to become involved, or feared that he or she might be “hassled”, to use Lockhart and Gummow JJ’s colloquialism. In neither case, in my opinion, would the conduct of the protester constitute “conduct which hindered or prevented” the prospective customer from entering the shop.”

39. It is similarly surprising that those subjective perceptions could only be nullified by:

“... the bringing home at the site to those third party suppliers an express disclaimer by the BLF of any intention or wish to prevent their entry to the site.” (at p.563, ll.35-39, ALR).

This subjective perception of the suppliers was thus treated as “reasonable”, absent such a

disclaimer or advice. Yet the evidence appears to have been that the suppliers did not attempt to cross, let alone drive up to the picket line. How then could it have been established whether such a disclaimer or advice existed (unless the disclaimer was written and visible from a distance)? The tenor of the union's instructions was not in dispute. Viewed another way, the union had instructed silence, not an impediment.

Earlier in their judgment Lockhart and Gummow JJ had said (at p.555 ll.40-47):

“The intentions of those organising the picket line as to the methods of its operation may well be of significance in determining the issue under s 45D as to purpose. But where, as here, what is being considered is the threshold question of the engagement in conduct of a certain description, being conduct which hindered or prevented the supply of goods or services, great weight must be given to the reasonable reactions of those representing the “third persons” who otherwise would have proceeded with the orderly supply of goods or services to J-Corp.” [emphasis added]

Implicit in their later line of reasoning is that such reactions on the part of the suppliers were reasonable. No “surrounding circumstance” was suggested, for example, that the picket line happened to be organised by a militant union, the BLF, with a consequent deterrent effect upon supplier perceptions. Indeed, the only surrounding circumstance was what the word “picket” or “picketline” would “reasonably have conveyed to those who heard it used” [emphasis added]; and the majority judgment only referred to (and the passages of the primary judge's reasons only referred) to the existence of the “...picket” as such having a deterrent effect.

The primary judge's conclusions (noted at p.561, ALR) were as follows:

- (a) “... to the drivers ... the existence of the picket line involved at least a request, and probably a direction, that they should not enter.” (ll. 8-10);
- (b) [having regard to that conclusion] “... the establishment and maintenance of the line involved an implied direction that it should not be crossed and an implied threat of unspecified sanctions in the event it were crossed.” (ll.31-37);

Lockhart and Gummow JJ found that these findings as to hindrance were open to the primary judge or the evidence (p.561 ll. 46-7, ALR).

40. As to this, Spender J (at p.566, ALR) said:

“The reasons for judgment of the learned primary judge are based in large measure on what he described

as “the common understanding” of a picket line. Particular reference was made to the Oxford Dictionary definition of “picket” which incorporates the function “to dissuade or deter” persons going to work during a strike, and to the Macquarie Dictionary definition, which speaks of persons aiming to “dissuade or prevent” workers from entering a building during a strike.

“Deterrence” is not the same as “prevention”, nor is either the same as “dissuasion”. In the same way, a “request” is not the same as a “direction”.

Given that a “picket” can have many and different meanings, ranging from the military connotation of somebody on guard duty to the lone protester, it is, in my respectful view, wrong to commence with the premise that in an industrial context, a picket line involves a prima facie contravention of s 45D, and such a contravention can be avoided if there is a sufficient disclaimer that access is not prevented or hindered.”

The Oxford Dictionary meaning there referred to stands in contrast to that adopted by the English Court of Appeal (see paragraph 35 above) and by Mason JA in *Sid Ross Agency Pty. Ltd. v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760 (see further paragraph 46 below), each of which were referred to in the majority judgment (at 556, ALR).

41. As to the second point of ‘purpose’ and, more relevantly, whether there was evidence that the relevant actor, the union’s chief executive had such a purpose, the Court found that there was no evidence of such purpose. In particular, the primary Judge in *J-Corp* had accepted the evidence of the union’s chief executive that he did not have such a purpose. The chief executive had said in cross-examination that the “main thrust” of the protest “was to embarrass the Government and Homewest because we saw then and still see that it is the Government who is at fault here” (at p. 564 ll. 42-45). That being the purpose, it was of course not possible for the Court on appeal to conclude that the union’s purpose was to cause substantial or, for that matter, any loss or damage to the business of J-Corp.
42. Accordingly, it will be important for an interest group to consider who the relevant actor would be for the purpose of entertaining a relevant purpose in a particular campaign or picket. Would it be in a case of a picket line the chief executive of the client; or its board or committee; so that the state of mind of other actors or employees would not be relevant to the state of mind of the client?

Implied freedom of political communication

The two-stage test

43. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-8; 145 ALR 96 at 112 a two-stage test was adopted for determining whether a law infringes the implied freedom of political communication under Australia's Constitution, namely:
- (a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?;
 - (b) secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

If the first question is answered "yes" and the second is answered "no", the law is invalid.

In *Coleman v Power* (2004) 220 CLR at page 1; 209 ALR 182, the two-stage test formulated in *Lange* was amended in the statement of the second question by replacing the phrase "the fulfilment of" by "in a manner": per McHugh J (Gummow, Kirby and Hayne JJ agreeing).

At page 50 of *Coleman* McHugh J said:

*"...It is the manner of achieving the end as much as the end itself that must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."*²²

The freedom which is protected

44. Further, in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; 209 ALR 582,

²² Gaudron J in *Levy v State of Victoria* (1996) 189 CLR 520 at 619; 146 ALR 248 at 271 adopted a different test, namely: "If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose." [emphasis added] The other Justices in *Levy* adopted instead the lower threshold test of 'reasonably appropriate and adapted', sometimes also measured by the test of 'proportionality', which in effect is now reflected in the second stage of the *Lange* test.

Gummow and Hayne JJ in their joint judgment referred with approval (at 246, para. 184) to the following passage of McHugh J in *Levy* (at 622):

*“The freedom protected by the Constitution is not, however, a freedom to communicate. It is a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters. But, as *Lange* shows, that right or privilege must exist under the general law.”* [emphasis by underlining added]

See also McHugh J in *Mulholland* at 223-4, and Heydon J at 303.

Gummow and Hayne JJ in their joint judgment also referred with approval to the following passage in McHugh J’s judgment in *Levy* where, McHugh J after raising the question whether, in the absence of the Regulations, the protesters and the media had the right to be present in the permitted hunting area, continued (at 625-626):

“The constitutional implication ... gave the protesters no right to enter the hunting area. That means that, unless the common law or Victorian statute law gave them a right to enter that area, it was the lack of that right, and not the Regulations, that destroyed their opportunity to make their political protest.” [emphasis added]

Gummow and Hayne JJ noted that these two passages developed a point later emphasised by Hayne J in *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28]; 163 ALR 734 at 740.

Accordingly, it would appear that the first question of the *Lange* test extends to a threshold requirement that a pre-existing right or privilege is burdened by the law in question.

45. The question then becomes from whence derives the right of the client to engage in conduct of a kind directed to animal protection or otherwise to advancing the public interest by law reform, being a right or entitlement with which section 45D(1) then interferes in a way offending the constitutionally mandated freedom of communication. Put another way, is there a right given by the common law or by statute to citizens or to political or other groups to mount campaigns or otherwise engage in conduct directed to such ends. The threshold issue is

to identify the existence and nature of the “freedom” which would be asserted by the group.

At common law

46. The answer to this question was expressed in *Lange* (supra) by the Full Court (at 564, CLR; at 110, ALR) in these terms:

“Under a legal system based on the common law, “everybody is free to do anything, subject only to the provisions of the law”, so that one proceeds “upon an assumption of freedom of speech” and turns to the law “to discover the established exceptions to it [Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109 at 283]. The common law torts of libel and slander are such exceptions.”

Accordingly, at common law subject to such exceptions, a client has the right to engage in such conduct by way of freedom of speech. In the writer’s opinion it is that freedom which section 45D(1) will burden in the case of a given client. It would also burden by parity of reasoning a similar (assumption as to) freedom of association, subject in each case to relevant laws such as the keeping of the peace, public safety, or public or private nuisance (or any other tort). This would be relevant to the question, for example, of picketing. Indeed, in *J-Corp* (supra) at 556 ALR Lockhart and Gummow JJ in their joint judgment noted that in *Sid Ross Agency Pty. Ltd. v Actors and Announcers Equity Association of Australia* (supra; paragraph 28) (a case decided on a demurrer) Mason JA (at 767) said:

“At common law, picketing is not necessarily a nuisance and unlawful as such, but it becomes so if it involves obstruction and besetting: see J Lyons & Sons v Wilkins [1899] 1 Ch 255; Ward, Lock & Co. Ltd. v Operative Printers’ Assistants Society (1906) 22 TLR 327 ...”

See also paragraph 36 above as to the meaning of “besetting”.

Freedom of association and movement

47. For completeness in respect of a freedom of association, in *Kruger v The Commonwealth* (1977) 190 CLR 1, Toohey J, Gaudron J (at 195-7, 205, CLR) and McHugh J each extended the freedom of political communication to enable a constitutional freedom of association and movement of persons. Brennan CJ and Dawson J each left the question open. Gummow J said there is no implied freedom of association for political, cultural and familial purposes. In *Levy* Gaudron J (at 269-70, ALR) reiterated that freedom of political movement is protected by

the Constitution as an aspect of freedom of communication. Relevantly, Brennan CJ (Toohey, McHugh, Gummow and Kirby JJ agreeing) said the implied freedom of communication protects non-verbal conduct as well as verbal communications. See also the observations of McHugh J in *Levy* at 622-3, CLR; 274, ALR.

Indeed, in respect of ‘picketing’ specifically, McHugh J in *Levy* at 274 said:

“Indeed, in any appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it. Thus, in Brown v Louisiana [383 US 131 (1966)], the United States Supreme Court held that a silent demonstration on the premises of a public library was constitutionally protected speech for the purpose of the First Amendment. Similarly, that court has held that peaceful picketing to publicise a labour dispute was constitutionally protected speech.” [*Thornhill v Alabama* 310 US 88 (1940)].

Accordingly, in a given case it may be that peaceful picketing falls within the implied freedom, having regard to the apparent imprimatur of McHugh J’s observations in *Levy*.

The communication must concern government and political matters

48. Having identified the “freedom” which it would be asserted is burdened by section 45D(1), the next question is whether such freedom is, in the terms of the first stage test in *Lange*, a “freedom of communication about government or political matters”. In *Lange* (at 559, CLR) the Full Court held that freedom of communication on such matters is an indispensable incident of the system of representative government created by the Constitution, and emphasised that (at 560, CLR):

“... communications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government, as it was understood at federation.”

See also *Roberts v Bass* (2003) 212 CLR 1, at 26 per Gaudron, McHugh and Gummow JJ.

Further, in *Theophanous v The Herald & Weekly Times Ltd.* (1994) 182 CLR 104; Mason CJ, Toohey and Gaudron JJ at 124 said:

“... in our view, the concept [of political discussion] is not exhausted by political publications and addresses which are calculated to influence choices. Barendt states that [Freedom of Speech (1985) p. 152]:

“political speech’ refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.”

It was this idea which Mason C.J. endeavoured to capture when, in Australian Capital Television, he referred to “public affairs” as a subject protected by the freedom [at pp. 138-140].”

In addition, the implied freedom extends to communication concerning the affairs of statutory authorities and public authorities obliged to report to the legislator or responsible minister: *Lange*.

49. It may be that the proposed conduct will be multi-layered, involving engagement in campaigns at a national level in respect of national issues, as well as at state level in respect to state issues. Whilst left open and not decided in *Levy*, it is highly arguable that the implied freedom is applicable to confine both the content of the State legislative powers and the content of State laws. This conclusion is supported by sections 106 and 108 of the Constitution which expressly provide for the continuation of State Constitutions and State laws to be “subject to this Constitution”: see *Theophanous* (supra) at 164, CLR per Deane J. Also not decided in *Levy* was the question of whether the implied freedom is implied in the *Constitution Act 1975* of Victoria: at for example 277, ALR per McHugh J; and at 271, ALR per Gaudron J; see further *Australian Capital Television Pty. Ltd. v Commonwealth* (1992) 177 CLR 106 per Mason CJ; 108 ALR 681; *Australia Act 1986* (UK), in respect of which see *Australian Capital Television Pty. Ltd.* at 138, CLR per Mason CJ. In any event, it defies common sense to pretend that political debate can be compartmentalised into “State political discussion” and “federal political discussion”, and that political debate, ideas and information are not in constant flow across State and federal boundaries: see for example the joint judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous v The Herald & Weekly Times Ltd.* (supra) at 122, CLR at 12, ALR; *Australian Capital Television Pty. Ltd.* (supra) at 142 per Mason CJ.

50. As to the importance of communications from the represented to the representatives, Mason CJ in *Australian Capital Television Pty. Ltd.* (supra) at 139 said:

“That is because individual judgment, whether that of the elector, the representative or the

candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in and access to, that discussion. In truth, in a representative democracy, public participation in political discussion is a central element of the political process.

Archibald Cox made a similar point when he said:

“Only by an uninhibited publication can the flow of information be secured and the people informed concerning men, measures and the conduct of government ... Only by freedom of speech, of the press, and of association can people build and assert political power, including the power to change the men who govern them.”

In *Nationwide News v Wills* (1992) 177, CLR 1 at 74; 108, ALR 681; Deane and Toohey JJ observed that the basis of an implication of freedom of political communication was identified by Duff CJC and Davis J in *Re Alberta Legislation*, when speaking of the British North America Act before the adoption of the Canadian Charter of Rights, in inter alia the following terms:

“The statute contemplates a Parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack ...”

The freedom is ongoing between elections

51. Further, the freedom is not confined to the election period: *Lange*. The workings of a representative democracy then connote more than visits by electors to the ballot box every four years or so after making political judgments based on information or proposals advanced in a prior election campaign. Instead, the workings of a representative democracy are an ongoing process involving the representatives working under the ongoing influence of public opinion and public discussion. Electors sometimes seek to influence representatives to change or introduce a law by direct communication. Electors also frequently seek to exert pressure upon representatives to do so by way of public campaigns. The public campaigns usually seek to communicate the electors' message in a manner directed to raising community awareness about the particular issue and to cultivating public support. This is particularly so of public campaigns conducted by bona fide special interest groups.

52. Participation in political debate by way of the electronic media is commonly seen as the most effective means of political communication: see *Australian Capital Television Pty. Ltd.* (supra) at 174 per Deane and Toohey JJ; and see for example *Ley* per McHugh J at 623, CLR. Lord Simon of Glaisdale in *Attorney-General v Times Newspapers Ltd.* (1974) A.C. 273, at 315 said:

“People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decision. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.”

53. Apart from individuals seeking to speak publicly and to do so persuasively with appropriate evidence, individuals in common cause may come together to procure political communication:
- (a) by way of protest about a practice at the place where the practice is conducted or at the headquarters of the responsible corporation, thus focusing the community spotlight upon the alleged disagreeable features of the practice or the corporation responsible for the practice rather than in reliance upon a secondhand report or protest: importantly, such a secondhand report or protest would be largely ineffective from a political or media viewpoint and thus not conducive to effective or persuasive political communication; and
 - (b) by way of a message not only from the represented to the representatives, but between the represented, relying on in particular the electronic and other media to create effective communication about such alleged disagreeable practices or practices contrary to the public interest in order to raise community awareness, cultivate public support, and in the case of an interest group, by creating greater awareness so as to also impart the prospect of say consumer protection.

The matters described are intrinsic to the process of political communication.

54. So, practically speaking, how is the question determined of whether an interest group’s freedom is one of communicating about government or political matters? Is the campaign directed to a national matter or the adoption of a policy by the federal government, for example. Is the campaign directed to an interstate body which conducts an interstate or national business, with

a view to seeking federal government intervention? Is the publicity for the campaign obtained in media programs or outlets with a national media audience? Or is it a State-based campaign directed to securing action on the part of a State government? In this respect though it could be noted that campaigns against duck shooting for example, whilst based in Victoria, can obtain national media and be the object of federal and state political discussion. Ultimately the question is whether the campaign involves communication on political or government matters. In *Levy* (supra), the applicant, Laurie Levy, argued there was an implied freedom of political communication under the Victorian constitution as well as one under the Australian constitution.

Considering the first stage test in *Lange*

55. Turning then to the first stage test in *Lange*, the first question is whether section 45D(1) effectively burdens the Centre's freedom of political or government communication in its terms, operation or effect. "Burden" arguably should be taken to have a broad meaning, extending to any inconvenience, restriction or adverse consequence imposed on political communications. In *Coleman v Power* (supra) at 49, McHugh J said:

"In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions or their occurrence. And a law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the Constitution."

56. It can be argued that the prohibition in section 45D(1) creates a legal restriction on communication. Further, a burden exists because it imposes potentially serious sanctions and an exposure to large damages claims and judgments, including legal costs. It thus fetters the implied freedom of communication and has the potential to regulate the freedom of political discussion. To restrict methods of communication and freedom of association where in the public interest it is sought to act in concert to target an arguably inimical practice or course of conduct, is to restrict the effectiveness of the freedom of political speech, and is to restrict the extent to which new concerns may be brought to the attention of the represented. Plainly,

intended campaigns of a group may stand in different instances to include criticism of representatives or public officials.

It would operate in practice to burden or deny a client's opportunity to obtain access to the media so as to transmit its message on political or government matters to other electors. McHugh J in *Levy* at 623, CLR; 274-5, ALR observed:

“Furthermore, the constitutional implication that protects the freedom is not confined to invalidating laws that prohibit or regulate communications. In appropriate situations, the implication will invalidate laws that effectively burden communications by denying the members of the Australian community the opportunity to communicate with each other on political and government matters relating to the Commonwealth. Thus, a law that prevents citizens from having access to the media may infringe the constitutional zone of freedom. The use of the print and electronic media to publicise political and government matters is so widespread in Australia and other Western countries that today it must be regarded as indispensable to freedom of communication. That is particularly true of television which is probably the most effective medium in the modern world for communicating with large masses of people.”

57. Further, by its terms, operation and effect, section 45D(1) directly and not remotely restricts or limits communications or freedom of association by way of an interest group acting in concert with fellow concerned citizens or organisations. It would also affect the manner or conditions of the occurrence of such communications.

In a media release²³ dated 2 March 2007 the then Federal Minister for Agriculture, Fisheries and Forestry Peter McGauran complained of misleading statements about practices such as the mulesing of sheep by the animal rights group People for the Ethical Treatment of Animals. As a consequence, he flagged an amendment to the *Trade Practices Act* empowering the ACCC to bring representative proceedings so that

²³ In the media release dated 2 March 2007 of the Federal Minister for Agriculture, Fisheries and Forestry, the Honourable Peter McGauran, MP, the Minister says:

“Individual farmers often do not have the funds to take legal action to defend themselves against secondary boycotts promoted by well-resourced extremists groups,” Mr McGauran said.

We have seen activists mount damaging campaigns, based on misleading information, that have encouraged the public not to buy particular farm produce. These campaigns can lead to substantial economic losses.

...

Mr McGauran cited as an example the current campaign by the foreign-based animal rights group, People for the Ethical Treatment of Animals (PETA), which he said was based on misleading and highly selective information about Australia's wool and sheep industry..

...

the ACCC could bring actions on behalf of farmers “against this type of campaign” promoted by PETA. It is quite arguable that the object of the Bill was thus to burden potential communications by certain interest groups, such as animal rights protesters. The amendment as flagged in a media release such as that of 2 March 2007 acted as a guide as to whether section 45D(1) was intended, by this proposed conferral of power on the ACCC, to act as a burden on possible communications or campaigns by such groups. Thus it would have been arguable that the Bill was incompatible with the maintenance of a system for representative government established by the Constitution.

But, as with all political discourse, the question of whether a statement is misleading or not, or a viewpoint is wrong or not, will usually depend on one citizen’s particular viewpoint as against another. And ultimately, if political representatives refuse to make laws to change particular practices, consumers who disagree are left, practically speaking, to “vote with their feet” and refuse to purchase the product affected by the practice. For example, why should the ordinary citizen be denied the opportunity to “vote with their feet” where urged by free range egg producers not to buy battery hen eggs on the grounds of the birds’ suffering? In the case of Spender J’s lone protester bearing a placard outside a furniture shop urging people to shop elsewhere because the shop makes furniture out of Amazonian rainforest timber, is he doing no more than providing information going to the consumer’s exercise of choice, on a basis where, in a democratic society, rational (or irrational) minds may differ as to its relevance? The choice still resides in the consumer whether to enter the shop.

Also, free speech is robust: it can stir unrest and make some feel aggrieved. It invokes the notion of the right to be wrong, or to be out of step. But ultimately in political discourse, notions of right and wrong are usually simply matters of opinion. The parameters depend on one citizen’s viewpoint on a particular proposal, matter or issue. Even the remedy for a problem can invite a divide, including whether a problem exists

or a remedy is necessary. One need look no further than the present climate change debate for an example.

58. Moreover, that section 45D(1) may burden political or government communications is supported by the existence of the exemption in respect of environmental protection or consumer protection. The legislature, by not extending the exemptions to other bona fide public interest causes or matters, does not thereby lessen the burden on the communication of such causes or matters, or indeed upon consumer protection organisations which, in respect of specific conduct, may be unable to avail themselves of the exemption in section 45DD.

Plainly these campaigns and their messages will have a political content or purpose. The conduct will include statements and action directed to or concerning political or government matters, and political representatives or public officials, and a section 45D(1) unrestricted but for the exemptions in its operation, terms or effect, will effectively burden that common law freedom of communication.

As to the proposed bill amending the ACCC to bring representative proceedings, the Bill lapsed with the calling of the 2007 federal election.

Considering the second stage test in *Lange*

59. Turning to the second stage test in *Lange*, on the basis that the law effectively burdens an interest group's posited freedom, the question is whether section 45D(1) is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the system of representative and responsible government. Ordinarily, it may be thought it would be reasonably appropriate and adapted to a legitimate end. However, in the case of an interest group with its campaigns, section 45D(1) is likely in different instances to not be reasonably appropriate and adapted to achieving a legitimate end where the burden is such that the communication of political or governmental matters is no longer "free". Whilst freedom of communication is not an absolute, and whilst laws burdening communications on

political and government matters in the words of McHugh J in *Coleman v Power* at 52 “will be permissible as long as they do no more than promote or protect such communications and those who participate in representative and responsible government from practices and activities which are incompatible with that system of government”, the communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means or, put another way, is not proportionate. It may be argued that the burden is unreasonably greater or not proportionate by reason of the limited exemptions granted under section 45DD(3), so that section 45D(1) has an unreasonably wide operation. Section 45DD(3) cannot be thought to provide for a wide rubric of public interest matters.

Insofar as words, messages or concerted action by a legitimate public interest group are adopted in the course of political communication, section 45D(1) stands to prohibit their use and dramatically curtail, if not silence, and stop them. Such a prohibition cannot be justified as compatible with the constitutional freedom. For the present, it is sufficient to observe that section 45D(1) would stand to infringe the constitutional freedom in a given case involving an interest group by simply making contravention of its terms subject to a pecuniary penalty under section 76 of the *Trade Practices Act* 1974 of up to \$750,000 on a body corporate.

60. In addition, damages and injunctions are available under sections 80 and 82 and remedial orders under section 87. Deane J in *Theophanous* (supra) at 177, CLR said:

“... it is apparent that potential civil liability in damages and costs is likely to represent a much more effective curtailment of the freedom of political communication and discussion than the possibility of conviction of most of the many criminal offences which are punishable by a pecuniary penalty.”

Plainly, this was thought undesirable in the case of political communications directed to the ends of environment protection and consumer protection as such. But the implied freedom would stand to apply irrespective of whether such communications or conduct in concert (by way of association) is engaged in by individuals or groups separate from those the subject of the exemption in section 45DD.

Accordingly, the provisions of section 45D(1) may stand to be read down in a given case so far as they would infringe the implied freedom in a given case.

United States

61. Further to the observations about peaceful picketing by McHugh J in *Levy* at 274 (see paragraph 44 above) and his reference to *Thornhill v Alabama* 310 US 88 (1940), there are other United States cases which bear upon the First Amendment (free speech) and boycotts. In *N.A.A.C.P. v Clairborne Hardware* 458 US 890, 910 (1982) the United States Supreme Court, quoting *De Jonge v Oregon* 299 US 353, 365 (1937), said that a State may not criminalize the “mere participation in a peaceable assembly and a lawful public discussion”. The United States Supreme Court, in referring to *Thornhill v Alabama*, also noted that peaceful picketing is protected even when it is intended to induce customers not to patronise businesses (at 910).

In *Clairborne Hardware* the boycotters “certainly foresaw – and directly intended – that the merchants would sustain economic injury as a result of their campaign” (at 915). Indeed, the United States Supreme Court concluded (at 911) that “(s)peech does not lose its protected character ... simply because it may embarrass others or coerce them into action.”

At bottom, in Australia a perhaps philosophical as much as a conceptual legal question will be whether the public interest is better served by leaving intact the residual risk of the effective means of political communication. Instance for example the Minister’s media release of 2 March 2007 and the debate on the ethics of production practices.

Hinder or preventing supply

The *Hahnhauser* case

62. An instance of a possible secondary boycott hindering or preventing the supply (as distinct from the acquisition) of goods arose in the case of *Rural Export & Trading (WA) Pty Ltd v Hahnhauser* [2008] FCAFC 156 (22 August 2008).

In summary, this case principally determined that conduct involving concerted interference with

the movement of goods between Australia and places outside Australia on the basis of the welfare of live sheep as to the goods in question was not protected by the environmental protection exemption to section 45D(B). Both consumer and environmental protection are exempt from liability where the dominant purpose, is substantially related to one or the other. The interference here with the live sheep exports comprised deliberate contamination of feed for sheep intended for live export and thus substantially hindered, according to the primary judge, the export of sheep within the meaning of section 45DB(1). The primary judge had found that the activity of Mr Hahnhauser and his collaborators was engaged in for a dominant purpose which was “substantially related to environmental protection” within the meaning of section 45DD(3)(a) of the Act ((2007) 243 ALR 356 at [70]-[71]).

63. The factual setting for this case is compendiously expressed in the first paragraph of the Full Court’s judgment, namely:

“Late on the night of 18 November 2003 Ralph Hahnhauser and others entered into a paddock of a sheep feedlot in Portland, Victoria. He placed ham and water into two feed troughs from which about 1,700 fed. The sheep were being held in the feed lots and prepared there to be exported alive on a ship, the MV Al Shuwaikh on about 21 November 2003. The next day, 19 November 2003, Mr Hahnhauser, who was a member of Animal Liberation SA Inc., publicised what had been done by issuing a press release and participating in a series of interviews. He caused a video to be made of the contamination of the feed. He explained that the contamination of the sheep feed by adding ham, was designed to prevent it meeting Halal requirements for the preparation of food suitable for consumption by Muslims in middle eastern destinations.”

A subsidiary issue determined on appeal was to reverse the primary judge’s finding that the onus of proving or negating the dominant purpose was substantially related to environmental protection lay upon the applicant for relief under section 45D(b)(i). Whilst not finding it necessary to express a “concluded view”, the Full Court expressed their “tentative view” that the onus lay upon the person seeking to invoke the exception, that is to say, the respondent to an application under section 45DB(i) (see generally paragraphs [38] to [42]).

64. Section 45DB(1) provides:

“A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect of preventing or substantially hindering a third person (who is not an employer of

the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia.”

Subsection (2) provides:

“A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose.”

65. The primary judge in determining that the dominant purpose of Mr Hahnhauser’s conduct, namely, the prevention of cruelty to and suffering of animals, fell within the “environmental protection” exemption stipulated section 45DD(3), relied on observations by the High Court in *Queensland v Murphy* (1995) 95 ALR 493 at 498 that the ordinary meaning of the word “environment” signified “that which surrounds” and the word had long been understood to “include the conditions under which any person or thing lives”. Further, the primary judge relied on statements made in Second Reading speeches in the Senate for the insertion of section 45DD(3) to confirm a meaning that “environmental protection” was meant to include “sheep generally”. In summary, he said that farm animals were as much a part of the human environment as wild and domestic animals, and that there was no reason why the protection of the conditions in which farm animals were kept should be excluded from the concept of environment protection.
66. The Full Court disagreed. At paragraph [23] of its judgment, the Full Court noted, first, that in *Queensland v Murphy* (supra) the High Court had also stated that:

“What constitutes the relevant environment must be ascertained by reference to the person, object or group surrounded or effected.”

In summary, the Full Federal Court found that “environment”:

“... referred to in the expression ordinarily will be a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists.”

By “artifice” it is assumed the Full Court was referring to the built environment. There would not seem to be any controversy in such a formulation of “environment” as referred to in section 45DD(3).

As to “protection”, the Court noted that it:

“is to preserve the existence and or characteristics of that environment being that location, thing or habitat which may include, or consist only of, that individual instance or aggregation.”

67. Thus, the Full Court affirmed that Mr Hahnhauser was not seeking the protection of any environment, and certainly not of the ship in which sheep would be placed for the voyage from Australia to the Middle East. He did not have the dominant purpose of protection of the sheep in the environment of the paddock. Rather he was seeking to protect them from what he asserted be “the conditions they would experience on board a ship engaged in the voyage from Australia to the Middle East.” In other words, the purpose was not to protect the environment from which the sheep were to be removed (the feedlot) or to be transferred (the ship). Rather, the object was to prevent the sheep being introduced into the environment of the ship. Put another way, it is one thing to contend that the environment in which sheep may be held should be protected. It is another to urge protection of the sheep *from* being in that environment.

5 Constitutional Law Issues in Animal Law

Section 92 of the Constitution

1. In early 2007 Dr Deb Foskey, a Greens Member of the ACT Legislative Assembly, introduced a Bill, the *Animal Welfare Amendment Bill 2001*, to ban battery cage production in the ACT. Clause 9A of the Bill provided:

“*A person commits an offence if-*

- (a) *the person keeps hens for egg production, poultry carcass production or both; and*
- (b) *the hens are kept in a battery cage system.”*

There was also a consequential amendment to the *Food Act 1992* proposed by the *Food Amendment Bill 2007*.

2. Opposition to the Bill within the Legislative Assembly was expressed on the basis that the Bill, if enacted, would infringe s.92 of the Constitution or its statutory equivalent contained in s.69(1), *Australian Capital Territory (Self-Government) Act 1988*; and second, on the basis that it would infringe s.9, *Mutual Recognition Act 1992 (Cth)*.²⁴ The Bill was introduced a little under a year before the High Court decision in *Betfair Pty Limited v Western Australia* [2008] HCA 11 (27 March 2008); (2008) 234 CLR 418; (2008) 244 ALR 32.
3. It will be recalled from Chapter 1 that the ‘mutual recognition’ principle enshrined in s.9 of the *Mutual Recognition Act 1992 (Cth)* operates on the act of sale rather than production, and that accordingly the Bills by uncoupling sale from production did not stand to breach s.9. The full reasoning on this point can be ascertained from Chapter 3.
4. Turning then to the constitutional question, section 92 of the Constitution relevantly provides:

24 Dr Foskey contacted the Barristers Animal Welfare Panel for advice on these two questions.

“On the imposition of uniform duties of customs, trade, commerce, and intercourse amongst the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.”

Section 69(1), *Australian Capital Territory (Self-Government) Act 1988* provided:

“(1) Subject to subsection (2), trade, commerce and intercourse between the Territory and a State, and between the Territory and the Northern Territory, the Jervis Bay Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, shall be absolutely free.”

5. One key legal issue that arose for analysis is how would a Court determine the validity of State or Territory legislation which purports on its face to address an inhumane practice or other social policy issue by a solution or prohibition which disadvantages producers of that State or Territory in interstate trade in the product the inhumane practice produces by comparison with another State where producers can continue to produce the product in reliance on the inhumane practice?
6. It will be seen that s.69(1), *Australian Capital Territory (Self-Government) Act 1988* incorporated the relevant wording of s.92 of the Constitution. It no doubt did so because section 92 only applies to “trade, commerce and intercourse among the States”, and thus does not apply to trade, commerce and intercourse between a Territory and a State except to the extent that such trade also comprises trade between States. Section 69(1) plainly intended that the legal principles governing section 92 be extended by force of the statute to “trade, commerce and intercourse” between the ACT and a State, and between the ACT and other Territories designated. Subsection 69(2) provides it does not bind the Commonwealth.

Cole v Whitfield

7. New legal principles for the application of section 92 were enunciated by the High Court in a joint judgment of all members of the Court in *Cole v Whitfield* (1988) 165 CLR 360. The Court said that the object of section 92 in its application to trade and commerce is the elimination of protectionism. Importantly, *Cole v Whitfield* established that a law which imposes a burden on interstate trade and commerce but does not give the domestic product or the intrastate trade in that product “a competitive or market advantage” over the imported product or the interstate

trade in that product, is not a law which discriminates against interstate trade and commerce on protectionism grounds: see also *Castlemaine Toobeys Ltd v The State of South Australia* (1990) 169 CLR 436, at 467.

8. *Cole v Whitfield* concerned Tasmanian Regulations which limited the size of crayfish that might be sold or possessed in Tasmania. Crayfish caught in South Australian waters and sold in Tasmania were less than the prescribed size but above the prescribed size under the South Australian Regulations. The essential question was whether the Tasmanian Regulations were compatible with section 92, the Court finding that they were.

A discriminatory burden of a protectionist kind

9. The Court, speaking with reference to a State law, observed (at 408):

“... A law which has as its real object the prescription of a standard for a product or a service or a norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s. 92. But if a law, which may be otherwise justified by reference to an object which is not protectionist, discriminates against interstate trade or commerce in pursuit of that object in a way or to an extent which warrants characterization of the law as protectionist, a court will be justified in concluding that it nonetheless offends s. 92.”

10. Whilst the Tasmanian size prescribed for crayfish was acknowledged to be a burden on interstate trade and commerce, it was not a discriminatory burden of a protectionist kind. It applied alike to crayfish caught in Tasmania and those imported. Accordingly, no discriminatory purpose appeared on the face of the law.
11. In the case of the ACT Bills, the prohibition was confined to intra ACT trade, yet that is not the end of the matter.
12. Also, in *Cole v Whitfield* it did not appear that the object or effect of the law was relevantly discriminatory for the object was to protect and conserve Tasmanian stock, an important and valuable natural resource. The protection granted by the Regulation did not confer a “competitive or market advantage” upon the Tasmanian industry.

13. In *Lane's Commentary on The Australian Constitution* (second edition) at p.695, the learned author observed:

"The quotation, "a competitive or similar advantage", discloses the two intermingling ingredients. The plaintiff must show protectionism (favouring Tasmanian production or trade) and discrimination (against interstate imports or trade therein)."

The Bills before the ACT Legislative Assembly also stood on a different footing from the Tasmanian Regulations in *Cole v Whitfield* because ACT producers stood arguably to be at a competitive or market disadvantage as against say New South Wales producers with recourse to the battery cage system of production.

14. In *Cole v Whitfield* the statement of facts recited the prohibitions were necessary to protect the natural resource. Accordingly, there was no occasion to decide whether, as a matter of law, the prohibition could be upheld despite the burdens (or the competitive or market disadvantage) they imposed on interstate trade on the basis that these burdens were a necessary means for achieving the conservation of the natural resource or, as the High Court put it in *Castlemaine Tooheys* (at 468), "or other public object which the legislation seeks to protect or promote".

Legislation which on its face addresses social problems: Castlemaine Tooheys case

15. That being so, the key legal issue (referred to in paragraph 5 above) was expressed by the High Court upon the facts in *Castlemaine Tooheys* (at 472) in these terms:

"The particular question in the present case is: how should the Court approach the determination of the validity of State legislation which attempts on its face to solve pressing social problems by imposing a solution which disadvantages the trade in beer brewed outside the State as against the trade in beer brewed within the State?"

16. Briefly, the facts in *Castlemaine Tooheys* were that Bond brewing companies, brewing beer in three States outside South Australia for sale throughout Australia, sold their bottled beer in South Australia in non-refillable bottles. The *Beverage Container Act 1975* (Sth A) by a 1986 amendment fixed a refund deposit of 15 cents for non-refillables by contrast with only 4 cents for refillables, resulting in a price differential which made Bond breweries' products non-competitive with the product of local brewing groups in the South Australian market, which all sold beer in cans.

17. In addition, by section 7 of the amending Act, it was an offence for a retailer to refuse to accept the return of non-refillable bottles and to pay the refund of 15 cents per bottle. The refillable bottles of the South Australian breweries were exempted from the application of section 7, which meant they could therefore be simply returned to a collection depot.
18. The State of South Australia contended that a return system, based on deposits on beverage containers, was a means of controlling litter. In addition, it was said that refillable bottles resulted in conservation of energy and resources, particularly the burning of natural gas in glass production, distribution and transportation. Natural gas was a finite resource in South Australia, with only sufficient reserves (as estimated in 1986) to supply the State until mid-1991.

Necessary or appropriate and adapted

19. The question set out in paragraph 5 above invoked the adoption by the Court of the following approach and principles (at 472):

“The central problems addressed by the legislation are the litter problem and the need to conserve energy resources. If the South Australian legislation were not attempting to provide a solution to these problems, the burden on interstate trade would be discriminatory in a protectionist sense because its operation would be discriminatory and protectionist in effect, even though the legislation on its face would treat interstate and intrastate trade even-handedly. What difference then does it make that the burden is imposed by legislation which on its face appears to be directed to the solution of social and economic problems, not being the uncompetitive quality or character of domestic trade or industry? Is the burden non-discriminatory in the relevant sense on that account? If so, how is that conclusion to be justified?”

In determining what is relevantly discriminatory in the context of s. 92, we must take account of the fundamental consideration that, subject to the Constitution, the legislature of a State has power to enact legislation for the well-being of the people of that State. In that context, the freedom from discriminatory burdens of a protectionist kind postulated by s. 92 does not deny to the legislature of a State power to enact legislation for the well-being of the people of that State unless the legislation is relevantly discriminatory. Accordingly, interstate trade, as well as intrastate trade, must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare.

It would extend the immunity conferred by s. 92 beyond all reason if the Court were to hold that the section invalidated any burden on interstate trade which disadvantaged that trade in competition with intrastate trade, notwithstanding that the imposition of the burden was necessary or appropriate and adapted to the protection of the people of the State from a real danger or threat to its well-being. And it would place the Court in an invidious position if the Court were to hold that only such regulation of interstate trade as is in fact necessary for the protection of the community is consistent with the freedom ordained by s. 92. The question

whether a particular legislative enactment is a necessary or even a desirable solution to a particular problem is in large measure a political question best left for resolution to the political process. The resolution of that problem by the Court would require it to sit in judgment on the legislative decision, without having access to all the political considerations that played a part in the making of that decision, thereby giving a new and unacceptable dimension to the relationship between the Court and the legislature of the State. An analogous field is the legislative implementation of treaty obligations under s. 51(xxix) of the Constitution. The true object of the law in such a case is critical to its validity. The Court has upheld the validity of legislative provisions if they are appropriate and adapted to the implementation of the provisions of the treaty: The Commonwealth v Tasmania (the Tasmanian Dam Case) ...; Richardson v Forestry Commission... See also Herald and Weekly Times Ltd v The Commonwealth ... But if the means which the law adopts are disproportionate to the object to be achieved, the law has not been considered to be appropriate to the achievement of the object: the Tasmanian Dam Case ...; South Australia v Tanner There is a compelling case for taking a similar approach to the problem now under consideration.” [emphasis added]

The State power to legislate for the “wellbeing” of the people of that State

20. As to the power of the State to enact legislation for the well-being of the people of that State, “well-being” in this context means “welfare”. Harrison Moore, *Commonwealth of Australia* (second edition) (1910), at pp.274-5 said “the purpose and design of every law is to guarantee the welfare of the community” of the enacting legislature: see *R v Foster, Ex parte Eastern & Australian SS Co Ltd* (1959) 103 CLR 256, 308 invoking Harrison Moore. But a phrase such as that found in section 22, *Australian Capital Territory (Self-Government) Act* 1988 conferring power on the Legislative Assembly to make laws for the “peace, order and good government” of the Territory, or again a phrase such as “peace, welfare and good government”, were historically a common form in instruments conferring legislative power on British dependencies. It is a matter for the enacting legislature to judge whether a measure on any topic on which it has power to legislate is in fact for the peace, welfare and good government of the State or Territory. The ACT has power to legislate in respect of animal welfare. It has enacted an animal welfare statute and in doing so necessarily judged it in fact to be for the welfare of the Territory. So animal welfare comes within the High Court’s phrase in *Castlemaine Toobeys* that “the legislature of a State has power to enact legislation for the *well-being of the people of the State.*” [emphasis added]. A State’s welfare is enhanced by the enactment of laws providing standards for the treatment of animals subject to the dominion of people in all manner of ways. Put

another way, it satisfies the public interest to do so.

21. If particular products were produced by say the widespread use of child labour under adverse conditions in addition to the use of adult labour, would it not be “beyond all reason” if s.92 invalidated any consequent burden or interstate trade from the enactment of a statute to prohibit the use of child labour; and did so simply because the abolition of one means of production disadvantaged interstate trade in such products where in other States the use of child labour was permissible?
22. The passage from *Castlemaine Toobeys* set out in paragraph 19 above reflects the historical tension the High Court has long acknowledged between ordered State societies and s.92.²⁵
23. The Bills before the Legislative Assembly were on a different footing to what was under consideration by the Court in *Castlemaine Toobeys* because there interstate trade was disadvantaged by comparison with intrastate trade, that is, the local brewers in South Australia. In the case of the ACT Bills the position was the reverse. By reason of the enactment of a law to prohibit the keeping of hens for egg or carcass production in battery cages where some or all such products may be produced for interstate trade, the intraterritory producer stood to be disadvantaged in interstate trade by comparison with the producers in the States or other Territories.

Are the means adopted proportionate?

24. The question then becomes whether the means adopted in the Bills proposed a solution (prohibition) to the particular problem (the cruelty of such enduring close confinement for hens) which satisfied the test propounded in *Castlemaine Toobeys*, namely, whether the imposition of the burden on interstate trade is “necessary or appropriate and adapted”. Put another way, the question is whether the means which the law adopts are proportionate to the object to be

²⁵ The references may be found in paragraph 21 of the memorandum of advice posted to the Barristers Animal Welfare Website.

achieved, that is, the elimination of such cruelty, it being noted that other production systems would remain available, whether free-range, barn-laid or otherwise.

25. If it is accepted that the cruelty of battery cages cannot be eliminated except by their abolition, then in the writer's view the test is satisfied. Where the problem of cruelty posed by battery cages is said to arise from the enduring close confinement of the animal, the conclusion that the cruelty they produce cannot be eliminated except by their abolition, would appear inescapable. Rational and legitimate grounds exist for apprehending that battery hen cages generate a cruel confinement. Accordingly, the legislative measures proposed by the Bills were necessary and appropriate and adapted to the resolution of the problem.

26. The question then becomes whether the burden they stood to impose on interstate trade was "incidental and not disproportionate" to achieving a resolution of the apprehended cruelty. It is difficult to see how the burden which the proposed law stood to impose on interstate trade could be characterised as "disproportionate", assuming that no alternative or better means existed to eliminate such cruelty. In *Castlemaine Toobeys*, for example, the refund amount fixed for non-refillable beer bottles was thought to far exceed what was thought necessary to ensure the success of the scheme for the return and collection of beverage containers. The relevant provision was therefore not appropriate and adapted to that end (see page 475) and s.92 prevailed. See also *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182 where the plaintiff, successfully, contended that any burden on interstate trade flowing from the law's operation was incidental to the attainment of a non-protectionist object and was not disproportionate to the attainment of that object.

27. So, if the Bills had become law and were later challenged, the defence would have been that their object was the Territory's "well-being" or welfare and that they provided measures "appropriate and adapted" to this end. Their true object was not to impose an impermissible burden, although that may, or does, result in fact. The measures adopted were the *necessary*

means to achieve the laws' object: this is important also because of the High Court's observations in *Betfair* (see para 2 above). Prior to *Betfair* (see para 29 below), the necessity or desirability of the measures would be for the ACT legislature to assess, the Court confining itself to the question of their general appropriateness. Further, any burden on interstate trade for intraterritory producers of hen eggs or carcasses, such as a competitive or market disadvantage, would have been "incidental" and "not disproportionate" to the objective of eliminating the particular cruelty.

28. Pausing there, these tests will often sufficiently reveal that a law is discriminatory in a protectionist sense (which in this case it is plainly not): *Castlemaine Toobeys* at 480 per Gaudron and Toohey JJ. Otherwise, what reasonable and adequate alternative to the laws' measures pose no burden on interstate trade, or a lesser burden? See *Castlemaine Toobeys* at 472, 477, 480; and see *Lane's Commentary on the Australian Constitution* (second edition), at pp.703-4

The Betfair Case

29. But there is also *Betfair* to consider . This was a case involving a Hobart-based internet betting agency with an Australia-wide customer base. Accordingly, the business did not engage in the sale of goods, but was instead part of the 'new economy'. The business was conducted under licence from Tasmania but its conduct was prohibited in WA by changes to the relevant Western Australian statute. The changes were introduced on the principal ground of revenue protection for in-State operators and in turn for the WA racing industry. The High Court majority said at [89] and [90]:

There are difficulties ... in the use in Castlemaine Toobeys of the expression "the people of" a state. State laws under challenge here apply not merely to those citizens who are resident in Western Australia, but to any person present there at any time.

Thus, the "fundamental consideration" identified in Castlemaine Toobeys of a condition of localized wellbeing will not encompass much modern state regulatory legislation in the "new economy". This is particularly so where the state law is given a "long-arm" territorial reach of the kind considered in Pinkstone²⁶."

Following further discussion, the majority said at [100]:

Neither the plaintiffs nor Tasmania challenged the existence of a “fundamental consideration” of the general nature discerned in Castlemaine Toobeys. Accordingly, further attention to its derivation from and place in the Constitution is not required here.”

30. However, it should be noted that in *Betfair*, the High Court majority observed at [102] that the “appropriate and adapted” criterion expressed in *Castlemaine Toobeys* involving the existence of a “proportionality”-

“...must give significant weight to the considerations referred to earlier when discussing Castlemaine Toobeys.²⁷ These involve the constraint upon market forces operating within the national economy by legal barriers protecting the domestic producer or trader against the out-of-state producer or trader, with consequent prejudice to domestic customers of that out-of-state producer or trader. They suggest the application here, as elsewhere in constitutional public and private law, of a criterion of “reasonable necessity”. For example, in North Eastern Dairy Co²⁸ Mason J said:

*“As the defendant has failed to show that the discriminatory mode of regulation selected is **necessary** for the protection of public health, it is in my judgement not a reasonable regulation of the interstate trade in pasteurized milk”. [emphasis added]*

Also at [102], the Court majority said that this view of the matter should be accepted as the doctrine of the Court.

31. The Court majority then held that the legislative choice taken by Western Australia was not *necessary* for the protection of the integrity of the racing industry in that State. In other words, the prohibitory state law in question was not proportionate: it was not appropriate and adapted to the propounded legislative object: see [110].

Further, the Court found that the effect of the Western Australian legislation was to restrict what otherwise was the operation of competition in the stated national market by means dependent upon the geographical reach of its legislative power within and beyond the state borders. This engaged s.92 of the Constitution: see [116].

What would this mean for the ACT Bills today? It would mean it would be necessary to show that in the national market for eggs the prohibition by the ACT of battery cage egg production was the only way to eliminate the birds’ cruel confinement. This would meet the doctrine of

27 Castlemaine Toobeys at CLR 468-70; ALR 380-2

28 North Eastern Dairy Co Ltd v. Dairy Industry Authority (NSW) (1975) 134 CLR 599, at 608; 7ALR 433, at 466.

‘reasonable necessity’. In any event, before this added criterion of ‘reasonable necessity’ by *Betfair* to the ‘proportionality test’, it would appear in any event that under the earlier *CastlemaineToobeys* statement of the ‘proportionality test’, it would have been required in the circumstances of the ACT Bills about caged hen egg production to show that prohibition was necessary because it was the only way the legislative object could be achieved. That is to say, it would have been insufficient to rely on effective but non-discriminatory treatment in any event. It is pertinent too that, unlike in *Betfair* where the local WA operators were sought to be protected together with, in turn, the local racing industry, the ACT Bills stood to create the reverse, namely, arguably put the local producer at a competitive disadvantage but with no impact on or discrimination against out-of-state producers whose products could still have been purchased by ACT consumers. Indeed, there would have been no prejudice to ACT domestic customers or, indeed, persons present at any time in the ACT. The “fundamental consideration” in *Castlemaine Toobeys* (see para 19 above) of “localized wellbeing” (see *Betfair* para 29 above) thus remains relevant, and the *Betfair* observations should not impugn Bills of the ACT kind: see further para 20 above.

The ACT government’s solution

32. Despite apparent agreement amongst members of the ACT Legislative Assembly that the *Mutual Recognition Act*, the ACT’s statutory equivalent of s.92, did not pose a difficulty to passage of the Bill,²⁹ the ACT government nevertheless refused to support the Bill and thus create a national legislative precedent. Instead, the ACT Chief Minister of the time, Jon Stanhope, by press release on 25 September 2007, declared that the ACT government would offer \$1 million in industry assistance to help the ACT’s only commercial egg producer, Pace Farms, change from battery egg production to the barn laid method as part of a suite of measures designed to phase out battery egg production in the ACT.³⁰

29 following circulation of a memorandum of advice by BAWP counsel.

30 The full report on the ACT result can be obtained from the Barristers Animal Welfare Panel’s website.

33. Notwithstanding the means by which the phase out was achieved, the ACT is nevertheless the first Australian jurisdiction to act to phase out battery hen eggs. A Bill was also introduced in the previous Tasmanian parliament to phase out battery hen eggs. It was not supported by the major parties and was thus defeated.

Section 109 of the Constitution

34. The relevant operation of s.109 of the Constitution is considered in Chapter 3, ‘Live Animal Exports’ when examining the *Emanuel Exports* case. In the *Emanuel Exports* case the s.109 point was whether a direct operational inconsistency existed between the federal and state legal regimes.
35. The question of whether the Commonwealth intends to “cover the field” in enacting a particular law was dealt with in *Ex parte McLean* (1930) 43 CLR 472. It is unlikely that the “cover the field test” would ordinarily be relevant to animal law. However, the relevant questions for the “cover the field” test are set out in constitutional texts, such as Chapter 5 of *Lane’s Commentary on The Australian Constitution* (Second Edition).

The implied freedom of political communication: the Levy case

36. Involvement in an animal welfare or other social movement may include defending the interests of protestors charged with offences. The supreme illustration of this perhaps was the High Court case of *Levy v State of Victoria* (1997) 189 CLR 579; (1997) 146 ALR 248, a decision of the full bench comprising seven justices.³¹ A series of High Court ‘free speech’ cases commenced in 1992 with *Nationwide News Pty Ltd v Wills* and *Australia Capital Television Pty Ltd v The Commonwealth*, where the High Court held that there was an implied freedom of political communication in the Australian Constitution.
37. The facts in *Levy* were straightforward. The Kennett Government promulgated the *Wildlife*

³¹ The writer was one of a small team of counsel who represented Mr. Levy.

(Game) (Hunting Season) Regulations 1994 pursuant to relevant sections of the *Wildlife Act* 1975 and the *Conservation, Forests & Lands Act* 1987. These regulations proclaimed Lake Buloke near Donald in Victoria to be a “permitted hunting area”. Persons, including well known duckshooting protestor Laurie Levy, were thereby prohibited from entering Lake Buloke (and the land within 5 metres of the shoreline) between the hours of 5 pm on Friday 18 March 1994 and 10 am on Saturday 19 March 1994 and 5 pm on Saturday 19 March 1994 and 10am on Sunday 20 March 1994, unless they held a valid licence to hunt.

38. During the prohibited hours on 19 and 20 March 1994 many licensed shooters entered permitted hunting areas (including Lake Buloke) and proceeded to shoot and kill game birds, mainly ducks. On 19 and 20 March 1994 the plaintiff, Laurie Levy, and other persons involved in the anti-duckshooting campaign, together with representatives of the media, none of whom held valid game licenses, entered permitted hunting areas (in particular, Lake Buloke). Laurie Levy and his supporters did so to observe the shooting of game birds, to gather evidence of the cruelty of duckshooting, to gather evidence as to the killing of protected birds by duckshooters, to draw the public’s attention to these matters, and thus to debate and criticize the Victorian Government’s policy and laws which permitted such shooting, and to protest the recreational shooting of ducks generally.
39. On 19 and 20 March 1994 Levy and others were intercepted by police officers at Lake Buloke, interviewed, removed from the area and issued with penalty notices for violations of the Regulations. The plaintiff and approximately 60 other persons were the subject of approximately 100 charges under the Regulations. All charged wished to contest all charges.
40. On 11 July 1995 the Magistrates Court at St Arnaud adjourned the hearing of all charges laid under the Regulations, pending the determination of the High Court challenge by Levy. Levy’s challenge was a test case for other persons charged.

41. By the time *Levy* came to be argued in the High Court in March 1997 the Attorneys General of the Commonwealth, South Australia, Queensland, Western Australian and New South Wales had intervened, and a number of media organisations such as John Fairfax Publications Pty Ltd, an industrial organisation, the Media Entertainment and Arts Alliance, and the Australian Press Council, had applied for leave to intervene or to appear as amici curiae (or friends of the Court).
42. The freedom of political communication implied by the High Court in Australia's Constitution since 1992 was and is a freedom from the operation of laws which would otherwise prevent or control communications in a manner contrary to the maintenance of representative government established by the Constitution. It may be contrasted with the freedom of speech protected in the United States by the First Amendment of the Constitution, which confers a freestanding right in the individual. Australia's implied freedom on the other hand operates to draw a circle around the reach of legislative or executive power so that the individual stands outside the circle and so obtains an immunity or freedom otherwise sought to be curtailed by the relevant law or regulation.
43. Sections 7 and 24 of the Constitution which respectively require that the Senate and House of Representatives be directly chosen by "the people of [each] State" and by "the people of the Commonwealth", and related sections (section 64 and section 128 providing for alteration of the Constitution by referendum) were relied upon by the High Court in *Levy* and the case of *Lange* (heard at the same time) to conclude that these sections impliedly require freedom of political communication. As succinctly stated by Brennan J (as he then was) in *Nationwide* at page 47:
- "it would be a parody of democracy to confer on the people a power to choose their Parliament, but to deny the freedom of public discussion from which people derive their political judgments"*.
44. As with any freedom, the implied freedom of political communication is not absolute. It will be recalled that in Chapter 4, 'Secondary Boycotts', the relevant tests were considered. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-8; 145 ALR 96 at 112 a two-stage

test was adopted for determining whether a law infringes the implied freedom of political communication under Australia's Constitution, namely:

- (a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?;
- (b) secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people?

If the first question is answered "yes" and the second is answered "no", the law is invalid.

45. In *Coleman v Power* (2004) 220 CLR at page 1; 209 ALR 182, the two-stage test formulated in *Lange* was amended in the statement of the second question by replacing the phrase "the fulfilment of" by "in a manner": per McHugh J (Gummow, Kirby and Hayne JJ agreeing). At page 50 of *Coleman* McHugh J said:

*"...It is the manner of achieving the end as much as the end itself that must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."*³²

46. The second and lower threshold test, that of "proportionality", is directed to whether the impugned law is "disproportionate" to achieving the competing public interest, which in the case of the Regulations in the *Levy* case was stated to be 'public safety'.
47. In political debate at the time it was said that the Kennett Government promulgated these Regulations in 1994 with the sole object of cultivating favour with the shooters lobby, which

32 Gaudron J in *Levy v State of Victoria* (1996) 189 CLR 520 at 619; 146 ALR 248 at 271 adopted a different test, namely: "If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose." [emphasis added] The other Justices in *Levy* adopted instead the lower threshold test of 'reasonably appropriate and adapted', sometimes also measured by the test of 'proportionality', which in effect is now reflected in the second stage of the *Lange* test.

was then, and still is, viewed by the main political parties as capable of delivering outcomes in marginal State and federal seats. Some commentators suggested that former NSW Premier, Barrie Unsworth, lost office in 1988 as a result of taking a strong stance on gun control, including the abolition of duck shooting. This then was only recent history at the time of the 1994 Kennett Government Regulations.

48. Gaudron J said at page 620 of the CLR (and at page 272 of the ALR):

“It can, I think, be taken that a direct purpose of reg. 5 was to keep those who wished to protest against recreational duck shooting out of the permitted hunting areas for the opening weekend of the 1994 season and, thus to restrict their freedom of movement and, perhaps, their freedom of political communication. In this regard, it is sufficient to observe that it seems unlikely that persons other than protestors and licensed duck shooters would wish to be in those areas at the time specified in the regulation”.

49. As noted earlier, the prohibition imposed by the relevant regulation, Regulation 5, was directed only to the first two days of an open season lasting some weeks, being the two days when most shooters completed their shooting. It was therefore the two days when the media and, in particular the electronic media, converged on such areas to report, photograph, and take television film footage of duck shooting “in action” and the Levy led rescue of wounded birds. In doing so, the media portrayed the disagreeable features of duckshooting, including the shooting of protected species, and the failure to kill ducks “cleanly” so that both protected and unprotected species were left maimed and wounded. Dead retrieved birds were deposited by Laurie Levy and his team on the front steps of Victoria’s Parliament House on the Monday morning following the opening weekend.

50. In *Levy*, with arguably more assertion than explanation, Court members stated there was an obvious risk to public safety by reason of possible confrontation between shooters with guns and protestors, and that the Regulations were therefore proportionate and valid.

51. Further, Kirby J said at page 648 of the CLR (and page 294 of the ALR):

“No prohibition was imposed upon the plaintiff or those of like minds during the time specified in reg. 5, or at any other time, to engage in protest so long as it was outside the area designated.

Photographs, posters and television film from earlier years would be readily available to illustrate their protests. The places and times specified in the regulation were appropriate to the peak period of danger to public safety, namely the opening days of the duck shooting season. The duration of the prohibition was relatively short. The places were confined to those of maximum risk. Other places, including those at or near private property, were not restricted. True some of the effectiveness of the protest would be lost by reason of the prohibition. But upon no view of the facts pleaded would the inhibition upon the freedom of communication upon political and governmental matters be such as to render reg. 5 invalid.”

52. The permitted hunting area around Lake Buloke was some 20 kilometres in area. Though the prohibition was relatively short, the opening weekend was the critical time with the critical activity. Most shooters engaged in the practice only on the first weekend. Protest engaged in outside the duck shooting area may be thought unlikely to attract electronic or other media interest. The same may be thought about archival photographs or posters or television film from earlier years: the media reports on matters of the moment and, in the case of the electronic media, it also places a premium on footage with visual interest. It is true that protest could have taken place at other places outside the designated area of 20 square kilometres. A silent vigil for example could have been held remote from the duck shooting area. But would it have been covered by the media? Even if it was, the powerful visual message about the ongoing disagreeable features of duck shooting would not have been imparted. In this respect, what Deane J said in *Theophanous*, may be thought apposite, namely, that since 1901 one of the more important developments (in combination with others) to:

“... transform the nature and extent of political communication and discussion in this country and to do much to translate the Constitution’s theoretical doctrine of representative government with its thesis of popular sovereignty into practical reality” ... [is] ... “the extraordinary development and increased utilization of the means of mass communication...”.

53. Importantly,, in *Levy* it was held for the first time that the implied freedom protects non-verbal conduct intended to be expressive, as well as verbal communication. Gaudron J also held that freedom of political movement is protected by the Constitution as an aspect of freedom of communication.
54. Historically, of course, any significant social or political reform has been usually brought about by minorities. It is in the nature of protest and the attendant political message that it is often

not free of some risk. The question becomes whether the public interest, on balance, is better served by leaving the residual risk intact rather than by extinguishing the effective means of political communication. At one level, the followers of Gandhi, Mandela or Martin Luther King exposed themselves to the risk of injury in order to make their civil protest. Martin Luther King marches were not stopped despite the very real risk in that case of assault or murder by whites. Is the implied freedom to only exist in relatively safe circumstances, so that in the event of any possible risk to safety, a government opposed to the individual's message can deny him or her effective access to the political process; and the transmission of that message to the ordinary citizen? If so, the implied freedom is liable to be characterized as a rather tame one. Laurie Levy's participation in the duck shooting debate and the vivid and persuasive message he had widely communicated to challenge on humanitarian grounds a hitherto entrenched practice in society, stood to be sterilized. That is not a desirable outcome in a free and democratic society vigilant to protect the democratic processes for its citizenry.

55. In the United States, the First Amendment does not permit government to moderate public discourse on the analogy of a town meeting. The Supreme Court has frequently acknowledged that speech often serves its highest function when it shocks or stirs unrest (see for example *Terminiello v Chicago*, 337 US 1,4 (1949)). Indeed, Tribe on American Constitutional Law (2nd edition) at page 854 observed there were several recurring themes in the Supreme Court decisions, two of which he noted as follows:

“First, the speaker cannot be silenced if his or her identity is the primary factor offered to justify the conclusion that audience violence is imminent. In the 1960’s the Supreme Court on several occasions overturned breach of the peace or similar convictions incurred by black demonstrators who peacefully protested the racial segregation of public and private facilities by attempting to make use of those facilities. In each case, the court concluded that reversal was mandated because the only justification local authorities could ultimately offer to support their belief in the imminence of white spectator violence was the assertion that the very sight of blacks attempting to make use of these facilities would stir anger.”

Pausing there, this last observation was relevant to *Levy* on the facts. The High Court was plainly concerned about the risk of violent confrontation between protestors and shooters.

Unlike in the United States, however, there was no articulation of whether such a risk give rise to a ‘clear and present danger’.

56. Tribe continued:

“Second, government authorities may not suppress otherwise protected speech if imminent spectator violence can be satisfactorily prevented or curbed with reasonable crowd control techniques. In another series of cases growing out of the civil rights demonstrations of the 1960s, the Supreme Court reversed breach of peace or similar convictions after finding that there was no evidence to support local officials’ claims that breaking up demonstrations was justified by the imminent prospect of white spectator violence. In each case, the court found that “[p]olice] protection at the scene was at all times as sufficient to meet any foreseeable possibility of “disorder” by spectators”.

It was argued on behalf of Levy that a greater police presence at the scene would have been sufficient to meet any foreseeable possibility of confrontation or disorder.

6 Wild and Feral Animals

States primarily responsible for wildlife management

1. Wildlife management in Australia is the responsibility of the States. However, if wildlife or wildlife products are to be exported, the Commonwealth acquires jurisdiction under the *Environment Protection and Biodiversity Conservation Act 1999*.

The commercial killing of kangaroos

2. There are a number of welfare challenges in native wildlife management in Australia, the principal one of which arises from the industry in the commercial killing of kangaroos. This industry is carried out in four states, namely, New South Wales, Queensland, South Australia and Western Australia. There is no commercial killing of kangaroos in Victoria. In the main, the commercial industry comprises the killing of the Red, Eastern Grey and Western Grey kangaroo. They are killed in part for human consumption and skin products, but mainly for pet food.

Kangaroo management plans

3. In each of these four states there is a Kangaroo Management Program for the purposes of the commercial industry. Originally, damage mitigation was one of the objects of such programs but the previous New South Wales Kangaroo Management Plan for 2002-2006 removed the damage mitigation object. The New South Wales Kangaroo Management Plan object became to “*maintain viable populations of kangaroos throughout their ranges in accordance with the principles of economically sustainable development.*” Each KMP fixes an annual harvests quota, the total of which in each year can vary, but is presently at approximately 4 million per annum.

The welfare challenge of commercial killing of kangaroos

4. Animal societies oppose the commercial killing of kangaroos on the basis of what they contend is an unacceptable degree and quantity of cruelty. In particular, animal societies contend that each year well in excess of 100,000 adult kangaroos are not shot cleanly, and that the manner in which in addition some 300,000 joeys are killed is brutal. As the industry is directed to commercial ends and not those of conservation, animal societies contend this strengthens the case for cessation of the industry.

Licensing of shooters

5. In New South Wales, for example, the relevant statute is the *National Parks and Wildlife Act 1974* (NSW) and its Regulations. The government department in New South Wales responsible for the protection and care of native fauna is the National Parks and Wildlife Service. Kangaroos are “protected fauna” for the purposes of the New South Wales Act. It is an offence to harm them, except in accordance with a licence or other lawful authority. Licensing for the commercial killing of kangaroos is provided for under the Act. Trappers licences, as they are called, are subject to a series of conditions including, importantly, that:

- (a) kangaroos be shot in accordance with the *Code of Practice for the Humane Shooting of Kangaroos*;
- (b) the trapper may not be in possession of a carcass containing a bullet wound to the body.

In turn, an occupier’s licence is necessary to conduct shooting in a particular place, which will specify the number of kangaroos entitled to be killed pursuant to that licence.

The kangaroo shooting code

6. The *Code of Practice for the Humane Shooting of Kangaroos* is brief.³³ Only the South Australian Kangaroo Management Program provides for an object which includes that the commercial kangaroo industry adhere to animal welfare standards.

33 A copy may be found at the Barristers Animal Welfare Panel website.

The RSPCA 2002 report

7. In July 2002 RSPCA Australia published ‘*A Survey of the Extent of Compliance with the Requirements of the Code of Practice for the Humane Shooting of Kangaroos*’³⁴. In establishing compliance with the *Code* the RSPCA sampled skins and carcasses at chosen processors, and tanners. Commercially killed kangaroos are taken by the shooter to a chiller and then transported to a processor.

The survey method and its limitations

8. The limitation upon the survey method, and it was noted as such in the RSPCA 2002 report (para 4.2.1.4), was that sampling at the processor did not take into account the number of kangaroos shot in the field. As noted in the report:

“Direct sampling of kangaroos in the field through observations of individual shooters was not attempted during this survey.”

Most commercial shooting of kangaroos takes place at night in outback regions.

Dr Malcolm Caulfield, in his book ‘Handbook of Australian Animal Cruelty Law’, observed (para 5.21) that surveying body-shot kangaroos in chillers and processors:

“... presupposes that a shooter who had killed a kangaroo with a body shot rather than a head shot (the former of which could be regarded as inhumane killing) would expose themselves to the risk of prosecution or loss of their licence by seeking to process the carcass. This seems highly unlikely.”

Head shot v body shot

9. The survey sampling involved each carcass and skin being “closely inspected and felt over for bullet holes in areas other than the head.” A record was made as to whether a sample was a head shot or body shot. The *Kangaroo Shooting Code* stipulates a head shot, although it is not free from ambiguity. Animal societies contend that neck shots are not humane as they may not result in instantaneous insensibility (unconsciousness). However, even a head shot can produce, for example, a blown off jaw and thus a slow and painful death. Thus a head shot to be humane must be a brain shot. As it is, a kangaroo head is a small target.

34 A link may be found at the BAWP website.

10. The skin inspections of the 2000-2002 survey suggested a national average head shot of 95.9%, with the lowest head shot percentage in Queensland for human/pet consumption of 93.5% and the best result in New South Wales of 97.3%. Assuming there is not a head shot for 4% of some 4 million kangaroos shot annually, this equates to 160,000 kangaroos annually. This is a figure which excludes a calculation or projection for kangaroos which fail to be head shot in the field. It should be noted that the RSPCA 2002 Report (at para 4.4.4) stated that neck shots were the major contributor to the overall proportion of body-shot kangaroos. However, the comments noted earlier of Dr Caulfield remain relevant here.
11. As the RSPCA 2002 report noted, there is general international agreement:

“of the criteria by which a method of killing an animal can be declared humane. The method must induce instant insensibility (unconsciousness) and the animal must remain unconscious until death supervenes ...

Shooting a kangaroo with a bullet at vertebrae C1 or C2 (the atlas and axis) would damage the spinal cord and not the brain and is therefore an inhumane way to kill a kangaroo. The effect of a bullet at C3 or lower in the neck would also damage the spinal cord and not the brain and therefore would also be an inhumane way to kill kangaroo. If a kangaroo is shot in the neck and the bullet misses the spine, the bullet could hit the carotid arteries and death could occur by exsanguination. This is similar to that resulting from a shot to the heart, a relatively fast death, but still regarded as inhumane as the animal would not become instantly insensible/unconscious.” (para 4.4.4.1)

The killing of joeys

12. As to the manner of killing joeys of shot female kangaroos, the *Kangaroo Shooting Code* provides:

“Shot females must be examined for pouch young and if one is present it must also be killed. Decapitation with a sharp instrument in very small hairless young or a properly executed heavy blow to destroy the brain in larger young are effective means of causing sudden and painless death.

Larger young can also be dispatched humanely by a shot to the brain, where this can be delivered accurately and in safety.”

Needless to say, young at foot which escape after their mothers are shot are likely to be taken by predators or die from starvation.

Animals Australia estimates that some 300,000 joeys would meet their end as a result of shot female kangaroos.

The Commonwealth, and a significant AAT case

13. In 2006 the *Environment Protection and Biodiversity Conservation Act 1999* was amended to prohibit review by the Australian Administrative Appeals Tribunal of management plans and ministerial decisions on the grant of import and export permits. All that was left is judicial review of whether the ministerial decision was lawfully made, a decidedly much narrower focus for review.

The last major Australian AAT Review arose when in December 2006 the federal Minister for the Environment made a declaration under the *Environment Protection and Biodiversity Conservation Act 1999*, section 303FO(2), that the New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011 was an “*approved wildlife trade management plan*” for the purposes of Part 13A of the federal Act. This plan was approved in the context of the Commonwealth’s powers in relation to the export of the products from NSW commercially killed kangaroos to overseas markets. Except in that context, the Commonwealth was without power to impose restrictions on the commercial killing of kangaroos. This decision by the Minister was the subject of an unsuccessful application by the Wildlife Protection Association of Australia Inc in the Australian Administrative Appeals Tribunal to review the Minister’s decision: see *Re Wildlife Protection Association of Australia Inc and Minister for the Environment and Heritage* (2008) 106 ALD 123. The application attacked different parts of the plan, including that the plan did not satisfy requirements for the humane treatment of kangaroos and their young. Part 13A of the federal environment statute provided as one of its objects, “*to promote the humane treatment of wildlife.*”

14. In addition, the Tribunal was required by section 303FO(3)(f) of the federal environment Act to be satisfied that regulatory conditions for the taking of wildlife “*are likely to be complied with.*” Those regulatory conditions were imposed by Reg 9.A05 of the *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth). For the purposes of section 303FO(3)(f) that regulation imposed the following conditions:

“(a) *the animal is taken, transported and held in a way that is known to result in minimal stress and risk of injury to the animal;*

(b) if the animal is killed, it is done in a way that is generally accepted to minimize pain and suffering.”

Did the Plan ‘promote the humane treatment of wildlife’, as the AAT found?

15. The Tribunal determined that the object of Part 13A, “to promote the humane treatment of wildlife”, was satisfied by the Plan. It did so by adopting the premise (para 45 of the reasons) that it had been accepted by the applicant that shooting in the brain with a centrefire rifle:

“is probably the most humane method of killing ... in that it will cause the least pain, suffering and stress... On that basis we conclude that in circumstances where that is achieved, that is, where the shooting causes instantaneous death, the treatment of kangaroos is humane and, in that respect, the Plan satisfies the object of s.303BA(1)(e) of the EPBC Act of promoting the humane treatment of wildlife.”

The Tribunal (at para 50) accepted that there would be “instances” where instantaneous death by brain shot is not achieved, and said:

“But those instances, whilst unfortunate, do not detract from our conclusion that the Plan does all that can be done to promote the humane treatment of wildlife. Any management plan that involves the commercial killing of free-ranging animals will involve a risk that perfection will not always be achieved. What is required is that the Plan achieve as near to perfection as human frailty will permit. We are satisfied that the system of accreditation, licensing, and compliance management achieves that object.”

16. Pausing there, it is one thing to act in a manner which promotes the humane treatment of wildlife or a wildlife species, with no inhumane outcomes, such as with fertility control measures. It is quite another to say that the humane treatment of wildlife is promoted where shooting results in inhumane treatment and deaths for many wildlife; and to so conclude because quick painless deaths are achieved in given instances and greatly exceed, in percentage terms, those of inhumane treatment and deaths.

It can be argued that the question was not whether humane outcomes were achieved in given instances, but whether the humane treatment of wildlife or, specifically, the kangaroo as a species, was promoted by the Plan. This included looking at, not only what the Plan provided, but at outcomes.

17. At paragraph 46 the Tribunal noted two areas relied upon by the applicant pointing to inhumane treatment of kangaroos, namely, when a brain shot was not achieved with thus an instantaneous death, and the treatment of joeys. The Tribunal concluded (at para 47) that the RSPCA 2002 report showed that “in a very high percentage of cases, in excess of 97%, there was compliance with the Code.” However, if 3% of an annual 4 million harvest quota is some 120,000 animals, it is difficult to appreciate a conclusion that the humane treatment of wildlife is promoted where so many animals suffer a lingering, painful or brutal death. What the Tribunal did was to rely upon percentages rather than absolute numbers, and thus ignore the outcome in numbers or the inhumane consequences for many. For it may be reasonably asked how the humane treatment is said to be promoted where inhumane consequences abound for so many?
18. Indeed, at paragraph 50 for example, and at paragraph 51 in respect of joeys, the Tribunal reasons suggest that the numbers that suffered were small or very small. This factually, in terms of numbers, could not have been so. It can only be assumed that evidence adduced before the Tribunal was insufficient for the Tribunal to have concluded other than it did. If one added an Animals Australia estimate of some 300,000 inhumane deaths each year over a ten year period, then one is approaching some half a million animals a year (by adding the 120,000 adult kangaroo inhumane deaths plus a notional allowance for the limitation in the RSPCA 2002 Report of no field statistics).
19. How does a figure of that magnitude or, for that matter, even say a hundred thousand, answer the primary meanings for ‘humane’ of ‘benevolent, compassionate’? If the same outcome and reasoning were to be applied to a human population, or to say children, it is unlikely it would be characterised as ‘humane’ or as having promoted their humane treatment. The fact is the KMP is a document the *raison d’etre* of which is to justify killing kangaroos for commercial ends, in contrast to their conservation or well-being. The Tribunal said at paragraph 50 (see paragraph 15 above) that a management plan which involves the commercial killing of free-ranging

animals was not free of risk. But the question was whether the Plan acted to promote the humane treatment of wildlife. Either it did or it did not. And this leaves to one side, of course, the more fundamental question of whether killing wildlife in such numbers for commercial ends can be said to promote, or be directed to, their humane treatment.

20. In paragraph 48, the Tribunal said:

“As it seems to us, no system, short of absolute prohibition, could prevent instances where instantaneous death was not achieved, the question is whether the plan, by accepting that these instances will occur, promotes the humane treatment of kangaroos. We think that it does... The Plan requires a very high standard of accuracy that, if achieved, achieves humane death. In the small percentage of cases where that cannot be achieved the Plan requires measures to quickly and humanely dispatch wounded kangaroos.” [emphasis added]

It is difficult to appreciate how a method of killing which is flawed, whether by “human frailty” as suggested by the Tribunal (see para 50), or otherwise, can be justified as promoting the humane treatment of wildlife when so many suffer a lingering and inhumane death. Further, it is not just a question of what “the Plan requires”, as noted in this passage by the Tribunal, but rather what were the outcomes in fact for some 120,000 animals on one estimate, and up to some 500,000 on another. Moreover, an inhumane consequence for wounded kangaroos is not remedied by their later humane dispatch or made thereby to result in their “humane” treatment.

21. As to the treatment of orphan joeys, the Tribunal concluded (at para 51):

“Dr Croft suggested that all young at foot joeys starve to death or are taken by predators. Professor Phillips was of the view that the survival rate was dependant upon forage quantity and quality. We need not resolve that issue. Again, it may be accepted that there will be a very small number of instances where young at foot die in this way, but we do not regard that fact, even in combination with the instances where an instantaneous killing of the adult is not possible, as leading to the conclusion that the Plan does not satisfy the object of promoting the humane treatment of wildlife. We are satisfied that it does meet that object.” [emphasis added]

Similar arguments to those outlined above can be applied to this reasoning. The evidentiary basis for the conclusion that death in this manner for joeys would extend to only “a very small number of instances” is not known. It can only be assumed that was the evidence before the Tribunal. Further, the Tribunal made no observations about whether the means prescribed for

the killing of joeys promoted their humane treatment, other than to note the Code prescribed a blow to the head or decapitation.

Non-commercial kangaroo shooting

22. There is in addition the non-commercial killing of kangaroos. In Victoria, this is permissible under the *Wildlife Act 1975* upon grant of a licence. Anecdotally, little difficulty or scrutiny by the relevant department attends the grant of such a licence. Animal societies contend that such shooting should only be carried out by commercial shooters and not part-time shooters.

Other wildlife questions

23. In the case of the trade in wildlife, both the federal *Environment Protection and Biodiversity Conservation Act 1999* and the *Convention on International Trade in Endangered Species (CITES)* are relevant. Then there are the other well-known practices of hunting, such as duck shooting and deer hunting. In Victoria, the *Wildlife Act 1975* applies to the grant of licences to kill wildlife. In the case of duck shooting, for example, an open season is declared and prescribed by a Schedule to the Act.
24. There is the further question too of the management of wild animals by permitting them to be kept in zoos or displayed in circuses. As to wild animals kept in zoos, see *Re International Fund for Animal Welfare (Australia) Pty Ltd v Minister for the Environment and Heritage* (2005) 93 ALD 594. That case involved an application to the AAT to review the federal Minister's decision to permit the Victorian and New South Wales zoos to import eight Asian elephants from Thailand.

In another case in the NSW Supreme Court, *Animal Liberation (NSW)* raised the question of whether the solitary circus elephant 'Arna' suffered by reason of her solitude. It is well known that elephants are social animals amongst their own, with strong family ties. *Animal Liberation (NSW)* was defeated at the first hurdle on the basis it had no standing to sue.

The Challenge Posed by Feral Animals

25. The environment and animal movements have long agreed on the preservation of habitat for

native wildlife. But they have never agreed on how to resolve the conflict which can arise between feral animals and the environment. It should now begin to be addressed. Animal welfare and community concerns initially stem from current short-term methods of control (for example, poisoning, trapping, disease and aerial shooting). But with few natural predators or diseases, introduced animals can and do cause agricultural, environmental and other damage, and act as reservoirs of disease.

Increasing international focus on fertility control

26. In the last 20 years though, there has been an increasing focus internationally on fertility control as the major control method of feral animal populations. After all, exotic species have been introduced by design or through inadvertence in most parts of the world. Fertility control offers significant welfare benefits whilst honouring the objects of agricultural and environmental protection. This stands in stark contrast to the acute and widespread suffering caused by nearly all existing short-term control methods. In addition, fertility control techniques stand to be, or are, species-specific and capable of delivery on a continental scale. Plainly, the emphasis moves from the kill rate to the birth rate.

Immunocontraception is the process by which the immune system of an animal is induced to attack the reproductive cells of its own species, thus preventing the animal from breeding. Immunocontraceptive agents can be delivered as a vaccine in a disseminating system (i.e. viral or bacterial vectors), and/or a non-disseminating system (e.g. oral baits)³⁵. Where a vector is employed for distribution of a contraceptive agent, the process is known as virally-vectored immunocontraception.

National long-term strategy required

27. In short, such technology invokes the broader challenge to provide for humane, where possible non-lethal, long-term strategies, and thus to not simply perpetuate the present short-term

35 Hinds & P.E. Cowan, 'Fertility Control for Wildlife Management the Options', Fertility Control for Wildlife Management Conference at Christchurch, New Zealand, December 2003.

thinking on the basis of what is cheap and what is quick. This will require a national strategy with the necessary resources for a long-term focus, and the marshalling of expertise in a coordinated and unfragmented manner.

Local statutes

28. Relevant State and Territory legislation can be readily ascertained³⁶.

In Victoria, for example, the protective reach of the *Prevention of Cruelty to Animals Act* 1986 does not extend to ‘pest’ animals, (in contrast to some protections conferred by NSW and SA animal protection statutes). By s.6(1)(d) the Act provides that it does not apply to:

“(d) anything done in accordance with the ***Catchment and Land Protection Act*** 1994.”

One of the objects of the *Catchment and Land Protection Act* 1994 is to provide for the control of noxious weeds and pest animals: see s.4. In summary, responsibility for prevention and management of pest animals resides with landowners.

The Act is administered by the Department of Primary Industries. By Part 8 of the Act four categories of ‘pest’ animals are proclaimed: prohibited (s.64), controlled (s.65), regulated (s.66) and established (s.67). Rabbits and foxes, for example, are declared as established pest animals across Victoria. Landholders may be and are directed by the Department’s Secretary to prevent their spread and, so far as possible, to eradicate them (see s.70B for example).

29. Further, s.6(1)(b), *Prevention of Cruelty to Animals Act* 1986 does not apply to inter alia the treatment, killing, hunting, shooting, catching or trapping of animals which is carried out in accordance with a code of practice (except to the extent it is necessary to rely upon a code of practice as a defence to an offence under the Act). Relevant codes of practice are the *Code of Practice for the Use of Small Steel-Jawed Traps* (2001) and the *Code of Practice for the Welfare of Animals in Hunting* (2001). Section 15 of the Act prohibits large steel-jawed traps, with exceptions for

36 They are listed at the back of each draft national model code of practice; otherwise see pages 41 to 49 of the Senate Environment, Communications, Information Technology and the Arts References Committee entitled ‘Turning back the tide – the invasive species challenge’ published in December 2004 (see http://www.aph.gov.au/Senate/committee/ecita_ctte/invasive_species/report/report.pdf.) (The author has derived assistance generally from this report on the legislative and regulatory framework affecting feral animals).

wild dog control in certain counties. However, snares and soft jaw traps are permitted, and small steel jaw traps are permitted for rabbit control. In the case of wild dog control in Victoria with large steel jaw traps, these are inspected weekly rather than daily: see for example, <http://www.theage.com.au/national/in-wild-dog-country-all-death-is-merciless-20081206-6sx0.html>; and <http://www.theage.com.au/national/wild-dog-laws-cause-controversy-20081220-72pn.html>. In summary though, the codes of practice do not address the central welfare issue of such traps, or for that matter, their non-discriminatory impact in trapping non-target animals.³⁷

30. Further, new national codes of practice are proposed for feral animals, namely feral cats, wild dogs, foxes, feral goats, feral pigs, feral horses, and rabbits.³⁸ Interestingly, in the draft model code of practice for each of feral pigs, foxes, feral horses and rabbits, fertility control was canvassed as a possible alternative control technique and, in respect of rabbits is noted as being “... seen as a preferred method of broad-scale rabbit control as it offers a potential humane and target specific alternative to lethal methods.”

That said, codes of practice of any kind usually favour the interests of producers over animal welfare where there is a conflict and thus set low welfare thresholds. Further, compliance with a code of practice acts as a defence or exemption from prosecution under the Act for conduct which too often would otherwise constitute a cruelty offence.

31. In addition, the *Flora and Fauna Guarantee Act* 1988³⁹ provides not only for conservation of threatened species, but also for the management of potentially threatening processes. Section 3

³⁷ Although directed to the development of a model code of practice for existing control methods for capture, handling or destruction of feral animals in Australia, the final report by the Vertebrate Pest Research Unit of the New South Wales Department of Primary Industries for the Australian Government Department of the Environment and Heritage published in November 2004 notes at page 14 a useful list of animal welfare concerns, inconsistencies, anomalies and gaps in knowledge in relation to existing control methods: <http://www.environment.gov.au/biodiversity/invasive/publications/humane-control/40595-final-report.pdf>.

³⁸ The existing codes of practice for feral animals at a Commonwealth, State and Territory level may be found at page 8 of the Regulatory Impact Assessment – Consultation Draft – August 2007 undertaken for the draft national codes of practice for feral animals.

³⁹ There is also the Domestic (Feral and Nuisance) Animals Act 1994 which is of only limited relevance, applying to nuisance dogs and cats and the powers of councils to deal with dangerous such animals or where they are found at large.

of the Act defines a potentially threatening process as “*a process which may have the capability to threaten the survival, abundance or evolutionary development of a taxon or community of flora or fauna.*”

Schedule 3 lists predation by red foxes and feral cats as threatening processes.

The welfare challenge of existing short-term methods

32. Turning then to the challenge posed by feral animals, we could begin at the beginning, by dropping the label of ‘vermin’ or ‘pest’ so that they are thereby removed from any serious notion of humane control. After all, in each of the draft national model codes of practice it is acknowledged that:

“An ethical approach to pest control includes the recognition of and attention to the welfare of all animals affected directly or indirectly by control programs.”

33. Second, the dimension of the animal welfare problem or, put more directly, the ‘quantity of suffering’ permitted by our indifference, is enormous. In summary, whilst there appears to be no estimate of fox numbers, we know anecdotally they are trapped and hunted in large numbers. Otherwise, for example, there are 300,000 feral horses⁴⁰; perhaps more than a million donkeys, mainly concentrated in the Kimberleys; estimates of feral pigs (which inhabit 38% of Australia) range from 3.5 million to 23.5 million⁴¹; about 300,000 camels, mainly in the Northern Territory⁴²; 2.6 million feral goats, mainly concentrated in central-eastern South Australia, Western Australia, southern Queensland and western New South Wales⁴³; perhaps as many as 12 million feral cats⁴⁴; thousands of feral cattle in the Northern Territory; in 1985 it was estimated there were 350,000 feral buffalo in the Northern Territory; and some 200 million rabbits.
34. Third, it is worth briefly listing the current methods of feral animal control to reinforce how most are primitive and inhumane practices in need of reform:

40 Paragraph 2.64, report of House of Representatives Standing Committee on Agriculture, Fisheries and Forestry entitled ‘Taking Control: a national approach to pest animals’, published November 2005 (see <http://www.aph.gov.au/house/committee/primind/pestanimals/report/fullreport.pdf>).

41 paragraph 2.37 (supra).

42 paragraph 2.69 (supra).

43 paragraph 2.59 (supra).

44 paragraph 2.75 (supra).

- poison bait (1080, pindone, strychnine);
- trapping (including steel-jawed trap);
- mustering into yards for later transport – itself stressful;
- shooting from ground or helicopter;
- electric fencing;
- dogging (rabbits and pigs);
- biological (disease);
- fumigation (rabbit burrows and fox dens);
- explosives (destruction of rabbit warrens).⁴⁵

The number, kind and diversity of methods reveal the extent of the problems perceived⁴⁶, the reactionary and short-term genesis of their employment, and the frustration of those in charge of feral animal control. Yet none of these methods is entirely successful and most cause stress, trauma or suffering for the animals. And despite the annual budgets for ‘pest’ control of the Federal, State and Territory governments running into many millions of dollars, no introduced species of animal has ever been eradicated from Australia. Existing or past methods such as poisoning, myxomatosis, trapping and shooting have all ultimately failed to stem the tide of particularly foxes, rabbits and pigs.

35. The most commonly used control techniques for various feral animal species are as follows:

- **feral pigs:** lethal baiting, shooting, trapping and exclusion fencing. In the case of lethal baits, non-target animals including native species, working dogs and livestock, can be exposed to poisons of high toxicity directly or indirectly. Poisons commonly used are sodium monofluoroacetate (1080) and yellow phosphorus (CSSP). Warfarin is also

45 A useful summary of the limitations on these methods of control for foxes and rabbits may be found in Appendix 3 of the Hume City Council Pest Animal Action Plan (page 28 et seq) at <http://www.hume.vic.gov.au/Files/HumePestAnimalActionPlanFinal.pdf>.

46 The short-term methods adopted in respect of animals listed as a Threatening Process such as the feral pig, the wild dog, the rabbit, the fox, the feral cat, and the cane toad may be found at www.invasiveals.com/index.php?id=Publications_Fact%20Sheets_Feral%20Animals.

being trialled. No case whatever can be mounted for the use of yellow phosphorus and warfarin, having regard to the long periods of pain and suffering by the animal before death.

The code of practice acknowledges the pain and suffering caused by 1080.⁴⁷ Yet of the three categories of acceptability adopted in Table 1 in respect of the various control techniques ('Acceptable', 'Conditionally Acceptable' and 'Not Acceptable'), 1080 poison is labelled as 'Conditionally Acceptable'. 'Conditionally acceptable' is defined to be a technique which "...*may not be consistently humane. There may be a period of poor welfare before death.*" Apparently, at a stakeholders' workshop leading ultimately to the development of these draft national model codes of practice, remarkably, it was thought that the "jury is still out" on the severity of pain caused by 1080, and thus it was decided that 'Conditionally Acceptable' should still apply.⁴⁸ No doubt the absence of a humane alternative bore upon this thinking.⁴⁹

- **wild dogs:** lethal baiting, shooting, trapping and exclusion fencing. Lethal baiting employs 1080 and strychnine. The draft national model code of practice states that strychnine "*is considered inhumane*". However, baiting with 1080 is deemed 'Conditionally Acceptable';
- **foxes:** lethal baiting, shooting, trapping, den fumigation and exclusion fencing. Lethal baiting is viewed as the most effective method of fox control;
- **feral goats:** mustering, trapping at water, aerial shooting, ground shooting and exclusion fencing. 'Judas' goats are also used. 1080 baits, whilst trialled, are not permitted by reason of inter alia the significant risk of poisoning non-target species;
- **feral cats:** shooting, trapping, lethal baiting and exclusion fencing. Lethal baiting is not

47 See <http://environment.gov.au/biodiversity/invasive/publications/pubs/cop-feral-pigs.pdf>.

48 Final report of the Vertebrate Pest Committee: Codes of Practice for Humane Vertebrate Pest Control, Finalisation for National Adoption by Australian States and Territories, at p.13: see further www.invasiveanimals.com/index.php?id=164 and search for 'codes of practice'.

49 New and less inhumane and more animal specific toxins are apparently under development. It is not known whether they will be humane, as distinct from less inhumane: see further <http://www.invasiveanimals.com/index.php?id=4>.

widespread as it is viewed as reasonably ineffective because “feral cats are often found in low densities and can have large home ranges. Also, they are naturally wary ...”⁵⁰;

- **feral horses:** mustering, trapping at water, aerial shooting and ground shooting;
- **rabbits:** lethal baiting, warren destruction and fumigation, shooting, trapping, exclusion fencing and biological control with RHDV and myxomatosis. Lethal baits used are 1080 and pindone. The draft national model code of practice for rabbits⁵¹ describes pindone as “*inhumane*” and the use of chloropicrin for warren fumigation as “*highly inhumane*”⁵². Carbon monoxide is currently being investigated as a humane alternative to chloropicrin and phosphine in warren fumigation.

1080 poison then is the main poison of use for foxes, wild dogs (including dingoes), feral pigs and rabbits.

The toxins or poisons used for lethal control of feral animals are regulated by the Commonwealth’s Australian Pest and Veterinary Medicines Authority and permits are issued under poisons and dangerous goods (or similar) Acts and Regulations in the different States and Territories.

36. Relevantly, all States and Territories have agreed to phase out those control methods identified in the codes of practice as ‘Not Acceptable’, namely:

- steel-jawed traps: rabbits, foxes, dogs, cats;
- strychnine baiting: foxes, dogs;
- chloropicrin fumigation of warrens: rabbits;
- warfarin baiting: pigs; and
- yellow phosphorous (CSSP) baiting: pigs.⁵³

These methods however remain in use and cause severe suffering. A pig which ingests

50 Model Code of Practice for the Humane Control of Cats, p.6.
 51 p.6.
 52 p.7.
 53 p.1 (supra).

warfarin, for example, may take up to 14 days to die.

37. Further, the NSW Department of Primary Industries was requested by the federal Department of Agriculture to prepare draft Codes of Practice and Standard Operating Procedures. These were originally written in 2004-05, and are being updated and revised. According to the website of the Invasive Animals Cooperative Research Centre:

“a system is being implemented to allow [their] periodic review and modification. It is proposed to publish these animal welfare documents on a suitable website and incorporate results into the pest animal control kits.”

38. Standard Operating Procedures discuss animal welfare impacts for target and non-target species and describe techniques and their application (see <http://www.dpi.nsw.gov.au/agriculture/pests-weeds/vertebrate-pests/codes/humane-pest-animal-control>). For example, in SOP ‘PIG005 Poisoning of Feral Pigs with 1080’, poisoning with 1080 is described as one of the ‘most effective methods of quickly reducing feral pig numbers.’ The animal welfare impact upon pigs after ingesting 1080 is described as follows:

“... there is a latent period, usually around an hour, for signs such as salivation, jaw chomping, vomiting, increased lethargy and labored respiration are observed. Although the precise nature and extent of suffering after ingestion of 1080 is unknown, it is likely that the animal will experience discomfort prior to and during vomiting. Some pigs exhibit signs of central nervous system disturbance including hyperexcitability, squealing, manic running, paralysis or convulsions, followed by coma and then death. Other animals may lie quietly, breathing slowly and laboriously until death. Time to death is variable depending on amount of 1080 absorbed but is usually around 4 hours after ingestion. With low doses, pigs can take a number of days to die.”

Having regard to another document prepared in 2008 by the NSW Department of Primary Industries as part of the Australian Animal Welfare Strategy, ‘A model for assessing the relative humaneness of pest animal control methods’ (see (http://www.daff.gov.au/animal-plant-health/welfare/aaws/humaneness_of_pest_animal_control_methods)) there is set out at pages 39-40 the five impact categories for the component of suffering described as ‘anxiety, fear, pain, distress’. The five impact categories are ‘no, mild, moderate, severe and extreme suffering’. Having regard to the symptoms for each category, there can be little question that the feral pigs

symptoms from ingesting 1080 fit within one or other of severe or extreme suffering.

Yet 1080 is not one of the control methods agreed to be phased out by all states and territories. This may be because there is yet to be established a humane alternative.

39. Other problems with human intervention by killing include:

- (a) first, that it requires continual intervention in the ecosystem – either massive kills every few years or an annual kill;
- (b) second, that the natural response of survivors is increased fecundity and in any event, as most are highly mobile, they replace those killed with little difficulty; and
- (c) third, the undesirable genetic selection of animals to kill – for example, where horses are shot (or darted) the result is craftier, harder to shoot animals next time around; or again, feral cats, which are naturally wary and readily trap or bait shy.

So these difficulties have led to a heightened desire for eco-controls.

Fertility control research

40. In the last 20 years six international “Fertility Control and Wildlife Conferences” have been held⁵⁴ at which scientists and others from around the world have reported on their research.

As long ago as the second ‘Fertility Control and Wildlife Conference’ in 1990 at Melbourne, Dr. Tyndale-Biscoe of the CSIRO noted how his research team was then developing an entirely new method for the rabbit and the fox, “...which, if successful, will block fertilization without interfering with hormone function and can be introduced to the population at minimum cost.”⁵⁵

At the time he delivered the paper, Dr Tyndale Biscoe thought the research would not have application for five or more years.

54 Commencing in 1987 (at Philadelphia), then in 1990 (at Melbourne), in 1996 (at Great Keppel Island), in 2001 (at Kruger National Park, South Africa), in 2003 (at Christchurch, New Zealand), and finally on 3 to 5 September 2007 (at York, England, see <http://www.wildlifefertility.org/>) In addition, for example, the “6th European Vertebrate Pest Management Conference” concluded on 15 September 2007 at the University of Reading in the United Kingdom (see <http://www.6evpmc.reading.ac.uk/programme.html>).

55 Dr Tyndale-Biscoe’s subject was ‘viral vectored immuno-sterilisation: a new concept in biological control of wild animals’

Within only a year or so, a reproductive immunologist (part of the research team) had isolated the fox-related protein and produced an antibody in a test tube which made foxes infertile. At the time Dr. Tyndale-Biscoe noted the exciting prospect it offered as a generic technology capable of application to feral cats and pigs, or possum control in New Zealand.

Yet it was originally believed that the research team's work would be unproductive.

41. Some 15 years later, in a paper prepared for the Prime Minister's Science and Engineering Council on 13 September 1996 entitled "Rabbits-prospects for long term control: mortality and fertility control"⁵⁶, four members⁵⁷ of the CSIRO Division of Wildlife and Ecology and Cooperative Research Centre for Biological Control of Vertebrate Pest Populations said⁵⁸:

"All agents that increase the rate of death are effective in the short term but must be applied continually, particularly if the species is highly fertile as are rabbits. Therefore another approach which constrains the birth rate (or fertility) of the pest is being developed. Mathematical modelling predicts that it has excellent prospects for long term suppression of populations."
[emphasis added]

The paper concluded that virally vectored immunocontraception was technically feasible⁵⁹. The paper also noted in respect of the rabbit⁶⁰:

"...we cannot hope to eradicate it from this continent. Realistically we can only aim to reduce its numbers to levels where its impact is insignificant..."

The VVIC approach for fertility control is considered an important advance in scientific thinking...

Furthermore, the enormity of the problems being experienced by Australia with the rabbit and the fox dictate that the research must be pursued to provide long term solutions for problems which are uniquely Australian."

42. A few years earlier, at the 2003 international conference on "Fertility Control for Wildlife Management", and just as Dr. Tyndale-Biscoe had forecast, researchers from the New Zealand Marsupial Cooperative Research Centre at Land Care Research noted that immunocontraception offered an effective and humane alternative approach to possum

56 See <http://www.dest.gov.au/archive/Science/pmsec/14meet/rcd1.html>.

57 Lyn A. Hinds, Brian D. Cooke, Tony J. Robinson and C. Kent Williams.

58 p.7.

59 p.9.

60 p.10.

management, and that possum fertility control baits should be available for use within eight years.

43. Also at the 2003 conference, seven members⁶¹ of the CSIRO's (then) Pest Animal Control Cooperative Research Centre noted that fox fertility control in Australia through vaccination with a bait-delivered anti-fertility vaccine was an important alternative to lethal fox control with 1080 poison to reduce their impact on native Australian fauna and livestock. They reported on progress with a suitable potential vaccine vector (canine herpes virus -CHV) and that an oral bait containing wildtype CHV could induce anti-viral immune responses in foxes.
44. Similar reports at this conference were provided, for example, on development of fertility control techniques for eastern grey kangaroos and free-ranging koalas, both immunological and endocrinal. The report concluded that both immunological and endocrinal techniques had shown dramatic progress in the last five years, suggesting that long-term broad scale fertility control was now within reach.
45. In another development, Auckland wild animal control specialist Connovation Ltd claimed (3 December 2007) to be developing a targeted, PAPP-based bait (Para-aminopropiophenone) which is fast acting and humane in control of wild dogs and pigs in Australia: see <http://www.scoop.co.nz/stories/SC0712/S00006.htm>. The federal Department of Agriculture website claims PAPP to be a highly promising alternative toxin to 1080.
46. By way of one final example, Professor Jay F. Kirkpatrick of the Science and Conservation Centre, Zoomontana, in the United States, reported on success in immunocontraception techniques with wild horses and white-tailed deer.

He concluded by saying that there had been impressive advances in the application of wildlife fertility control in many species of animals but that, despite this, the management tool remained

61 G. Reubel, J. Wright, J. Pekin, D. Venables, N. French, T. Strive and C. Hardy.

underused because of opposing political forces.

47. Finally, it is noted that one successful “humane” alternative immunocontraceptive vaccine for control of feral animals is being trialled in the US. It is a product called GonaCon™. GonaCon™ is a new gonadotropin-releasing hormone (GnRH) immunocontraceptive vaccine developed by scientists at the US Department of Agriculture’s Wildlife Service National Wildlife Research Center. Presently, applications of GnRH are being researched in controlled field studies for potential use as a wildlife management tool. According to the relevant website, GonaCon is not yet commercially viable.

How does GonaCon™ work? The single shot multi-year vaccine stimulates the production of antibodies that bind to GnRH. GnRH is a hormone in an animal’s body that signals the production of sex hormones (e.g. estrogen, progesterone and testosterone). By binding to GnRH, the antibodies reduce GnRH’s ability to stimulate the release of these sex hormones. All sexual activity is decreased, and animals remain in a non-reproductive state as long as a sufficient level of antibody activity is present.

The National Wildlife Research Center is working with other agencies and organisations to develop and test GonaCon™, including the US Department of Defense.

Australia’s legislative and regulatory framework

48. Professor Kirkpatrick’s observations about “opposing political forces” in 2003 is an appropriate marker from which to consider the Australian legislative and regulatory framework, and the approaches adopted by two parliamentary committees of the federal Parliament in addressing the challenge posed by feral animals. With the advent of all this promising research, what then is Australia’s legislative and regulatory framework?

First, the Commonwealth has no express powers under the Constitution in respect of environmental matters. There are, of course, heads of power that may be called in aid, including:

- (c) the trade and commerce power (s.51(i));
- (d) the corporations power (s.51(xx));
- (e) the taxation power (s.51(ii));
- (f) the external affairs power (s.51(xxix));
- (g) the quarantine power (s.51(ix));
- (h) the posts and telegraph power (s.51(v));
- (i) the power in respect of Commonwealth instrumentalities and the public service (s.52);
- (j) the power in respect of customs, excise and bounties (s.90);
- (k) the financial assistance power (s.96); and
- (l) the territories power (s.122).

In addition, there is of course s.109.⁶²

49. Second, the most important Commonwealth statute is the *Environment Protection and Biodiversity Conservation Act 1999*.⁶³ An objective of the Act is to promote a cooperative approach to the protection and management of the environment by governments, the community, landholders and indigenous peoples. This sharing of responsibilities reflects the cooperative federalism of the *Intergovernmental Agreement on the Environment* signed by the Commonwealth and all States and Territories in 1992.

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provides a framework for the management of species other than native species by listing key threatening processes (s.183) and providing for threat abatement plans (s.270B).

Section 301A provides for the development of regulations for the control of non-native species, where they may threaten or would likely threaten biodiversity.

⁶² Section 109 provides that where a State law is inconsistent with a Commonwealth law, the Commonwealth law shall prevail and the State law “shall to the extent of the inconsistency, be invalid.”

⁶³ See also the Quarantine Act 1908 (Cth) which has obvious relevance to the import of animals at Australia’s borders.

50. Another relevant Commonwealth statute is the *Natural Heritage Trust of Australia Act 1997* administered jointly by the Department of Environment and Heritage and the Department of Agriculture, Fisheries and Forestry. The Trust's focus is upon a more targeted approach to environmental and natural resource management in Australia. The Natural Heritage Trust supports a National Feral Animal Control Programme managed by the Bureau of Rural Sciences. It was established to reduce the damage to agriculture caused by 'pest' animals.⁶⁴
51. Apart from State legislation and State bodies (see paragraphs 28 to 31 and footnotes 31 and 33 above), local government also discharges a role in undertaking pest, plant and animal risk control measures. Indeed, local government bodies have made a large number of applications for National Heritage Trust grants.

The principal international convention

52. The principal international convention is the *Convention on Biological Diversity*, the objects of which include the conservation of biological diversity. It notes there is an urgent need to address the impact of invasive alien species. Plainly, the Commonwealth has responsibility. By Article 8(h) each Contracting Party shall, as far as possible and as appropriate:

*"Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species."*⁶⁵

The *Convention on Biological Diversity* sets out a number of *Guiding Principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats and species*.

53. Against this background, the relevant Ministerial Councils may be noted, principally the Natural Resources Management Ministerial Council,⁶⁶ but also the Primary Industries Ministerial Council. Ministerial Councils enable the national implementation of proposals where the

⁶⁴ Regulatory Impact Assessment – Consultation Draft – August 2007, p.3, National Codes of Practice for the Humane Control of Vertebrate Pest Animals: see www.invasiveanimals.com/index.php?id=164 and search 'codes of practice'.

⁶⁵ See <http://www.cbd.int/decisions/default.aspx?m=COP-06&id=7197&lg>.

⁶⁶ The NRM Council comprises the Commonwealth/States/Territories and New Zealand Government Ministers responsible for primary industries, natural resources, environment and water policy. It is jointly chaired by the Commonwealth Government Ministers responsible for Environment and Heritage, and Agriculture, Fisheries and Forestry.

division of constitutional powers creates barriers. The objective of the NRMCC is to:

“Promote the conservation and sustainable use of Australia’s natural resources.”⁶⁷

Vertebrate Pests Committee

54. The principal relevant Ministerial Council committee is the Vertebrate Pests Committee⁶⁸, which is a sub-committee of the Natural Resource Policies and Programs Committee created in early 2004. It acts as one of two major advisory committees in support of the work of the Natural Resource Standing Committee⁶⁹, which in turn supports the work of the Natural Resources Management Ministerial Council.
55. In summary, direct control of feral animals still resides primarily with the States and Territories, and extends to landholders and rural industry. The Commonwealth plays a coordinating role, particularly through the Vertebrate Pests Committee, Invasive Animals Cooperative Research Centre and the National Feral Animal Control Programme.

The Australian Pest Animal Management Program

56. The APAMP is funded by the federal Department of Agriculture and administered by the Bureau of Rural Sciences. According to the federal Department of Agriculture website, APAMP funds research projects that develop and promote improved approaches to the management of monitoring of agricultural pest animals; and is aligned with the goals and objectives of the Australian Pest Animal Strategy. It is plain from the list of 2009/10 funded projects that animal welfare is of little priority. Yet the website says that the principles underlying APAMP include supporting development ‘of more humane pest management techniques and strategies where their efficacy *and cost-effectiveness* are likely to be comparable to existing approaches.’ [emphasis added]

67 Ministerial Council website at: www.mincos.gov.au/about_nrmcc.htm.

68 The Vertebrate Pests Committee comprises one member from each Australian State, Territory and New Zealand; the CSIRO; Bureau of Rural Sciences, the Department of Environment and Heritage, and Biosecurity Australia. It does not have its own funded secretariat, but instead relies on a recently initiated revolving State-based secretariat according to which State on a rotating three-yearly basis holds the Chair. It monitors research, but is not funded to conduct research.

69 The Standing Committee comprises the departmental heads/chief executive officers of the relevant Commonwealth/State/Territory and New Zealand government agencies responsible for natural resource policy issues.

The ‘Australian Pest Animal Strategy’

57. In 2007 the Vertebrate Pests Committee published its “Australian Pest Animal Strategy: a national strategy for the management of vertebrate pest animals in Australia.” Three brief observations may be made about this document. First, humaneness in the treatment of pest animals has a very low priority. At best, Key Principle no. 10 notes that:

“Where there is a choice of methods, there needs to be a balance between efficacy, humaneness, community perception, feasibility and emergency needs.”

Second, in an earlier form, the Committee listed “the most useful pest animal control methods”⁷⁰. They comprised the usual inhumane short term methods, save and except for “fertility control” and one other method, namely:

“...
changes in land use including agricultural practices (e.g. timing of lambing or planting different crops).”

This last method is entirely sensible. But fertility control was not discussed, and when the question of research was referred to, it was more about co-ordination than leadership.

Third, commercial harvesting of feral animals was sanctioned. As with commercial harvesting of kangaroos, this is contrary to proper population management and points up how the dollar prevails over animal welfare.

Suffice to say, commercial enterprises are keen to ensure their resource is stable. Once a species is reduced in density in an area, it becomes more expensive to capture or kill further animals. Again, this will mean animals are left to regenerate the completed population in that area.

Recent federal parliamentary committee reports

58. There have been two recent federal parliamentary committee reports on feral animals: the Senate Environment, Communications, Information Technology and the Arts References

70 “●Killing or removal (e.g. baiting, shooting, trapping or mustering); ● exclusion (e.g. fencing or netting); ●biological or fertility control; ● habitat manipulation (e.g. removal of surface refuges); and ● changes in land use including agricultural practices (e.g. timing of lambing or planting different crops).”: paragraph 1.3 (at page 2).

Committee Report entitled “Turning back the tide – the invasive species challenge”⁷¹ published in December 2004, and the House of Representatives Standing Committee on Agriculture, Fisheries and Forestry Report published in November 2005 entitled: “Taking control: a national approach to pest animals”⁷². Both reports recommend a national strategy and framework.

Whilst much useful factual material may be found in each report, overall animal welfare issues received scant attention or a low priority.

Take the Agriculture Committee Report for example. Whilst the report noted that the Tasmanian Government had resolved to end the use of 1080 poison on Crown land by the end of 2005, and that the federal Government had made a commitment to phase out its use on both Government and private land in Tasmania as part of its 2004 election policy, the Committee recommended this phase out be reconsidered with a view to encouraging the continued availability of 1080 poison: see paragraphs 6.66, and 6.85. The Committee acknowledged the symptoms of 1080 poison (such as manic running, retching and “distressed vocalization” [i.e. shrieking]; see paragraph 6.51). But the manner in which the Committee nonetheless concluded that the poison should not be phased out is unsatisfactory, if not intellectually disingenuous.

The “extremely inadequate” research funding

59. In the Senate Environment Committee Report, it was noted⁷³ that the CSIRO had argued that funding for the management of invasive species is inadequate and that funds delivery was generally provided year-to-year or for 18 months at a time, which did not allow for long-term strategic control measures to be planned.
60. At paragraph 5.123 the Report noted that Commonwealth funding for research is delivered through funded research institutions such as CSIRO, but that these research institutions were increasingly being required to seek co-investment from external investment to match core funding. More problematically, the Committee notes that it had heard that over the past decade

71 See http://www.aph.gov.au/Senate/committee/ecita_ctte/invasive_species/report/report.pdf.

72 See <http://www.aph.gov.au/house/committee/primind/pestanimals/report/fullreport.pdf>.

73 at paragraph 5.119 (at page 140).

funding to research institutions had been steadily decreasing and was extremely inadequate.

At paragraph 5.124 it was noted that a number of witnesses argued that short funding cycles disallowed the development of new research projects. The Committee noted (at para 8.57) that it had heard that it can take more than 10 years for a biological control method to be developed from inception to implementation, and said:

“Long-term commitment to funding is essential especially for programs that are seeking to develop biological control responses to invasive species. Central to being able to plan and implement such a research activity is the need for a guaranteed commitment to funding.”⁷⁴

61. However, despite a report of 226 pages plus appendices, no mention was made of animal welfare. Nevertheless, the Committee’s observations about long-term funding for biological controls is to be commended. In particular, whilst research institutions are required to seek co-investment from external investors to match core funding, what private investor will be prepared to wait some 10 to 20 years for a product to be sufficiently developed to be introduced to the market, given the present low rate of funding by government?

The CSIRO is no longer the primary research institution on pest animal research. It is now “outsourced” to or carried out by a federal body called the Invasive Animals Cooperative Research Centre.⁷⁵ According to its website, its “terrestrial products and strategies” include fertility control and the Centre’s 2011 conference agenda includes speakers in which fertility control and animal welfare are part of their topic. The key question of course is whether this is or can be a priority, having regard to the bleak prospect of funding. If it is true that the annual cost of the economic, environmental, and social impact of 11 major introduced invertebrate feral animals is some \$700 million⁷⁶, it is difficult to see how long-term funding cannot be justified.

62. As to the Invasive Animals Cooperative Research Centre, its website homepage states that the

74 at paragraph 8.57.

75 See www.invasiveanimals.com/.

76 See <http://www.aph.gov.au/house/committee/primind/pestanimals/report/fullreport.pdf>.

Centre focuses on “management strategies”. No mention is made of animal welfare as a focus. The latest annual report published to the website, the 2008-9 annual report, summarises a series of projects or management strategies. Under the heading ‘reducing the damage of feral pigs’, for example, ‘biological controls’ are mentioned. However, it notes the relevant project’s aims are to register and commercialise a 1080 feral bait – ‘PIGOUT’, released in March 2008. It notes that a more humane lethal bait, ‘HOG-GONE’ is under development. The project “*has a distinct commercial focus, aimed at enhancing feral pig control options for public and private land managers.*” [emphasis added]

63. The federal Department of Agriculture’s website still touts 1080 as:

“... the most appropriate toxicant for lethal baiting of foxes. Continual efforts should be made ... to promote its advantages to ensure its long-term registration and acceptance by the community at large.”

Further, the website notes that:

“Para-aminopropiophenone (PAPP) appears to be the most highly promising alternative toxin to 1080 which is currently being researched.”

Conclusion

64. In conclusion, enough research and studied assessment exists to show that, when weighed against the historic failings of short-term inhumane measures, fertility control offers real hope as a long-term measure. In view of the scale of suffering, it can be argued that a moral imperative exists to pursue it. It cannot be pretended that fertility control or, for that matter longer term control methods, hold the only answer. That said, humane methods should be developed which are carried out under the direct supervision of a relevant government authority, and where possible within a long-term scientifically sound population control program.
65. It is also long overdue to question on general public policy grounds the ongoing conduct of farming in marginal, arid or semi-arid areas of Australia where good years are unusual and “drought” conditions are the norm, such as over much of inland Australia: see further, for example, the article ‘Cash to cut and run’, The Weekend Australian newspaper, 6-7 October

2007 ('Inquirer' section, p.23):

<http://www.theaustralian.news.com.au/story/0,25197,22538227-28737,00.html>. Indeed, as it is, whether by reason of climate change or otherwise, more than half of Australia's agricultural land in recent times has been characterised by conditions of drought. It is of course during the dry periods that feral animals can attain what is described as pest status by competing with livestock for feed and water.

66. At a minimum, fertility control research points up how more sophisticated attempts can and should be made to improve our treatment of these animals, and how this can be done whilst recognising the needs of our natural environment. If this much only were to be acknowledged, those responsible would cease to reach for what is cheap and what is quick, and then perhaps begin to turn away from the inhumanity and the chaos which is presently left in their wake. For the present, strategic failures and moral indifference remain the sad indictments of those who act in reliance on exemptions of feral animals from the protective or proper reach of animal protection statutes, and the sanction in draft national model codes of practice and SOPs of control methods of stark inhumanity and poor welfare before death.

7 Animals in Research

Introduction

1. As noted by Dr Paula Gerber in her chapter on ‘Scientific Experimentation on Animals’ in ‘Animal Law in Australasia: a new dialogue’ (Federation Press, 2009) (chapter 9, p.212):

“The use of animals for scientific research is viewed by many as essential to the development of treatments and cures for diseases that afflict humans. Indeed, medical research involving animals has been credited with breakthroughs in the treatment of diabetes, leukaemia and heart transplants and the development of vaccinations for cholera and anthrax.”

Peter Singer in his seminal work ‘Animal Liberation’ (2nd ed) at p.91 said:

“No doubt there have been some advances in knowledge which would not have been attained as easily without using animals. Examples of important discoveries often mentioned by those defending animal experimentation go back as far as Harvey’s work on the circulation of blood. They include Banting and Best’s discovery of insulin and its role in diabetes; the recognition of poliomyelitis as a virus and the development of a vaccine for it; several discoveries have served to make open heart surgery and coronary artery bypass graft surgery possible; and the understanding of our immune system and ways to overcome rejection of transplanted organs.”

2. The unanswered question is whether less useful medical research would have resulted if, from the beginning, only non-animal alternatives to their use had been available. Professor Singer observed (at p.92):

“Some discoveries would probably have been delayed or perhaps not made at all; but many false leads would also not have been pursued, and it is possible that medicine would have developed in a very different and more efficacious direction, emphasising healthy living rather than cure.”

More animals are used in research in Australia for agricultural or non-biomedical ends than in biomedical research. Dr Gerber (at p.233), noted that the most recent statistics available in Australia are for 2005, and “... indicate that 5.3 million animals were used in research that year.”

3. Today, despite the reference to ‘Replacement’ in Australia’s Code of Practice governing the use of animals in research, little if any endeavour is made to bring about ‘non-animal methods of experimentation.’ In this respect, Australia is little different from the rest of the world. Yet it is here that the solution lies to ceasing the employment of many hundreds of millions of animals annually in scientific procedures and testing around the world.

The 3R’s

4. Australia’s Code of Practice is supposed to be based upon the three Rs, namely:
- *Reduction*: using the minimum number of animals;
 - *Refinement*: minimising pain, suffering and distress inflicted on animals; and
 - *Replacement*: wherever possible, using non-animal methods of experimentation.
5. The 3Rs were first suggested in 1959 in a report, ‘The Principles of Humane Experimental Techniques’ by Russell, a zoologist, and Burch, a microbiologist, commissioned by the UK Universities Federation for Animal Welfare. Yet *Refinement* is the focus of compliance by researchers with the Australian Code, known as the *Code of Practice for the Care and Use of Animals for Scientific Purposes*. The last edition was published in 2004.
6. The Australian Code extends to all live non-human vertebrates and higher order invertebrates. However, the Victorian Act does not apply to invertebrates except for live crustaceans. And a live adult decapod crustacean, that is, a lobster, crab or crayfish, is exempted from the definition of “animal” in s.3(3) of the Victorian Act for the purposes of Part 3 dealing with scientific procedures together with any fish or amphibian or reptile, bird or mammal below the normal mid-point of gestation or incubation.
7. The National Health and Medical Research Council produced the Australian Code and is the principal funding body for biomedical research in Australia. Animal experimentation is a high proportion of NRMRC- funded research.

The legal regime

8. The Australian Code is sanctioned, like other codes, by state and territory animal protection statutes. For the Victorian legislative regime, see in particular Part 3 of the *Prevention of Cruelty to Animals Act* 1986, and the broad definition of ‘scientific procedure’ in s.3(1) of the Act. Section 42(2)(d) of the Act provides that regulations may be made which apply, adopt or incorporate the provisions of inter alia any code, which is what Victoria has done in respect of the Australian Code under its *Prevention of Cruelty to Animals Regulations* 2008 . Accordingly, prescribed conditions for scientific procedures licences require that all scientific procedures be carried out in accordance with the Code: regulation 92(2).

9. Also, Part 3 of the Victorian Act requires research institutions to be licensed. In order to secure a licence, an institution must nominate an Animal Ethics Committee to perform functions under the licence in accordance with the Code: regulation 92(3). No scientific procedure may commence until the Animal Ethics Committee has granted its approval: regulation 92(8). The licence holder must ensure that an Animal Ethics Committee acts in accordance with the Code in relation to any animal scientific procedure: regulation 92(9). Any person carrying out a scientific procedure under the licence must do so in accordance with the approval given by the Animal Ethics Committee: regulation 92(14).

10. Importantly, regulation 92(20) provides that where death is a deliberate measure in the scientific procedure and where there will be no intervention to kill the animal humanely before death occurs in the procedure, the procedure may not be carried out unless:
 - (a) its objective cannot be achieved by any other scientific means; and
 - (b) the procedure is approved by the Minister; and
 - (c) the procedure is related to:
 - *potentially* lifesaving treatment for animals or human beings; or

- research *in connection with* cancer in animals or human beings; or
- development and assessment of the humaneness of lethal vertebrate test control agents; or
- *investigation* of environmental contaminants.

This regulation would thus apply to the LD50 test.

11. New South Wales is the only State with a separate statute, the *Animal Research Act* 1985. Animal researchers or suppliers of animals for research are required to be authorised under the Act, and the conduct of such research and supply is regulated under the Act.

In Queensland, the requirements for the use of animals for scientific purposes are similar to those in Victoria, namely, registration with the Department of Primary Industries, approval of research projects in advance by an Animal Ethics Committee, compliance with the Australian Code, and annual reports.

The Draize and LD50 tests

12. Whilst the LD50 test and the Draize eye irritancy test are circumscribed in NSW, they are not prohibited. Under regulation 26 (4)(b) of the NSW *Animal Research Act Regulation* 2010, the Draize test is prohibited “*unless the test is to be carried out for the sole purpose of establishing that prophylactic or therapeutic materials or substances ordinarily intended for use by application to the eye are not irritants to the eye.*”

Section 92 of the Queensland *Animal Care and Protection Act* 2001 prohibits the Draize test without the Chief Executive’s written approval.

Regulation 14 of South Australia’s *Animal Welfare Regulations* 2000 prohibits the use of the Draize test on rabbits [and thus not on all animals] unless:

- the assessment relates to research that has the *potential* to benefit human or animal health; and

- the objectives of the assessment cannot practicably be achieved by means that will cause less pain to animals.

The Draize test using rabbits was banned in Victoria some 20 or so years ago. In the last few years the ban was extended to all animals. Regulation 92(19), *Prevention of Cruelty to Animals Regulations* 2008 provides:

“A person must not carry out a scientific procedure under the licence involving the eye of any animal to determine irritancy of a chemical or biological agent unless the procedure is carried out under terminal anaesthesia.”

The Draize test usually involves the restraint of a rabbit in a holding device so that different household or industrial products (such as a bleach or a shampoo) may be placed in one eye of each rabbit. The eye is then held closed. Reactions are then observed, such as swollen eyelids, ulceration, bleeding, perforation and blindness. As rabbits do not have tear ducts, they cannot flush the substance from their eye. Eye irritancy is therefore compounded. Studies can endure for three weeks.

13. A *toxicity test* generally means a scientific procedure in which a substance is administered to an animal for the purpose of determining the concentration or dose of the substance which will achieve a predetermined toxic effect.

A *lethality test* is a scientific procedure in which any material substance is administered to animals for the purpose of determining whether any animals will die or how many animals will die.

Death as an end point is defined in the Australian Code as a scientific procedure where the death of the animal is a deliberate measure in the procedure and there will be no intervention to kill the animal humanely before death occurs in the course of the procedure.

14. The LD50 test is an acute toxicity test. LD stands for lethal dose. The animal is given a

“dosage of the test chemical necessary to kill fifty percent of the test animals” (32 *McGeorge Law Review*, 461, 657). Most of the LD50 tests use rats or mice. The chemical is placed on the animals shaved skin, then covered with an adhesive plaster. Severe side effects include “severe abdominal pain, muscle cramps, convulsions, vomiting, diarrhoea, gastrointestinal ulcers, bleeding and loss of kidney functioning and other painful or distressed conditions” (ibid). Animals that survive the LD50 test are in any event immediately killed and their tissues examined pathologically.

15. In NSW, under regulation 26(4)(a) of the *Animal Research Act Regulation* 2010, LD50 tests for the purpose of product testing are prohibited “except with the concurrence of the Minister, given on a recommendation or concurrence by the Animal Research Review Panel, to the carrying out of the test for that purpose”.

Section 56A of the NSW Act defines lethality testing and specifies requirements for approval by the relevant Animal Care and Ethics Committee, record keeping and reporting.

16. In Queensland, s.92 of the *Animal Care and Protection Act* 2001 prohibits the classical LD50 test, or a similar test, without the Chief Executive’s written approval.
17. South Australia’s *Animal Welfare Regulations* 2000 by regulation 14 prohibits exposing an animal to any substance for the purpose of assessing its toxicity against a pre-determined level of mortality, unless the two tests set out above (in paragraph 12) also for the Draize test are satisfied.
18. In Victoria, Ministerial approval is required for lethality as an end point: see regulation 92(20), referred to in paragraph 10 above. Prior to amendments to the regulations in recent years so that the use of biological agents and not just chemicals was covered, the previous ‘gap’ in the regulation, according to Victoria’s Bureau of Animal Welfare, meant that over 20,000 animals (out of 289,000 used in scientific procedures in total) were used in death as end point tests in

2003⁷⁷.

Animal Ethics Committees

19. The Code provides for the establishment of an animal ethics committee within a research institution (see s.2 of the Code). The primary responsibility of an AEC is to ensure “... on behalf of institutions, that all care and use of animals is conducted in compliance with the Code.” The role of the AEC is to ensure that “... the use of animals is justified, provides for the welfare of those animals and incorporates the principles of Replacement, Reduction and Refinement” (see s.2.2). An AEC must comprise at least four persons, but in practice comprises more than four persons. One person must be a person with a “demonstrable commitment to, and established experience in, furthering the welfare of animals, who is not employed by or otherwise associated with the institution”. A further person is required who “... is both independent of the institution and who has never been involved in the use of animals in scientific or teaching activities.” In practice, such representatives can be outvoted in an AEC decision.

The test for use of animals: the Code’s deficient protection

20. The information required for a proposal to an AEC about the proposed use of animals “... must be sufficient” to justify their use “... by weighing the *predicted* scientific or educational value of the proposal against the potential impact on the welfare of the animals” [emphasis added] (see ss.1.2 and 2.2.15). Such a criterion is, to say the least, broad. And there may be a gulf between the ‘predicted’ value on the one hand and the ‘likely’ value on the other. In the infamous saga of the Imutran xenotransplantation experiments in the UK, the UK RSPCA in a report described Imutran’s predicted value as “extraordinarily over-optimistic”.

Further, how is such “weighing” to be calibrated? If the ethos in the scientific community is to view animal-based experimentation as necessary and justified, the

77 Regulatory Impact Statement - Prevention of Cruelty to Animals (Amendment) Regulations 2005.

predicted scientific value can be expected to be weighed more heavily in the ordinary course. The mere fact that the approach adopted is one of “weighing” benefits against harm suggests that the interests of animals will not be weighed on a par with the interests of humans. For example, in planning a project, s.3.2.1 requires the AEC, investigators and teachers to consider a number of questions during the planning stages of a project. The first one is expressed in these terms:

“Do the potential benefits outweigh any ethical concerns about the impact on animal welfare?” [emphasis added]

The word “potential” in describing benefits is, to say the least, open-ended. It is not even circumscribed by a phrase such as “likely potential benefits”. Further, ‘ethical concerns’ is an elastic concept. There should be no discrepancy in the tests adopted: see for example the test identified as adopted in ss. 1.2 and 2.2.15

In the contemporaneous UK RSPCA report on the Imutran xenotransplantation experiments, it was noted (at p.12) as follows:

“In our view, spokespersons for science and industry are far more willing to talk of the potential benefits of their research than they are to acknowledge the potential, or in this case very real, harms to the animals involved.”

Or again (at p.27), the report noted in respect of the cost, harms and benefits test:

“Judgments in this respect will always be subjective since they involve the weighing of disparate ‘units’ that cannot be objectively measured and compared. Moreover, different people will make different judgements depending on their own individual interpretation and assessment of the costs and benefits, and on their own interests and moral perspectives... [statutory authorities] are both charged with having due regard to the interests of science and industry and protecting animals from unnecessary suffering in experiments. This is difficult when the interests of science and industry will always conflict with those of the individual animals used ... The difficulty in deciding whether the judgments made by either or both authorities in this case were proper and fair, is that it is not clear how either term (costs or benefits) is defined and/ or interpreted.”

21. Even in the case of “Toxicological studies”, the Australian Code permits enduring distress and pain:

“Investigators must not allow the painful, distressing or lingering death of animals unless no other end-point is feasible and the goals of the project are the prevention,

alleviation or cure of a life-threatening disease or situation in humans or animals.”
(see s.3.3.48) (emphasis added)

A painful, distressing or lingering death then is sanctioned by the Code on a ground of what is ‘feasible’, a concept of indeterminate extent or meaning in any given case.

Further, this is not weighed against even the ‘likely benefits’ nominated for the project, but instead weighed against its ‘goals’, however ultimate, remote or broadly -based they may be.

A further example arises in the case of “Modifying animal behaviour”. Here s.3.3.44 provides that inducement of modified animal behaviour may need to be some form of biological stress. Having noted that painful or noxious stimuli should be avoided, the Code then provides:

“If their use is necessary, the level and duration of the stimulus must be minimised...”

“Minimised” as employed here is no more than a relative term. Why in any event should such procedures be thought necessary, let alone be permitted?

22. One final brief example arises from “Research on pain mechanisms and the relief of pain”. Section 3.3.78 provides, inter alia, that:

“If unanaesthetised animals are to be subjected to stimuli designed to produce pain, investigators must: ...

(ii) ensure that the animals are exposed to the minimum pain necessary for the purpose of the procedure.” [emphasis added]

Similar comments may be made here: ‘minimum pain’ is employed in no more than a relative sense.

The UK Animals (Scientific Procedures) Act 1986

23. Under the UK’s *Animals (Scientific Procedures) Act* 1986, provision is not only made for local ethical review, but also for statutory controls imposed by the central government. In determining whether to grant a licence for an experimental project, the Secretary of State (the Home Office) “... shall weigh the likely adverse effect on the animals concerned against the

benefits *likely* to accrue” (emphasis added). The UK is the only country in the world to have both systems operating in tandem. Further, the UK Act provides for ‘likely’ benefits whereas the Australian Code only stipulates open-ended “potential” benefits.

Two practical strategies to bring about ‘Replacement’

24. The public debate on the use of animals in experiments has canvassed different means by which their use may be regulated in a better manner to reduce the number employed. However, there are two practical strategies available to engender non-animal use methods, namely:
- the topping up of the annual research budget by a sum equal to say 20 or 25% thereof to fund the expedited development of alternatives (including existing alternatives) to the use of animals in experiments; and
 - the gradual prohibition of different species of animals from use in experiments: for example, in the UK, horses, cats and dogs may not be used in scientific procedures.

The UK had no qualms banning their use despite the website www.animalresearch.info, which is devoted to justifying the use of animals in scientific procedures and testing, stating:

“... animals can act as models for the study of human illness. For example ... dogs suffer from cancer, diabetes, cataracts, ulcers, bleeding disorders such as haemophilia, which makes them natural candidates for research into these disorders. Cats suffer from some of the same visual impairments as humans. Upon such models we learn how disease affects the body, how the immune system responds, who will be affected, and more.”

The recent European ban on the use of great apes

25. Further, on 8 September 2010 Europe banned the use of great apes such as chimpanzees, gorillas, bonobos, and orangutans in animal testing as part of drastically tighter rules to scale back the number of animals used in scientific research. However, quistitis and macaques were not banned from use because it was thought it could hamper research into neurodegenerative illnesses such as Alzheimer’s: thus their use will be permitted if the goal of the test cannot be

achieved without using the species. Members of a 27 nation bloc have two years to comply with the new rules and need “to ensure that whenever an alternative method is available, this is used instead of animal testing.”⁷⁸

The NHMRC Policy rationale for the use of primates

26. In Australia, the National Health and Medical Research Council published in 2003 its Policy on the Care and Use of Non-Human Primates for Scientific Purposes. This is supposed to be read in conjunction with the Australian Code: the Code and the Policy are also posted to the website. Suffice to say, in its Policy’s ‘Introduction’, “the NHMRC recognises that non-human primates can provide unique and invaluable models for medical research purposes due to their close evolutionary relationship to humans.” In answer to this, Professor Peter Singer would say (p.52):

“Either the animal is not like us, in which case there is no reason for performing the experiment; or else the animal is like us, in which case we ought not to perform on the animal an experiment which would be considered outrageous if performed on one of us.”

The non-human primates are thought to share 99% of our DNA.

The futility of so many experiments

27. In chapter 2 of *Animal Liberation* (2nd ed) entitled “Tools for research ... your taxes at work” Professor Singer catalogues by way of illustrative examples a range of different experiments which point up the sheer futility of millions upon millions of experiments over the years with appalling welfare consequences for the animals concerned. He opens the chapter describing a series of animal experiments carried out by the United States Air Force “... designed to see whether chimpanzees would continue to ‘fly’ a simulated plane after being exposed to radiation.” A sanitised version of these experiments was glimpsed in a popular film released in 1987, *Project X*. The plot for this film may have been fiction, but as Professor Singer notes, the experiments were not. The seven phases of training the monkey to fly a platform, which could be made to pitch and roll like an aeroplane, may be gathered from pages 25-26 of Professor

78 The report is posted to the Barristers Animal Welfare Panel website: www.bawp.org.au.

Singer's work. In short, in order to induce the monkey to use the control stick to return the platform to a horizontal position the monkeys were given electric shocks 100 times per day. They were shocked until they made the appropriate response. The training regime took several weeks. As Professor Singer notes (at p.27) the training involved "thousands of electric shocks", but was only preliminary to the real experiment.

Once they were keeping the platform horizontal for most of the time, they were then exposed to lethal or sub-lethal doses of radiation or to chemical warfare agents to see how long they could continue to 'fly' the platform.

28. One report is taken which was published by the United States Air Force School of Aerospace Medicine in October 1987 – after *Project X* had been released. The report was entitled 'Primate Equilibrium Performance Following Soman Exposure: Effects of Repeated Daily Exposures to Low Soman Doses'. As Professor Singer notes (at p.27) Soman is another name for nerve gas, the chemical warfare agents that caused terrible agony to troops in the First World War. The monkeys had been operating the platform "at least weekly" for a minimum of two years and had received various drugs and low doses of Soman before, but not within the previous six weeks (p.27). Professor Singer then notes:

"The experiment calculated the doses of Soman that would be sufficient to reduce the monkeys' ability to operate the platform. For the calculation to be made, of course, the monkeys would have been receiving electric shocks because of their inability to keep the platform level. Although the report is mostly concerned with the effect of the nerve poisoning on the performance level of the monkeys, it does give some insight into other effects of chemical weapons:

"The subject was completely incapacitated from the day following the last exposure, displaying neurological symptoms including gross incoordination, weakness and intention tremor... these symptoms persisted for several days, during which the animal remained unable to perform PEP task."

29. As Professor Singer notes (p.28), Dr Donald Barnes was for several years the principal investigator in the US Air Force School of Aerospace Medicine and in charge of these experiments. Dr Barnes estimated that he irradiated up to 1,000 trained monkeys during his

years in this position. Ultimately, Barnes resigned to become an ardent campaigner against animal experimentation. However, experiments using the Primate Equilibrium Platform have continued (p.28).

The NHMRC's deficient protection of primates

30. In Australia, non-human primates for use in experiments are sourced from National Breeding Colonies for macaques, marmosets and baboons. These NBCs, according to the NHMRC *Policy on the Care and Use of Non-Human Primates for Scientific Purposes*:

“... will not generally accept animals that have been used for scientific purposes. In most cases, euthanasia will be the only option.”

Accordingly, the end-point for non-human primates used for scientific purposes will be mostly death. The NHMRC states in its ‘Introduction’ that it “supports” these National Breeding Colonies. Yet the question is not addressed about providing for the retirement of such primates so that death as an end-point can be avoided. It is plainly thought that scientists are free of any responsibility in this respect. The retirement of primates should be provided for in any allocation of grant funds, alternatively, the federal government should intervene to provide for their retirement.

31. As to the test for use of non-human primates, it remains that “the *potential* benefits of the scientific knowledge gained” must “outweigh harm to the animal” [emphasis added]. In short, the same ultimate test applies to non-human primates as it does to any other animal under the Australian Code, despite the creation of a separate NHMRC Policy in respect of non-human primates. Question 1 of Appendix 2 to the NHMRC Policy provides, for example, in the “AEC checklist for assessing proposals involving non-human primates” the same question as that under the Australian Code, namely:

“Is the AEC convinced that the potential benefits or the scientific knowledge gained outweigh the potential harm to the animal.”

32. In the case of great apes, the Animal Welfare Committee of the NHMRC “must be notified of proposals” for their use before the project can commence. This then only goes to notification, rather than the proposal’s further scrutiny. The stark contrast with Europe’s ban on the use of great apes could not be plainer.

The ‘leaking’ of confidential information in the public interest

33. Australian legal principles on the ‘public interest defence to allege breaches of confidence and copyright are examined in detail in Chapter 2, ‘Three Key Challenges in Strategic Public Interest Litigation.’

Nevertheless, it is appropriate to look at the treatment of non-human primates in practice in an infamous set of procedures in the United Kingdom known as the ‘Imutran’ saga. This saga pointed up how an animal’s welfare can be sacrificed under even a regulatory regime for scientific procedures like that in place in the UK. By reason of leaked documents the Imutran experiments came to public notice and, ultimately, before the High Court of England and Wales.

A few principles

A person may, for example, come into possession of information which exposes animal cruelty, but which that person knows to be confidential. Briefly, in Australia, ordinarily, such a person would be under a duty at law not to publish it: *Prince Albert v Strange* (1849) 1 Mac&G 25; 41 ER 1171; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 260, 268; or for example in Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1, 10. Typically, the person seeking to protect confidential information will apply for an interlocutory injunction on the grounds of breach of confidence and/or say breach of copyright.

Public interest publication

34. In the United Kingdom a ‘public interest’ defence may be invoked. In Australia by contrast

such a defence is unavailable in South Australia and Victoria. It remains to be resolved at a Commonwealth level. This defence is examined in chapter 2.

Lenah Game Meats

35. Leaving to one side then the question of a ‘public interest’ defence in Australia, a decision of interest by the High Court is *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1. Lenah Game Meats sought an interlocutory injunction restraining the Australian Broadcasting Corporation from broadcasting a film of the processor’s slaughter operations at a “brush tail possum processing facility”. The film was made surreptitiously and unlawfully by reason of trespass, and was given to the ABC to broadcast. The unchallenged evidence was that broadcasting the film would cause financial harm to the processor.

In brief summary, the course of argument before the High Court invoked principles of unconscionability, the implied freedom of political communication, rights of property, and an emergent tort of invasion of privacy. The privacy argument was quickly dismissed because it is not available to a corporation: see paragraph [132] of the joint judgment of Gummow and Hayne JJ, for example. The question of what may constitute filming of private activity, on the one hand, and what is necessarily public, on the other, was canvassed at some length. Gleeson CJ at paragraph [42] observed:

“There is no bright line which can be drawn between what is private and what is not... An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford... The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person with ordinary sensibilities is in many circumstances a useful test of what is private.” [emphasis added]

The UK test for private v public activity

36. In the United Kingdom by contrast, the House of Lords in *Campbell v MGN Limited* [2004] UKHL 22 adopted the perhaps more useful test:

“Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.”

37. Returning to *Lenah Game Meats*, at [25] of his judgment, Gleeson CJ noted that it was not suggested that the operations that were filmed were secret, or that requirements for confidentiality were imposed upon people who might see the operations.

38. And it was not contended that the ABC had contravened, or threatened to contravene any statute, unlike the people from whom the ABC received the video.

The filmed activity was not private

39. At [39] of his judgment, Gleeson CJ observed that if the activities filmed were private, then the law of breach of confidence was adequate to cover the case. Notwithstanding that, at paragraph [43] Gleeson CJ concluded:

“The problem for the respondent is that the activities secretly observed and filmed were not relevantly private...Of course, the premises on which those activities took place were private in a proprietary sense...Nor does an act become private simply because the owner of land would prefer that it were unobserved...It may mean that a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private.”

40. Accordingly, the Court examined the principal contention of the respondent invoking unconscionability. In this respect, it was incumbent upon the respondent to explain why the ABC was bound in conscience not to publish.

The publication was not unconscientious

41. Given that Gleeson CJ found that there was no breach of the law of confidence, he observed at [55] that:

“... the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large.”

The Imutran case

42. The *Imutran* case arose initially from proceedings taken by a biotechnology company in the High Court of England and Wales to injunct the publication of material taken in breach of confidence and breach of copyright and given to an animal society which then published the material on its website. The decision of the Vice-Chancellor on the interlocutory application is reported as *Imutran Ltd v Uncaged Campaigns Ltd and Anor* [2001] EWHC Ch 31 (11 January 2001). The case arose in this way in September 2000. Imutran Ltd, a wholly owned subsidiary of a Swiss owned international pharmaceutical company, was engaged in research into xenotransplantation, that is to say, the replacement of human organs with those of animals, usually pigs. Most of such research was being carried out at a laboratory known as Huntingdon Life Sciences. As xenotransplantation necessarily involved experimental work on animals, it was regulated by the UK *Animals (Scientific Procedures) Act* 1986. Amongst the duties imposed on the Home Secretary by the Act was the duty, when considering an application for a project licence, to weigh the likely adverse effects on the animals concerned against the *benefit likely to accrue* as a result of the proposed project.

In the northern hemisphere spring of 2000, Uncaged Campaigns Ltd received a package and a CD-Rom containing copies of a large number of documents belonging to Imutran. A director of Uncaged Campaigns Ltd was Daniel Lyons, a then part-time student at Sheffield University for a PhD in the subject area of the ethical and political theory implications of xenotransplantation. Mr Lyons appreciated that the documents came from Imutran and mainly concerned its program of primate xenotransplantation conducted at Huntingdon Life Sciences. Amongst other things, he considered that the documents raised extremely serious questions of animal welfare and the adequacy of regulation of research by the Home Office. He also appreciated the documents were confidential.

The Diaries of Despair

43. Mr Lyons wrote and published on the website “Diaries of Despair: The Secret History of Pig to

Primate Organ Transplants” comprising 157 pages of information from Imutran’s documents obtained from the unknown source.

The Daily Express newspaper articles

44. On 19 September 2000 a journalist with the Daily Express faxed to Imutran three specific questions concerning its program of xenotransplantation to which Imutran replied. A few days later articles appeared in the Daily Express commenting adversely on Imutran’s program. They were based on the Diaries of Despair.

Interim Injunctions

45. An interim injunction was obtained on 26 September restraining UCL and Mr Lyons from infringing Imutran’s copyright in its documents and from using or disclosing the information contained in nominated confidential documents. A proviso to the injunction exempted from the prohibition further use or disclosure of information appearing in the Daily Express articles. These injunctions were obtained on 10 October. The interlocutory injunction application came on before the Vice-Chancellor on 18 October 2000. The matter was adjourned for reasons it is unnecessary to note.

Imutran’s reliance on breach of confidence, and copyright

46. In the upshot, the Home Secretary asked the Chief Inspector of the UK RSPCA to examine compliance by Imutran with licence conditions imposed under the *Animals (Scientific Procedures) Act* 1986, which it did in a report to be considered shortly.

The Vice-Chancellor’s eventual decision was handed down on 11 January 2001. Imutran in argument had relied upon first, breach of confidence, and second, infringement of copyright. Relevant to both those issues was the proper approach for the Court to adopt in considering an application for interim injunctions in which the right to freedom of expression guaranteed by Article 10, *European Convention on Human Rights*, was material. This depended in turn on the proper construction and application of s.12 of the UK *Human Rights Act* 1998.

The Vice-Chancellor's view of the public interest

47. It is unnecessary here to explore the human rights argument. Suffice to say, in summary, the Vice-Chancellor found that the documents were in their nature confidential, that the defendants knew this was so, and that the defendants knew that Imutran had not known or consented to removal of the documents. The Vice-Chancellor then turned to whether the defendants should be free to publish and campaign with Imutran's confidential and secret documents. Surprisingly, the Vice-Chancellor said:

“Many of those documents are of a specialist and technical nature suitable for consideration by specialists in the field but not by the public generally. Given the proviso to the injunctions sought there would be no restriction on the ability of the defendants to communicate the information to those specialists connected with the regulatory bodies denoted by Parliament as having responsibility in the field.” [emphasis added]

The Vice-Chancellor went on to find that there had been also a breach of copyright.

48. What is surprising about the Vice-Chancellor's reasons is the view that matters of the public interest as to the treatment and welfare of higher primates should be satisfied by reference of the material to appropriate regulatory bodies, and not by publication to the public generally.

Further, so far as may be gathered, it was suggested that the Home Office had classified severely intrusive procedures as instead “moderate” only, and had “cosied up” to Imutran in securing the grant of the licence.

The UK RSPCA view of public interest publication

49. The UK RSPCA published a report about Imutran's project which was highly critical. At page 11 of its report, the UK RSPCA said in unequivocal terms:

“The Kennedy Committee report stated that the acceptability of xenotransplantation depended on the full evaluation of its costs and benefits, and it emphasised that such assessments are not ‘one off’. We believe that a stringent critical re-evaluation of this issue is long overdue. We believe it imperative (as do Uncaged) that information regarding the full impact of

xenotransplantation research to the animals concern should be in the public domain, otherwise people cannot make a fully informed judgment on whether they believe the development of xenotransplantation to be morally acceptable.” [emphasis added]

As it is in respect of the Kennedy Committee report , the Diaries of Despair note:

“The Kennedy Committee report on the ethics of xenotransplantation, which has laid the framework, on paper rather in practice, for the Government's policy on xenotransplantation, concluded that "it would be ethically unacceptable to use primates as source animals for xenotransplantation, not least because they would be exposed to too much suffering.”

Further UK RSPCA report comments

The ‘substantial’ severity of the Imutran procedures

50. There were further salient observations by the UK RSPCA in its report of some 70 pages. As to the Imutran project’s classification as ‘moderate’ rather than ‘substantial’, the UK RSPCA (at p.24) said:

“We believe that projects involving procedures that, as a whole, merit a ‘substantial’ severity rating should be classified as such ... Furthermore, the classification and the criteria on which it is based, should be in the public domain ... we believe that a substantial classification was without doubt necessary for this project.” [emphasis added]

The suffering

51. Or again, commenting on the suffering arising from the procedures and their effects, the UK RSPCA (at p.32) commented:

“The procedures reported in the majority of the study reports involved major abdominal surgery. This, by its very nature, caused pain, suffering and distress – even if analgesia is administered. Tissue rejection and immunosuppressive treatment cause further suffering. It is for this reason that the research had to be licensed under the ASPA ... In their response to the Uncaged report and in comments reported elsewhere Imutran, however, seemed either unwilling to acknowledge the primates used suffered, or are ambivalent in regard to animal suffering.”

At page 34, the UK RSPCA continued:

“... other observations made in the clinical signs indicate that severe suffering occurred ... the serious very unpleasant effects listed in the study reports include grinding of the teeth, whole body

shaking, infected wounds, wound-weeping, gangrene, haemorrhaging, weakness, vomiting, diarrhoea, abdominal and scrotal swelling and tremors.

It is a matter of extreme concern to the RSPCA that Imutran seem unaware of, or are unprepared to acknowledge, indicators of suffering described in the clinical observations.”

Imutran’s ‘extraordinarily over-optimistic’ prediction of benefit

52. Finally, the UK RSPCA arrived at the following conclusion as to the cost/ benefit assessment of the Imutran project (at p.38):

“It is now clear that Imutran’s 1996 prediction was extraordinarily over-optimistic. Results of research by Imutran and others demonstrate that the expected progress towards clinical application of transplantation of animal organs to humans has just not been realised in the ensuing five years. Indeed, at the beginning of 2000 Novartis, the parent company, told Imutran that it was necessary to demonstrate long-term survival of transplanted organs within the ensuing 18 months if the research programme was to continue.”

At p.39 the UK RSPCA said that it considered:

“... that in no way the animals survive sufficiently well, with a sufficient quality of life post-transplant, for the transplant procedures to be considered successful. Hence, we do not consider that a significant and justifiable benefit is being achieved.”

The limited improvement in survival time

53. In the Diaries of Despair, Daniel Lyons noted:

“Documents demonstrated that, after five years of research, Imutran had improved the average survival time of monkeys with functioning pig kidneys from two to just four weeks. The success rate of heart xenotransplantation was even less tangible – just 11 days according to the documents.”

Imutran ultimately settles

54. Despite its success before the Vice-Chancellor on the injunction application, ultimately Imutran settled the proceeding with Uncaged Campaigns Ltd and Mr Lyons. According to Wikipedia, the papers reveal researchers at Imutran exaggerated the success of work aimed at adapting pig organs for human transplant. It is plain too that the procedures for the hundreds of higher primates used (monkeys and baboons captured from the wild) between 1994 and 2000 were, to

say the least, doubtful, and produced an appalling result for their welfare.⁷⁹

English Court of Appeal dicta on the public interest

55. Little over a year later the English Court of Appeal in *A v B plc (Flitcroft v MGN Limited)* [2002] EWCA Civ 337 (11 March 2002); [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545; delivered judgment on two appeals, with an entirely different flavour to that of the reasons of the Vice-Chancellor in the *Imutran* case. ‘A’ was a well known footballer, B was a national newspaper, and C was one of two women with whom A, a married man, “had affairs”. Applications for interim injunctions were made by A on the ground of breach of confidence in the context of particular Articles of the *European Convention of Human Rights*. In summary, the question arose whether a person is entitled to have his privacy protected by the Court or whether the restriction of freedom of expression which such protection involves cannot be justified. The CA’s decision and reasoning on the *privacy* question should be taken to be no longer good law. Whilst not expressly overruled by the House of Lords in *Campbell v MGN Limited* (supra), it is plain that the House of Lords decision at the time of writing enunciates the law in the UK.⁸⁰

But it is not the privacy question which commands interest, but rather the dicta as to public interest publication. They must be read however in the context of UK privacy principles and the impact of the Convention Articles.

Article 8 operated so as to extend the areas in which an action for breach of confidence can provide protection of privacy. Article 10 operated in the opposite direction because it protects the freedom of expression and to achieve that it was necessary to restrict the area in which remedies were available for breaches of confidence.

56. The English Court of Appeal noted:

⁷⁹ The diaries remain published and appear at www.xenodiaries.org. The website of Uncaged Ltd is at www.uncaged.co.uk.

⁸⁰ The appellant was the well-known fashion model, Naomi Campbell.

“Any interference with the press has to be justified, as it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable so any interference with it has to be justified.”[emphasis added]

This principle arises because the view is taken that it is more important in a democratic society that a press be free from both government and judicial control.

57. Importantly, the Court noted further:

“...the existence of a public interest publication strengthens the case for not granting an injunction. Again, in the majority of situations whether the public interest is involved or not would be obvious. In the grey area cases public interest, if it exists, is unlikely to be decisive.”

8 Australia's ICJ application on whaling against Japan

The migratory habits of Southern Ocean whales

1. According to the Sea Sheppard Conservation Society website:

"In May of each year, the northern whale migration begins. Humpback (at least 1,200 in number) and Southern Right whales make their way from the food-rich southern ocean to mating and breeding grounds in the warm sub-tropical northern waters. The 5,000 km northern migration follows routes around New Zealand and up the coast of Australia – in the east to the Great Barrier Reef, and in the west to areas around and north of Shark Bay and Ningaloo Reef.

The whales then return south in November to the colder seas to grow and mature."

It is here that the International Whaling Commission declared a Southern Ocean Sanctuary in which Japan conducts its Antarctic whaling hunt. This should not be confused with the Australian Whale Sanctuary declared by the federal government some time ago under the federal *Environment Protection and Biodiversity Conversation Act 1999*.

2. The Dwarf Minke whale also migrates from the Southern Ocean Sanctuary to northern waters proximate to the Great Barrier Reef. According to a program screened on Channel 7 on 29 August 2010, they were only discovered as a species in 1981. Despite the name 'dwarf', these whales can be up to 8 metres in length and 5 tonnes in weight. They are distinct from the Minke whale, which also inhabits the Southern ocean. The program focused upon the unique interaction of Dwarf Minke whales, mainly adolescent, with people in the waters off the Great Barrier Reef.

The 2010 IWC meeting

3. The International Whaling Commission held its most recent meeting in Agadir, Morocco in June 2010. At this meeting, the IWC considered a proposal by the Chairs to permit limited commercial whaling, but which would in fact sanction Iceland, Japan and Norway killing 13,000 whales over a 10 year period. It would also have permitted the taking of whales in the IWC whale sanctuary in the Southern Ocean and threatened species to be killed, according to a media release of 19 June 2010 issued by Peter Garrett as Australia's Minister for Environment Protection and representative at the IWC meeting. Mr Garrett said in the media release:

“Australia’s own proposal for IWC reform seeks nine key improvements to the Chairs’ plan, including an end to so-called ‘scientific’ whaling, an end to Southern Ocean whaling, and whaling on vulnerable species, and the rigorous use of science.”

4. The Chairs’ proposal failed to secure agreement. This was not surprising as the European and Latin American blocs together with Australia were keen for whaling in the Southern Ocean to be brought down to zero. Following the IWC meeting, Japan’s Vice-Minister of Agriculture, Forestry and Fisheries, Ms Yasue Funayama said:

“Of course if it was indeed the case that zero had to be the number for proper management of the whales – if it was in a critical situation – then of course Japan would agree that it had to be brought down to zero.

However, we do have evidence that the whale stock is sustainable if it is contained under a certain level of catch, and therefore we fail to understand why it has to be brought down to zero.”

The answer given by Japan’s opponents is that it is not a question of whether the whale stock is sustainable, but whether whales should be taken from the IWC declared Southern Ocean whale sanctuary. In any event, the more central question is whether Japan’s whaling activities are conducted “for the purposes of scientific research” where the number of whales taken should not turn on whether the population is sustainable as such, but on whether such taking of whales is necessary for purported scientific research and, whether in fact, the whales are taken for scientific research by comparison with commercial hunting, including for the sale of whale meat for consumption both in Japan and elsewhere.

Non-lethal research

5. The national newspaper, 'The Australian' reported on 27 August 2010 on the development by Australian scientists of a new non-lethal way in which to study dolphins and whales. Marine animal researchers have relied on gathering the animals' DNA by shooting a dart into the skin of an animal to get a tissue sample. The new "blow sampling" method developed by Australian scientists enabled scientists to gather crucial DNA information without potentially harming the animal, discrediting Japanese arguments that a whale needs to be killed. Blow sampling captures the air and the equivalent of spit expelled when the animal comes up for air.

Australia files its ICJ Application against Japan

6. Shortly before the IWC meeting in June, Australia filed its Application against Japan, and its whaling in the Antarctic, in the Registry of the International Court of Justice. Article 38 of the ICJ Rules of Court provides, inter alia:

- “1. *When proceedings before the Court are instituted by means of an application addressed as specified in Article 40, paragraph 1, of the Statute, the application shall indicate the party making it, the State against which the claim is brought, and the subject of the dispute.*
2. *The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.*”

7. The Application was filed on 31 May 2010.⁸¹ However, it is plain that the proceeding before the ICJ will take some years. For example, by an order made by the International Court of Justice on 13 July 2010, the time limits for the filing of the written pleadings were directed to be 9 May 2011 for the “Memorial of Australia”, and 9 March 2012 for the “Counter-Memorial of Japan”. Article 45 of the ICJ Rules of Court provides:

- “1. *The pleadings in a case begun by means of an application shall consist, in the following order, of: a Memorial by the applicant; a Counter-Memorial by the respondent.*
2. *The Court may authorize or direct that there shall be a Reply by the applicant and a Rejoinder by the respondent if the parties are so agreed, or if the Court decides, proprio motu or at the request of one of the parties, that*

⁸¹ A copy of Australia's Application may be obtained from the Barristers Animal Welfare Panel website www.bawp.org.au. The Application is some 43 paragraphs together with an appendix.

these pleadings are necessary.”

As to what is the content of a memorial and a counter-memorial, Article 49 provides:

- “1. *A Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions.*
2. *A Counter-Memorial shall contain: an admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial; a statement of law in answer thereto; and the submissions.*
3. *The Reply and Rejoinder, whenever authorized by the Court, shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them.*
4. *Every pleading shall set out the party's submissions at the relevant stage of the case, distinctly from the arguments presented, or shall confirm the submissions previously made.”*

The December 2007 Aide-Memoire

8. Before turning to the Application, it is in particular pertinent to note that on 21 December 2007 Australia and 29 other countries and the European Commission sent an Aide-Memoire to the government of Japan to inform Japan of their “strong objection to the resumption of the second Japanese Research Program ... in the Antarctic.” It is this Aide-Memoire which is reproduced as an annexure to Australia’s ICJ Application, as such documents relied upon by the applicant are required under ICJ Rules of Court to be annexed. The Aide-Memoir drew attention “... to the availability of non-lethal research techniques to obtain adequate data for biological, population and management purposes, rendering Japan’s lethal research program unnecessary.” It concluded urging Japan to “... cease all its lethal scientific research on whales and assure the immediate return of the vessels” implementing its research program.
9. Japan responded by stating that its program’s purpose was to undertake research on the appropriate means of managing whaling and was in line with the relevant international conventions. Japan stated that whilst it would not change its research program, it would postpone its plans to hunt humpback whales whilst the IWC considered proposals for “normalising” the taking of whales.

Australia's Special Envoy on Whale Conservation

10. As part of its diplomatic endeavour, Australia also appointed a Special Envoy on Whale Conservation whose role was to engage Japan and other significant IWC members on the question of Japan's scientific program. The Special Envoy's endeavours however, including discussions held with the government of Japan, have failed to produce any real improvement, let alone change of course on the part of Japan.

The focus of the ICJ dispute

11. The focus of the dispute before the International Court of Justice turns on what is described as the Second Phase of Japan's Whale Research Program under Special Permit in the Antarctic, known as "JARPA II", in alleged breach of Japan's obligations under the International Convention for the Regulation of Whaling, as well as other international obligations for the preservation of marine mammals and the marine environment.
12. The key allegations in Australia's Application are as follows.

"Japan's obligations under the ICRW"

5. *In 1982 the IWC adopted under Article V(1)(e) of the ICRW a "moratorium" on whaling for commercial purposes, fixing the maximum catch of whales to be taken in any one season at zero. This was brought into effect by the addition of paragraph 10(e) to the Schedule to the ICRW which provides that:*

"... catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/1986 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice..."

Japan objected to paragraph 10(e) within the prescribed period but subsequently withdrew its objection. [emphasis added]

6. *"In 1994 the IWC adopted under Article V(1)(c) of the ICRW the Southern Ocean Sanctuary. This was brought into effect by the addition of paragraph 7(b) of the Schedule to the ICRW which provides that:*

"... commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary ... This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission."

Japan objected to paragraph 7(b) within the prescribed period in relation to Antarctic minke whale stocks and has not subsequently withdrawn its objection. [emphasis added]

7. *Under the Schedule to the ICRW, Japan is therefore obliged:*
 - (a) *by paragraph 10(e), to refrain from killing all whale stocks for commercial purposes; and*
 - (b) *by paragraph 7(b), to refrain from commercial whaling in the Southern Ocean Sanctuary for all whale stocks other than minke whale stocks.*
8. *In accordance with Article 26 of the Vienna Convention on the Law of Treaties and with customary international law, Japan is obliged to perform those obligations in good faith.*

Conduct of Japan

9. *Following the introduction of the moratorium, Japan ostensibly ceased whaling for commercial purposes. But at virtually the same time Japan launched the “Japanese Whale Research Program under Special Permit in the Antarctic” (“JARPA I”)⁸² which it purported to justify by reference to Article VIII of the ICRW, under which a Contracting Government may issue special permits to its nationals authorizing that national to “kill, take and treat whales for the purposes of scientific research ...” (emphasis added)*
10. *JARPA I commenced in the 1987/88 season and continued until the 2004/5 season. The focus of JARPA I was the killing and taking of Antarctic minke whales (*Balaenoptera bonaerensis*) within the Southern Ocean Sanctuary. Approximately 6,800 Antarctic minke whales were killed in Antarctic waters under JARPA I. This compares with a total of 840 whales killed globally by Japan for scientific research in the 31 year period prior to the moratorium. Whale-meat caught during JARPA I was taken to Japan where it was placed on commercial sale.*
11. *JARPA II commenced in the 2005/06 season with a two-year feasibility study. The full-scale JARPA II then commenced in the 2007/08 season. Although Japan has purported to justify JARPA II by reference to the special permit provision in Article VIII of the ICRW, the scale of killing, taking and treating carried out under this program greatly outweighs any previous practice undertaken on the basis of scientific permits in the history of the IWC.”*
13. The reference in paragraph 8 of the Application to ‘customary international law’ is a reference to “... rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.”⁸³ The Statute of the International Court of Justice acknowledges the existence of customary international law in Article 38(1)(b), and indeed,

82 The whaling program is conducted pursuant to permits granted by the Japanese Government to the Institute of Cetacean Research, an organization established under Japanese law.

83 Rosenne, *Practice and Methods of International Law*, p.55.

provides that the Court in determining disputes submitted to it shall do so in accordance with international law and apply "... international custom, as evidence of a general practice accepted as law."

14. Further key parts of Australia's Application may be noted.

"Refusal of Japan to accept recommendations of the IWC

17. *Under Article VI of the ICRW the IWC may from time to time make recommendations to any or all parties on any matters which relate to whales or whaling and to the objectives and purposes of the ICRW which include, first and foremost, "safeguarding for future generations the great natural resources represented by the whale stocks".*
18. *The IWC has made numerous recommendations to Japan that it not proceed with JARPA II...*
19. *In 2003 the IWC called upon Japan to halt the JARPA program, or to revise it so that it is limited to non-lethal research methodologies ...*
20. *In 2005 the IWC:*
- "STRONGLY URGE[D] the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means."⁸⁴*
21. *In 2007 the IWC:*
- "CALL[ED] UPON the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Whale Ocean Sanctuary."⁸⁵*
22. *Japan has refused to comply with any of these recommendations.*
- ...
37. *Moreover, having regard to the scale of the JARPA II program, to the lack of any demonstrated relevance for the conservation and management of whale stocks, and to the risks presented to targeted species and stocks, the JARPA II program cannot be justified under Article VIII of the ICRW.*
38. *Further, Japan has breached and is continuing to breach, inter alia, the following obligations:*
- (a) under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"),⁸⁶ the Fundamental Principles contained in Article II in relation to "introduction from the sea" of an*

84 IWC Res 2005-1: <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm>.

85 IWC Res 2007-I: <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm>.

86 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, 993 UNTS 244.

*Annex I listed specimen*⁸⁷ other than in “exceptional circumstances”, and the conditions in Article III(5) in relation to the proposed taking of humpback whales under JARPA II,⁸⁸ and

(b) *under the Convention in Biological Diversity,*⁸⁹ the obligations to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Article 3), to cooperate with other Contracting Parties, whether directly or through a competent international organization (Article 5), and to adopt measures to avoid or minimize adverse impacts on biological diversity (Article 10(b)).

39. *These provisions are to be interpreted and applied in the light of each other, and of Japan’s obligations under customary international law.*

Remedies sought by Australia

40. *For these reasons, and reserving the right to supplement, amplify or amend the present Application, Australia requests the Court to adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean.*

41. *In addition, Australia requests the Court to order that Japan:*

(a) *cease implementation of JARPA II;*

(b) *revoke any authorisations, permits or licences allowing the activities which are the subject of this application to be undertaken; and*

(c) *provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.”*

15. As stated earlier, it will be seen from the foregoing that Australia in its Application relies upon the Southern Ocean Sanctuary declared by the IWC, and not the Australian Whale Sanctuary declared by the federal Government under the federal *Environment Protection and Biodiversity Conservation Act* 1999. If Australia had sought to rely upon the federal statute, it would obviously have put at risk and in issue Australia’s claim to sovereignty over part of the Antarctic, a claim recognised by only five nations, including Britain and New Zealand.

The treatment of other marine animals

16. A species of endangered turtles and vulnerable dugongs in Far North Queensland are

87 Annex I includes ... “all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized under exceptional circumstances.” (CITES, Article II(1), “Fundamental Principles”).

88 While all three whale species targeted by JARPA II are listed in Annex I of CITES, Japan has entered reservations as to minke and fin whales.

89 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, 1760 UNTS 79.

permitted, by a general exemption conferred by section 8 of Queensland's *Animal Care and Protection Act 2001*, to be hunted and killed because they are part of a traditional hunt.

17. Following a turtle hunt, turtles may be turned on their backs for days, or stacked on top of each other. These practices often result in their death before the animals are due to be finally killed. Further practices include hacking off their flippers, or slicing off their plastron (underside of the shell), while the animal is still alive and fully conscious.
18. Dugongs may be harpooned in the back, or in the head, when they surface for air. According to the Animals Australia website, dugongs can drag the boat in an endeavour to swim away. Thus it can take several hours for an adult male to die from this exertion. He may otherwise be killed in one of the following ways, namely, by drowning from his head being held under water, suffocation from having his nostrils plugged, or by being dragged under the keel of the boat until he dies. Animals Australia's website makes the point that these traditional hunting methods are no justification for such cruelty. It can be reasonably argued that an act is either humane or it is not, and that it does not become less inhumane because it is cloaked in the name of tradition.
19. There is too the traditional hunt conducted in Canada by the clubbing of baby seals. Or again, Namibia conducts an annual kill of a seal population, which is viewed by animal welfarists as the cruellest hunt in the world.
20. Finally, a website www.fishcount.org.uk details the suffering in the trillions of fish caught by different methods of commercial fishing. Publicity normally attends only the reports of dolphins and turtles, for example, caught in trawling nets.
21. The short point is that marine animals appear to inhabit a world well removed from ordinary human cognition, and as a result, receive little protection. Hopefully, if the International Whaling Commission should finally secure a zero result for the commercial hunting of whales, it or a body of similar constitution could embark upon the serious object of addressing

traditional hunts and methods of commercial fishing.

9 A critical analysis of Australia's whaling case against Japan in the ICJ

by Gian-Maria Antonio Fini

Background and facts

1. Australia's decision to institute proceedings against Japan before the International Court of Justice ('ICJ') in The Hague derives primarily from a dispute between the two states over interpretation of the *International Convention for the Regulation of Whaling* ('ICRW').⁹⁰ The purpose of the ICRW is to provide for the 'proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.⁹¹

Under the ICRW, the state parties to the convention meet annually at the International Whaling Commission ('IWC') whose main duty is to keep under review and revise as necessary the *Schedule to the ICRW* ('*Schedule*').⁹² The *Schedule* governs the conduct of whaling throughout the world,⁹³ and is an integral part of the Convention.⁹⁴ Amendments to the *Schedule* require a three-fourths majority of those members voting,⁹⁵ and a Contracting State may not be bound by an amendment if it objects within ninety days of its notification.⁹⁶

2. Over the past few decades, the *Schedule* has been modified considerably by the IWC and has

90 Donald R Rothwell, *Australia v. Japan: JARPA II Whaling Case before the International Court of Justice* (2 July 2010) The Hague Justice Portal, 1 <<http://www.haguejusticeportal.net/eCache/DEF/11/840.html>>; *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) ('ICRW').

91 ICRW preamble.

92 International Whaling Commission, *IWC Information* (4 August 2010) <<http://www.iwcoffi ce.org/commission/iwcmain.htm>> ('IWC Information').

93 Ibid.

94 Frans A Nelissen and Steffen van der Velde, *Australia Attempts to Harpoon Japanese Whaling Program* (5 July 2010) The Hague Justice Portal, 2 <<http://www.haguejusticeportal.net/eCache/DEF/11/843.html>>.

95 ICRW art III(2).

96 ICRW art V(3).

gradually become more conservation oriented.⁹⁷ For instance, in 1982 the IWC adopted a moratorium on whaling for commercial purposes in accordance with Article V(1)(e) of the ICRW. The IWC brought the moratorium into effect by inserting paragraph 10(e) to the *Schedule*, which provides:

*Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero.*⁹⁸

Japan filed an objection to this amendment to the *Schedule*, as did Norway, Peru, and the Soviet Union.⁹⁹ However, at the insistence of the United States, Japan subsequently withdrew its objection.¹⁰⁰

3. Furthermore, in 1994, the IWC created a Southern Ocean Sanctuary ('SOS') pursuant to Article V(1)(c) of the ICRW.¹⁰¹ The SOS prohibits all commercial whaling within its limits, and is subject to review after 10 years.¹⁰² Japan lodged an objection within the prescribed period to the creation of the SOS to the extent that it applies to the Antarctic minke whale stocks.¹⁰³

Notwithstanding the moratorium on commercial whaling, there is an exception for so-called *special permit* or *scientific* whaling under Article VIII of the ICRW. Article VIII provides that:

*Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ... and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.*¹⁰⁴

4. Soon after the introduction of the moratorium Japan announced its intention to commence the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA). JARPA commenced in the 1987/88 season and concluded after the 2004/5 season, and principally focused upon taking minke whales in the Southern Ocean with an initial sample size of 300 (+ or – 10%) per season.¹⁰⁵ The sample size was increased to 400 (+ or – 10%) from the 1995/6 season.¹⁰⁶

97 Rothwell, above n 1, 1.

98 Schedule to the International Convention for the Regulation of Whaling (June 2009) International Whaling Commission <<http://www.iwcoffice.org/commission/schedule.htm>> para 10(e) ('Schedule to the ICRW').

99 A W Harris, 'The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science' (2005) 29 William & Mary Environmental Law & Policy Review 375, 379–381.

100 Maria Clara Maffei, 'The International Convention for the Regulation of Whaling' (1997) 12 International Journal of Marine and Coastal Law 287, 298.

101 The Southern Ocean Sanctuary declaration was brought into effect by inserting paragraph 7(b) to the Schedule to the ICRW.

102 Schedule to the ICRW para 7(b).

103 Schedule to the ICRW para 7(b).

104 ICRW art VIII.

105 Rothwell, above n 1, 2.

106 Ibid.

A number of IWC Resolutions in 1986,¹⁰⁷ 1987¹⁰⁸ and during the 1990s expressed concern about the issuing by contracting states of special permits for scientific whaling. Moreover, Resolutions 2001-7¹⁰⁹ and 2003-3¹¹⁰ called upon Japan to suspend the lethal aspects of its program. Other IWC Resolutions also raised issues concerning JARPA's consistency with the SOS.¹¹¹ It should be noted that Adopted Resolutions of the IWC are non-binding but are intended to reflect the general views of the Commission on an issue.¹¹²

5. Once the JARPA program was completed, Japan immediately announced its intention to conduct the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II). JARPA II commenced in the 2005/6 season with a two-year feasibility study followed by a full-scale program that commenced in the 2007/8 season and has no fixed end date. The sample size during the feasibility study was 850 (+ or – 10%) minke whales and 10 fin whales.¹¹³ Once the full-scale program commenced in 2007/8 the sample size included 850 (+ or – 10%) minke whales, 50 humpback whales, and 50 fin whales; however, at the insistence of the United States, Japan unilaterally undertook not to take any humpback whales under JARPA II.¹¹⁴

6. According to the Institute of Cetacean Research, JARPA II has the following objectives:

*1) Monitoring of the Antarctic ecosystem, 2) Modelling competition among whale species and developing future management objectives, 3) Elucidation of temporal and spatial changes in stock structure and 4) Improving the management procedure for the Antarctic minke whale stocks.*¹¹⁵

In addition to lethal sampling, JARPA II also includes non-lethal research techniques such as

107 International Whaling Commission, Resolution 1987-1: Resolution on Scientific Research Programmes (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>.

108 International Whaling Commission, Resolution 1987-1: Resolution on Scientific Research Programmes (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>.

109 International Whaling Commission, Resolution 2001-7: Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling (5 May 2004) <<http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm>>.

110 International Whaling Commission, Resolution 2003-3: Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling (5 May 2004) <<http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm>> ('Resolution 2003-3').

111 International Whaling Commission, Resolution 1996-7: Resolution on Special Permit Catches by Japan (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>; International Whaling Commission, Resolution 1998-4: Resolution on Whaling under Special Permit (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>.

112 International Whaling Commission, Resolutions (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/resolutionmain.htm>> ('Resolutions').

113 Rothwell, above n 1, 3.

114 Ibid.

115 International Whaling Commission, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources (2005) <<http://www.icrwhale.org/eng/SC5701.pdf>> ('Plan for JARPA II').

sighting surveys, biopsy sampling, acoustic surveys for prey species, and the collection of oceanographic data.¹¹⁶ Since the announcement of JARPA II, the IWC has issued two Resolutions urging Japan to suspend the lethal aspects of the program.¹¹⁷

7. Australia has persistently raised its objections to Japan's conduct of JARPA and JARPA II.¹¹⁸ For example, an Aide-memoire to Japan from Australia and numerous other countries informed the Government of Japan of its "strong objection to the resumption of ... JARPA II" and strongly urged Japan to "cease all its scientific research on whales".¹¹⁹

Australian Application

8. On 31 May 2010, Australia filed its application against Japan in the Registry of the ICJ in respect of Japan's whaling in the Antarctic. Australia's application alleges that:

*Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II') [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ('ICRW'), as well as its other international obligations for the preservation of marine mammals and the marine environment.*¹²⁰

Australia contends that:

*Japan has breached and is continuing to breach the following obligations under the ICRW: (a) the obligation under paragraph 10(e) of the Schedule to the ICRW to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes; and (b) the obligation under paragraph 7(b) of the Schedule to the ICRW to act in good faith to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.*¹²¹

9. Australia's application asserts that, in accordance with Article 26 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')¹²² and with customary international law, Japan is obliged to perform its obligations under paragraphs 10(e) and 7(b) of the *Schedule to the ICRW* in good faith.¹²³

116 Ibid.

117 See International Whaling Commission, Resolution 2005-1: Resolution on JARPA II (24 June 2005) <<http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm>> ('Resolution 2005-1'); International Whaling Commission, Resolution 2007-1: Resolution on JARPA (30 October 2007) <<http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm>>.

118 Rothwell, above n 1, 3.

119 Dispute Concerning Japan's JARPA II Program on "Scientific Whaling" (Australia v Japan) (Application Instituting Proceedings, International Court of Justice, 31 May 2010) annex 1 ('Australian Application').

120 Ibid [2].

121 Ibid [36].

122 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('Vienna Convention').

123 Australian Application, above n 30, [8].

10. The Australian application claims that:

*having regard to the scale of the JARPA II program, to the lack of any demonstrated relevance for the conservation and management of whale stocks, and to the risks presented to targeted species and stocks, the JARPA II program cannot be justified under Article VIII of the ICRW.*¹²⁴

Australia alleges that Japan has breached its obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES'),¹²⁵ and the *Convention on Biological Diversity*¹²⁶ ('CBD').¹²⁷

11. Australia is seeking a declaration by the ICJ that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean.¹²⁸ Furthermore, Australia seeks orders that Japan: (a) cease implementation of JARPA II; (b) revoke any Scientific Permits; and (c) provide assurances and guarantees from the Government of Japan that they will not take any further actions under JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.¹²⁹

Legal issues under the ICRW

Jurisdiction and admissibility

12. The jurisdiction of the ICJ to hear the dispute may be challenged by Japan. Japan may raise arguments as to: (1) whether disputes concerning the interpretation and application of the ICRW may be settled by the ICJ; (2) whether there is an *existing dispute* between the two nations; and (3) the *jus standi* of Australia.

In relation to the first contention, neither the ICRW nor its *Rules of Procedure* provide for any dispute settlement procedures.¹³⁰ Although state parties may air their grievances with other contracting states within the IWC, there are no preordained procedures to be followed in the event a dispute arises concerning the interpretation of the ICRW.¹³¹ Without any dispute settlement procedures provided for under the ICRW, Australia may rely on the compulsory jurisdiction of the ICJ. Both Australia and Japan have accepted the compulsory jurisdiction of the ICJ in relation to any state accepting the same obligation by virtue of making declarations

124 Ibid [37].

125 Convention for the International Trade in Endangered Species of Wild Fauna and Flora, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('CITES').

126 Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('CBD').

127 Australian Application, above n 30, [38].

128 Ibid [40].

129 Ibid [41].

130 Nelissen and van der Velde, above n 5, 4.

131 Natalie Klein, 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan' (2009) 21 *Georgetown International Environmental Law Review* 143, 192.

under Article 36(2) of the *Statute of the International Court of Justice*.¹³² Thus, in conformity with the parties' Optional Clause declarations,¹³³ the ICJ may settle disputes between the two nations concerning the interpretation and application of the ICRW and customary international law.

13. In relation to the second issue, Australia needs to demonstrate there is an *existing dispute* between Australia and Japan.¹³⁴ Furthermore, 'whether there exists an international dispute is a matter for objective determination'.¹³⁵ The evidence would suggest there is an *existing dispute* between the two nations. For example, Australia has persistently raised objections in relation to JARPA II within the IWC, in an Aide-memoire to Japan, in bilateral discussions between the two states, and through public statements by government Ministers.¹³⁶
14. As to the *jus standi* of Australia, Japan may argue that Australia has no legal interest in Japan's whaling activities.¹³⁷ The *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ('*Draft Articles*') provide some guidance on the issue:

*Any state other than an injured state is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.*¹³⁸

In line with the *Draft Articles*, Australia may argue it has a right to bring a claim against Japan since Japan's obligations under the ICRW are owed to a group of contracting states including Australia, and those obligations were established to protect the collective interest of the group.¹³⁹ Furthermore, it would be surprising if a contracting state to the ICRW could not bring a claim before the ICJ, as it would imply that no state could bring a claim.¹⁴⁰

132 For Australia, see A J G Downer, Australian Declaration (22 March 2002) International Court of Justice <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=A>

U>. For Japan, see Kenzo Oshima, Japanese Declaration (9 July 2007) International Court of Justice <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=JP>> ('Japanese Declaration').

133 Optional clause declarations are voluntary declarations made under Article 36(2) of the Statute of the International Court of Justice conferring jurisdiction on the ICJ to settle certain types of disputes.

134 Nuclear Tests Case (Australia v France) (Judgment) [1974] ICJ Rep 253, 270–1; South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections) [1962] ICJ Rep 319, 328; Mavrommatis Palestine Concessions Case (Jurisdiction) [1924] PCIJ (ser A) No 2, 7.

135 Nuclear Tests Case (Australia v France) (Judgment) [1974] ICJ Rep 253, 271.

136 Rothwell, above n 1, 3.

137 Nelissen and van der Velde, above n 5, 4.

138 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN GAOR, 53rd sess, Supp No 10, UN Doc A/56/10 (3 August 2001), art 48(1) ('Draft Articles').

139 Draft Articles art 48(1)(a). See also Nelissen and van der Velde, above n 5, 4.

140 Nelissen and van der Velde, above n 5, 4.

Interpreting the ICRW

15. The ICRW is to be interpreted in accordance with the following provisions of

Article 31 of the *Vienna Convention*:

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

...

3. *There shall be taken into account, together with the context:*

(a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*

(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*

(c) *any relevant rules of international law applicable in the relations between the parties.*¹⁴¹

...

Article 31(1) of the *Vienna Convention* providing that a treaty be interpreted in good faith requires giving effect to the object and purpose of the treaty. The preambular paragraphs of the ICRW indicate that the objective of the convention is to ‘achieve the optimum level of whale stocks’ to ensure their ‘proper and effective conservation and development ... and thus make possible the orderly development of the whaling industry’.¹⁴² Thus, although concerns about conservation feature in the preamble to the ICRW, these concerns relate to ensuring the ongoing viability of the whaling industry by maintaining stocks at ‘appropriate levels for ongoing utilization’.¹⁴³

16. Over sixty years later, these objectives are at odds with recent developments under the ICRW, such as the moratorium on commercial whaling and the creation of the SOS. Thus, Australia may argue that the ICRW should now be understood in a different light.¹⁴⁴ Professor Triggs is supportive of a dynamic interpretation of the ICRW:

*Like comparable constitutive international legal instruments, the Whaling Convention has provided a framework for the creation of norms of management that would not have been anticipated at the time the agreement was negotiated. As social values and scientific and other priorities have changed, so too have the practices developed under the Whaling Convention.*¹⁴⁵

A 2006 report by an International Panel of Independent Legal Experts (‘Paris Panel’) adopted

141 Vienna Convention art 31(1), (3).

142 ICRW preamble.

143 Klein, ‘Whales and Tuna’, above n 42, 200–1.

144 Ibid 201.

145 Gillian Triggs, ‘Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?’ (2000) 5 *Asia Pacific Journal of Environmental Law* 33, 47.

such an approach and argued that, in light of the object and purpose of the ICRW, conservation now has primacy in its interpretation.¹⁴⁶ Furthermore, some commentators, citing *state practice* and developments in the Law of the Sea, have argued that the ICRW ought to be interpreted as having evolved into a more *protectionist* agreement.¹⁴⁷ However, a dynamic approach to interpretation of the ICRW would need to be employed with restraint so as not to subvert the convention's clear words and objectives.¹⁴⁸ As Professor Birnie has noted:

*[The Commission] can interpret the treaty broadly to achieve its general purposes, e.g., of conservation and development of stocks. Although such interpretation can be broad, it cannot be perverse, and must conform to the objects and purposes of the convention and to the general rules of international law concerning treaties.*¹⁴⁹

Thus a broad interpretation of the ICRW could be adopted that takes into account the evolving practices of the IWC, such as the moratorium on commercial whaling and the creation of the SOS. However, such an interpretation may not alter the positive terms of the treaty.¹⁵⁰

Is there an absolute sovereign right to issue scientific permits?

17. Japan may argue that Article VIII confers an absolute sovereign right on member states to issue special permits for scientific whaling and therefore, since JARPA II has been conducted in accordance with Article VIII, JARPA II is permissible under the ICRW. If Japan's argument were to succeed, it is unlikely the ICJ would have to consider any evidence concerning the scientific value of JARPA II. Some commentators have supported such a construction of Article VIII, asserting that it recognizes treaty parties' absolute sovereign right to issue permits in their discretion.¹⁵¹ Furthermore, it has been argued that national prerogatives in decisions regarding research, and the obligation to utilize any whales taken under a scientific program, are so integral to the language and structure of the ICRW that any interpretation that countenances outlawing or limiting research is simply unacceptable.¹⁵²
18. The discretionary power to issue special permits is broad. The ICRW does not require that member states obtain IWC approval prior to issuing special permits, and does not provide any guidance as to the meaning of *scientific research*.¹⁵³ However, other factors tend to indicate that the

146 Laurence Boisson de Chazournes (chair), 'International Panel of Independent Legal Experts – Special Permit ("Scientific") Whaling Under International Law' (Report, International Fund for Animal Welfare, May 2006) 71–77 ('Paris Panel Report').

147 Eldon V C Greenberg, Paul S Hoff and Michael I Goulding, 'Japan's Whale Research Program and International Law' (2002) 32 California Western International Law Journal 151, 160.

148 Triggs, above n 57, 50.

149 Quoted in Greenberg, Hoff and Goulding, above n 59, 160.

150 Triggs, above n 57, 50.

151 Greenberg, Hoff and Goulding, above n 59, 158.

152 Ibid 160–1.

153 Triggs, above n 57, 51.

discretion to issue scientific permits is not without limit.¹⁵⁴ First, Article VIII of the ICRW requires that member states ‘report at once to the Commission all such authorizations which it has granted’.¹⁵⁵ Second, the *Schedule to the ICRW* requires contracting states to submit proposed permits for prior review by the Scientific Committee and allow the Committee sufficient time to review and comment on them.¹⁵⁶ Third, there is at least an implication that member states are required to issue directions concerning the use or sale of whales taken under special permit(s).¹⁵⁷ Fourth, all scientific information collected pursuant to any special permit(s) is to be transmitted to a body designated by the IWC.¹⁵⁸ Moreover, Article VIII(4) emphasizes the importance of scientific information for ‘sound and constructive management of the whale fisheries’ and requires contracting states to ‘take all practicable measures to obtain such data’.¹⁵⁹

Lastly, and perhaps most significantly, an unfettered discretion in contracting states to issue special permits may undermine the conservation measures agreed by the contracting states to the ICRW. Consequently, it has been suggested that the right to issue special permits ought to be interpreted strictly.¹⁶⁰ These factors would suggest that the right to issue special permits under the ICRW is not an absolute sovereign right.¹⁶¹ If that were so, the ICJ may consider evidence concerning the scientific value of JARPA II.

Commercial or scientific whaling

19. The crux of Australia’s claim is that JARPA II is unlawful because it is commercial whaling carried out in the guise of scientific research and hence in violation of the ICRW. Thus, a finding of fact would need to be made as between competing evidence that JARPA II is research for a *scientific purpose* and evidence that the research is a ‘sham or device to avoid the primary treaty obligation’.¹⁶²
20. Australia may argue that the sheer number of whales taken under JARPA II and Japan’s refusal to suspend the lethal aspects of its program is evidence that JARPA II is not truly for a *scientific purpose*.¹⁶³ In regard to the number of whales taken, the IWC’s Resolution 2005-1 expressed concern that more than 6,800 Antarctic minke whales had been killed under the 18 years of JARPA I, compared with only 840 whales killed globally by Japan for scientific research in the

154 Ibid.
 155 ICRW art VIII(1).
 156 Schedule to the ICRW para 30.
 157 Triggs, above n 57, 51.
 158 ICRW art VIII(3).
 159 ICRW art VIII(4).
 160 Triggs, above n 57, 50.
 161 Ibid 51.
 162 Ibid 53.
 163 Klein, ‘Whales and Tuna’, above n 42, 201.

31 year period prior to the moratorium.¹⁶⁴ Furthermore, one commentator has argued that ‘the total number of whales of various species now being taken for research greatly exceeds the number necessary in order to gather sufficient tissue samples for scientific tests’.¹⁶⁵ Other commentators have argued that the quantity of whales killed under JARPA II is equivalent to a commercial harvest.¹⁶⁶

21. In regard to the lethal aspects of JARPA II, the Paris Panel found that lethal research needs to be ‘absolutely necessary and unavoidable’ in order to comply with Article VIII.¹⁶⁷ Thus, Australia may argue that JARPA II is in violation of Article VIII since viable research may be undertaken through non-lethal means,¹⁶⁸ indicating the lethal aspects of JARPA II are not ‘absolutely necessary and unavoidable’. Furthermore, the IWC has expressed concern about Japan’s use of lethal research in a number of Resolutions.¹⁶⁹
22. Although in accordance with Article VIII(2), any whales taken under special permit may be processed and sold,¹⁷⁰ Australia may argue that the fact that whale meat caught under JARPA II is placed on commercial sale indicates the program is primarily a commercial activity.¹⁷¹ As it is, the Institute of Cetacean Research (the Japanese government-sponsored institution responsible for conducting JARPA II) derives 85% of its income from the commercial sale of whale products taken under special permit.¹⁷² In response to Australia’s claims that JARPA II is commercial whaling in disguise, Japan could be expected to lead evidence pointing up the scientific merit of JARPA II, such as the amount and type of data collected, its uses, and the goals of its research.¹⁷³ Japan may have to satisfy though a higher threshold than simply showing here that some scientific research is being carried out under JARPA II.¹⁷⁴ Triggs has argued

164 Resolution 2005-1, above n 28. Note, Resolutions of the IWC are not binding in nature: see Resolutions, above n 23.

165 Harris, above n 10, 383.

166 Natalie Klein, ‘Litigation over Marine Resources: Lessons for the Law of the Sea, International Dispute Settlement and International Environmental Law’ (2009) 28 *Australian Year Book of International Law* 131, 154.

167 Paris Panel Report, above n 58, 80.

168 Harris, above n 10, 383.

169 See International Whaling Commission, Resolution 1995-8: Resolution on Whaling under Special Permit in Sanctuaries (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>; International Whaling Commission, Resolution 1995-9: Resolution on Whaling under Special Permit (18 February 2010) <<http://www.iwcoffice.org/meetings/resolutions/searchRes.htm>>; Resolution 2003-3, above n 21. Note, Resolutions of the IWC are not binding in nature: see Resolutions, above n 23.

170 ICRW art VIII(2).

171 See Hague Justice Portal, Australia institutes proceedings against Japan at ICJ over whaling dispute (1 June 2010) <<http://www.haguejusticeportal.net/eCache/DEF/11/738.TGFuZz1FTg.html>>.

172 Peter H Sand, ‘Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)’ (2008) 17 *Review of European Community & International Environmental Law* 56, 64.

173 Klein, ‘Whales and Tuna’, above n 42, 203.

174 Triggs, above n 57, 52.

evidence of Japan's research points up that it provides little guidance for management; may be carried out by non-lethal means; requires only a small quantitative sample for reliable results; and is insignificant compared to the commercial uses of the whale meat.¹⁷⁵

In demonstrating the scientific merit of JARPA II, Japan may lead evidence including: (1) JARPA II is conducted under the auspices of the Institute for Cetacean Research, a non-profit research foundation subsidized by the Government of Japan, whose staff includes biologists and other experts trained in wildlife management;¹⁷⁶ (2) JARPA II involves not just lethal sampling, but also uses non-lethal research methods such as sighting surveys, biopsy sampling, acoustic surveys for prey species, and the collection of oceanographic data;¹⁷⁷ (3) aspects of its program may only be achieved through lethal sampling and, in any event, non-lethal research techniques are not feasible;¹⁷⁸ (4) JARPA II has been conducted in close coordination with the IWC Scientific Committee;¹⁷⁹ (5) Japan has been extremely diligent in submitting both its proposals and research results to the Scientific Committee;¹⁸⁰ (6) the program has produced many publications, many of which appear in peer-reviewed scientific journals;¹⁸¹ and (7) the program has answered many valid scientific questions relevant to management concerns.¹⁸² These factors have led some commentators to regard JARPA II as a legitimate scientific enterprise.¹⁸³

22. In construing the right to issue permits under Article VIII, it would be expected that regard would be had to the object and purpose of the ICRW. As mentioned above, the ICRW has evolved from an agreement for maintaining the ongoing viability of the whaling industry into a regime promoting conservation measures. This would not have been anticipated at the time it was negotiated.¹⁸⁴ Australia may argue that this implies that Article VIII should be interpreted strictly,¹⁸⁵ as a broader interpretation has the potential to undermine conservation measures under the convention.

Or it may be argued that Article VIII ought to be read narrowly as it constitutes an exception to

175 Ibid.

176 Greenberg, Hoff and Goulding, above n 59, 162.

177 Plan for JARPA II, above n 26.

178 See Greenberg, Hoff and Goulding, above n 59, 167.

179 Ibid 206.

180 Ibid.

181 Ibid.

182 Ibid.

183 See Greenberg, Hoff and Goulding, above n 59, 168.

184 See Sam Blay and Karen Bubna-Litic, 'The interplay of international law and domestic law: The case of Australia's efforts to protect whales' (2006) 23 *Environmental and Planning Law Journal* 465; Reuben B Ackerman, 'Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of Scientific Research, Culture and Tradition' (2002) 25 *Boston College International and Comparative Law Review* 323.

185 Triggs, above n 57, 50.

the general provisions in the ICRW.¹⁸⁶ In this respect, it could be said too that Article VIII should be read in conjunction with the IWC *Guidelines for the Review of Scientific Research Proposals*¹⁸⁷ ('*Guidelines*').¹⁸⁸ The *Guidelines* reflect criteria set out in IWC Resolution 2003-2,¹⁸⁹ which expressed the opinion that special permit whaling should only be permitted in exceptional circumstances; meet critically important research needs; satisfy criteria established by the Scientific Committee; be consistent with the Commission's conservation policy; be conducted using non-lethal research techniques; and ensure the conservation of whales in sanctuaries.¹⁹⁰

On the other hand, Japan may argue for a broad interpretation of Article VIII: one that permits research to be conducted on the terms and conditions that it thinks fit.¹⁹¹

Procedural obligations for lawful scientific whaling

23. It has been argued that various procedural requirements need to be met in order to comply with Article VIII.¹⁹² These procedural requirements stem from the fact that the Scientific Committee has the ability to review and comment on proposed permits and must be accorded sufficient time in doing so.¹⁹³

Whilst the Australian application does not allege breach of any such requirements by Japan, Australia may argue that Japan has breached its procedural obligations by not delaying the commencement of JARPA II. For the Scientific Committee did not have sufficient time to review and comment on the new permits before its commencement.¹⁹⁴ Australia may further argue that Japan has breached Article VIII, as it did not afford the Scientific Committee an opportunity to conduct 'the full scrutiny required under the Guidelines'.¹⁹⁵ In any event, it is unclear whether Japan has breached any procedural obligations. For it is uncertain whether such requirements even exist.

Southern ocean sanctuary

24. There has been some debate concerning the legality of the designation of the SOS by the

186 Paris Panel Report, above n 58, 52.

187 International Whaling Commission, *Guidelines for the Review of Scientific Research Proposals* (22 June 2010) <<http://www.iwcoffice.org/conservation/permits.htm#guidelines>>.

188 Klein, 'Whales and Tuna', above n 42, 203.

189 Ibid.

190 International Whaling Commission, Resolution 2003-2: Resolution on Whaling under Special Permit (5 May 2004) <<http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm>>.

191 Klein, 'Litigation over Marine Resources', above n 78, 156.

192 Paris Panel Report, above n 58, 59. See also Triggs, above n 57, 50–1.

193 These requirements are provided for in the Schedule to the ICRW para 30. See also Paris Panel Report, above n 58, 60–1.

194 Klein, 'Whales and Tuna', above n 42, 205.

195 Paris Panel Report, above n 58, 62.

IWC.¹⁹⁶ These concerns are primarily based on the grounds that there is a lack of scientific evidence justifying its designation and that it is not ‘necessary to carry out the objects and purposes’ of the ICRW.¹⁹⁷ However, in practice, with the exception of Japan, contracting states to the ICRW have accepted the validity of the SOS.¹⁹⁸

Although commercial whaling within the SOS is prohibited under the moratorium, scientific whaling remains available to contracting states.¹⁹⁹ Thus, if JARPA II is deemed to be in accordance with Article VIII, it will not be in contravention of the prohibition on commercial whaling within the SOS.²⁰⁰ On the other hand, if JARPA II is characterized as commercial whaling, then JARPA II violates the prohibition on commercial whaling within the SOS in respect of fin and humpback whales.²⁰¹

Abuse of right

25. One commentator has argued that if Japan’s research program is not characterized as undertaken for the ‘primary purpose of scientific research’, then the *abuse of right* doctrine becomes relevant.²⁰² The Australian application does not assert that Japan’s conduct in implementing JARPA II constitutes an *abuse of right*. Yet its relevance to the legal issues raised by Australia can be briefly noted.

The Paris Panel found that ‘[i]n international law, abuse of rights refers to a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State.’²⁰³ Japan’s conduct in implementing JARPA I and JARPA II has led some commentators to conclude that an argument of *abuse of right* by Japan may succeed.²⁰⁴ However, others argue that the so-called doctrine does not even exist in international law.²⁰⁵ Little guidance exists on the doctrine’s substantive content.²⁰⁶

Legal issues under the convention on biological diversity

26. Australia’s application also claims that Japan has breached and is continuing to breach its

196 Triggs, above n 57, 52.

197 Ibid.

198 Ibid.

199 Ibid.

200 See Triggs, above n 57, 52.

201 Japan lodged an objection to the designation of the SOS to the extent that it applies to Antarctic minke whales; therefore, Japan’s taking of minke whales within the SOS does not contravene the prohibition on commercial whaling within the SOS.

202 Triggs, above n 57, 37

203 Paris Panel Report, above n 58, 83.

204 Ibid 82–98; Triggs, above n 57, 37.

205 Greenberg, Hoff and Goulding, above n 59, 177.

206 Triggs, above n 57, 37–8.

obligations under the CBD, including: Article 3, which imposes an obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction; Article 5, which imposes a duty of cooperation; and Article 10(b), which imposes an obligation to adopt measures to avoid or minimize adverse impacts on biological diversity.²⁰⁷

Furthermore, the Paris Panel identified additional obligations under the CBD that may be implicated by JARPA II, including: Article 6, which imposes obligations related to the development of national strategies for the conservation and sustainable use of biological diversity; Article 8, which deals with in-situ conservation; and Article 14, which imposes an obligation to conduct an appropriate environmental impact assessment for projects that are likely to have significant adverse effects on biological diversity.²⁰⁸ There is little doubt that the mass slaughter of protected whales in the Antarctic would fall under these provisions.²⁰⁹

Moreover, it may be thought unlikely Japan can invoke the primacy of the ICRW provisions, as JARPA II may cause a ‘serious damage or threat to biological diversity’.²¹⁰ However, Australia’s only recourse under the CBD would be conciliation proceedings under Article 27(4), as Japan has not accepted any of the means of dispute settlement under Article 27(3).²¹¹ Consequently, it may be that the ICJ will not consider the merits of Australia’s claims under the CBD, given that Japan has entered into a reservation stating that its optional clause declaration ‘does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement’.²¹²

Legal issues under CITES

27. Australia’s application also claims that Japan has breached and is continuing to breach its obligations under CITES.²¹³ Whales are listed under Appendix I of CITES.²¹⁴ Therefore, in accordance with Article II(1), commercial trade in whales is generally prohibited.²¹⁵ However, it must be noted that Japan has reservations with respect to the listing of minke and fin whales.²¹⁶ Thus, Australia can only argue that the proposed taking of humpback whales under JARPA II is in contravention of Article III (‘Regulation of Trade in Specimens of Species Included in

207 Australian Application, above n 30, [36].

208 Paris Panel Report, above n 58, 115–116, 117, 119.

209 Sand, above n 84, 60.

210 CBD art 22(1).

211 Sand, above n 84, 60.

212 Japanese Declaration, above n 43. See also Sand, above n 84, 59.

213 Australian Application, above n 30, [36].

214 CITES appendix I.

215 CITES art II(1); Klein, ‘Whales and Tuna’, above n 42, 207.

216 CITES, Reservations Entered by Parties.

Appendix I').²¹⁷ Yet Japan has refrained from taking humpback whales under JARPA II. Accordingly, Japan cannot be said to be engaging in the commercial trade of humpback whales in contravention of Article III.²¹⁸

In any event, it may be that the ICJ cannot consider the merits of Australia's claims under CITES. Article XVIII(2) provides for binding third party arbitration proceedings for disputes that cannot be resolved by negotiation. This has the effect of excluding ICJ jurisdiction by virtue of its interaction with Japan's optional clause declaration under Article 36(2) of the *Statute of the International Court of Justice* (discussed above in relation to the CBD).²¹⁹

In summary

28. While Japan's optional clause declaration excludes ICJ jurisdiction for CITES and the CBD, it does not exclude ICJ jurisdiction to consider the merits of Australia's claims under the ICRW, which has no dispute settlement clause of its own.²²⁰ Accordingly, the outcome of Australia's impending case against Japan may turn on the ICJ's interpretation and application of the ICRW.
29. Plainly, the outcome of the case will be influenced by the court's approach to treaty interpretation. Japan's arguments support a literal, positivist approach to the convention's interpretation.²²¹ The strict wording of Article VIII permits Japan to conduct research under the terms and conditions that it thinks fit and that resolutions of the IWC are not binding in nature.²²² On the other hand, Australia's arguments can be expected to favour a more expansive interpretation of the ICRW requiring the ICJ to take into account developments in international environmental law since the convention was adopted, and ²²³ the development of the ICRW into a more conservation oriented agreement in a manner which does not subvert the convention's clear words and objects.

217 See Tim Stephens, Using CITES to Stop Japanese Whaling (21 December 2007) Sydney University Blogs <<http://blogs.usyd.edu.au/timstephens/2007/12/>>; Sand, above n 84, 63.

218 See Stephens, above n 135 ('Japan has made reservations in relation to a range of whale species but, very significantly, not humpbacks ... CITES applies with full force to this species and Japan will be in breach of its CITES obligations if it goes ahead and harvests humpbacks').

219 See Sand, above n 84, 59.

220 Ibid.

221 Klein, 'Whales and Tuna', above n 42, 208.

222 Klein, 'Litigation over Marine Resources', above n 78, 156.

223 Ibid.

10 Challenges of Prosecution and Enforcement

Challenges of prosecution

1. A law that is unenforced stands to be a law unobserved. Examination has been made in previous chapters of why little enforcement of State animal protection statutes takes place, or indeed fails to do so under the largely federal legal regime regulating the export trade in live animals. However, there are further practical challenges which exist in detection of offences, the formulation of charges, and in prosecution. The Victorian *Prevention of Cruelty to Animals Act* 1986 is taken as a case example. Its enforcement provisions were reviewed and amended in 2007.

POCTA inspector's power of entry

2. Like other inspectors designated by section 18 of the Victorian Act, RSPCA inspectors have restricted powers of entry conferred by the Act to enter premises to detect an offence or render aid to an animal. Even though the review was supposed to enhance the power of such inspectors, and the RSPCA was consulted by the Victorian government for that purpose, few substantive enhancements have been realised.
3. The power of inspectors to file charges is now provided for in the new section 24ZW of the Act.
4. As to the emergency power to enter premises and seize distressed animals, the new section 24(1)(b) provides:

“If a POCTA inspector suspects on reasonable grounds that there is on any premises (that is not a person’s dwelling) an animal that is abandoned, distressed or disabled the inspector may, with any assistance that is necessary:

- (a) enter the premises;*
- (b) if the inspector finds any animal on the premises that the inspector reasonably believes is abandoned, distressed or disabled:*
 - ...
 - (ii) immediately seize the animal, if the inspector reasonably believes that the animal’s welfare is at risk...” [emphasis added]*

This new provision is little different from material provisions of the former section 21(1)(c) and (d). The key word in the provision is “distressed”. But vitally there are also any number of animal welfare scenarios where the animal in question may not be “abandoned, distressed or disabled”. The language of this provision is directed to an end-point. What about where a course of conduct, if persisted with, is likely to cause pain and suffering? Section 9(1)(c) prescribes a cruelty offence in these terms:

“does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal; or”

But the trigger for the ordinary powers of inspection conferred by the Act for detection of such a wide-ranging offence do not extend to “pain or suffering...likely to be caused”. The trigger should be that the inspector “suspects on reasonable grounds” that at the premises an animal’s welfare is at risk, rather than the end-point that the animal is abandoned, “distressed or disabled”. It would also have the added merit of consistency with paragraph (b)(ii).

5. In these circumstances, only limited relief can be extended, principally under section 23(2) to give food and water where the animals are ruminants or mammals, or under section 24C to arrange veterinary treatment, subject to where the owner or person in charge can be contacted to give them an opportunity to arrange their own veterinary practitioner to undertake treatment: section 24C(2).

The Minister’s power to authorise seizure - section 24E

6. As to the earlier point about a course of conduct, which if persisted with is likely to cause pain and suffering, power is conferred by section 24E upon the Minister to authorise *seizure of the*

animal in such circumstances. Subsection (1) is expressed in these terms:

“If the Minister believes on reasonable grounds that an animal is in such a condition, or, in such circumstances, that the animal is likely to become distressed or disabled, the Minister may serve notice that the Minister intends to authorise seizure of the animal.” [emphasis added]

7. It is difficult to appreciate why such a power could not have been conferred on a POCTA inspector instead of confining the trigger for the inspector’s powers to the end-point where the animal is already distressed or disabled. Plainly, by conferring the power instead on the Minister, it is intended that such seizure be exceptional and thus difficult to effect. Leaving aside the hurdles one faces in securing a Minister to act, practically speaking, it is only likely that a Minister will act in a case of neglect attended by great publicity. This shows the hand of producer interest over welfare. In any event, there are any number of adverse welfare consequences for an animal which fall short of the animal being “likely to become distressed or disabled”. Why should not just ‘illness’ suffice, or for that matter, circumstances or a condition where the animal’s welfare is at risk, for example?

Notice in writing is required to be served under subsection 24E(2). Under section 24F:

“If, on the expiration of 7 days after the service of a notice under section 24E, the Minister is not satisfied that action has been or is being taken to remove the likelihood of the animal becoming distressed or disabled ...the Minister may authorise a specialist inspector to seize... and to dispose of the animal...” [emphasis added]

The application for a search warrant

8. As the Minister’s seizure powers under section 24E depend upon seven days notice, this power plainly would fail in an urgent case. Otherwise, for seven days the condition of an animal viewed as “likely to become distressed or disabled” is permitted to deteriorate, as a result of which in a given case the animal could suffer a lingering and painful death or torment.

The alternative is that, by section 24G an inspector, *but only after the written approval of the Department Head*, may apply to a magistrate for a warrant authorising him or her to seize an animal and retain possession of the animal seized for the time specified in the warrant, if “the

inspector believes on reasonable grounds” that the welfare of an animal is at “risk”. The written approval of a Departmental Head (or even a delegate) may be doubted where the time frame is urgent or short. That said, the saving grace of s.24G is that a warrant can otherwise be applied for where the welfare of the animal is generally at risk rather than where its condition is teetering towards an end-point. Once again, the hand of producer interest prevails.

Specialist inspectors

9. A specialist inspector is a person whom the Minister by instrument in writing appoints on the basis that he considers the person to have “appropriate qualifications to be a specialist inspector”: see section 18A. It is also difficult to appreciate why a distinction should be drawn between a POCTA inspector on the one hand and a specialist inspector on the other. After all, they would all appear to have “appropriate qualifications” for the purpose of entry and inspection under the different provisions of the Act. Suffice to say, specialist inspectors will in the ordinary course be members of the Department of Primary Industries and thus not, for example, RSPCA inspectors. Specialist inspectors carry out inspections at the instance and on behalf of the Minister. Thus control is kept in the hands of the Department.

The Minister’s vital power of random inspection – section 24L

10. The vital power of random inspection of premises is conferred on the Minister by section 24L. Such power is exercised by a specialist inspector “with the prior written authority of the Minister” to enter non-residential premises to principally “observe any practice” conducted in the management of animals on the premises. The power is exercised sparingly. Yet in some States there is no equivalent power of random inspection at all. Self-evidently, the power of random inspection is the principal tool in the armoury by which offences (such as in a battery hen shed for example) stand to be detected. The power should be conferred on POCTA inspectors. In Victoria it lies tightly controlled by the Minister of a department which views itself as the ‘friend of industry’.

As noted earlier, there also lies within the tight control of the Minister for Agriculture the

further power under section 24L to seize animals in circumstances or in a condition where they are likely to become distressed or disabled. Both these section 24L powers stand in contrast to a POCTA inspector's greatly more limited powers of inspection or seizure. One can only conclude it is not without design. Suffice to say, such a design suggests the welfare of the animal is not paramount by comparison with the property interests of the producer. This stands in stark contrast also to the legislative principles underpinning say child protection.

The search warrant alternative

11. As a POCTA inspector has no power of random inspection, the only alternative is an application for a search warrant under section 24G of the Act. Remember that such an application may only be made after the written approval of the Department Head. One would think it sufficient that a magistrate should need to be satisfied as to the merits of issuing a warrant for seizure. But a discretion is conferred upon the Department Head to stop such an application "dead in its tracks", despite an authorised inspector's sense of urgency or reasonable grounds. The hand of the producer bodies is again apparent.

The search warrant may issue in relation to a person's premises (including residential premises) and to that extent only is wider than the Minister's power of random inspection which is confined to non-residential premises. However, a search warrant may only be applied for on the basis that the inspector *believes on reasonable grounds* that there is in or on the premises:

- (a) *an abandoned, diseased, distressed or disabled animal*;
- (b) *an animal, the welfare of which the inspector believes on reasonable grounds is at risk;*
or
- (c) *an animal, in respect of which a contravention of section 9 [the cruelty offences] or the regulations is occurring or has occurred.* [emphasis added]

The substantive change to section 24G by comparison with its predecessor, section 21A, is by way of changing the ambit of ground (b) from "immediate risk" to "at risk".

Further, why should the basis of a search warrant be that the inspector "believes" on reasonable grounds rather than the less onerous basis of "suspects". Where an animal's welfare may be at

risk, it is difficult to appreciate why an animal protection statute is not more enabling.

Extending time to retain a seized animal under a search warrant

12. Further, a POCTA inspector who has obtained a search warrant must apply to the Court for an extension of the period of time specified in the warrant for retention of the animal seized before the time the warrant authorised expires: section 24H(1). It will be necessary to satisfy the Court that the extension of the period for retention of the animal "... is necessary for its welfare": section 24H(2). This kind of statutory requirement may keep an inspector tied up in Court process, in circumstances where its genesis was intervention to protect an animal at risk. Otherwise, presumably the animal must be returned to the owner.

13. An interesting legal question would arise where an extension of time was sought under section 24H to retain the seized animal in reliance on the phrase that "retention of the animal is necessary for its welfare", but on the ground that retention may be necessary because return of the animal to a neglectful owner posed an ongoing risk to the animal's welfare rather than by reason of its existing condition.

Probably there are only two alternatives: to prosecute the owner, or apply for a Court order under section 24X. As to the first alternative, an owner may only be disqualified from having custody of animals where convicted for one or more "offences of a serious nature": see section 12. "Aggravated cruelty" offences under section 10 arise where the act of cruelty results in the "death or serious disablement" of the animal. How far the notion of a "serious offence" travels short of an aggravated cruelty offence is unclear, and is presumably a matter of Court discretion in a given case. So only in the clearest of serious offences would this appear to even be a possibility. However, the time it would take to commence a prosecution and eventually secure a conviction would defeat the object of retaining the animal for the immediate purpose of an extension of time of the warrant.

As to the second and thus only practicable alternative, where it is not desired to return an

animal after its recovery period to a neglectful owner, a Court application will be required under section 24X(1)(b) for disposal of the animal on the ground that “it is reasonably believed that the welfare of the animal is at risk.” Such an application may be made even though the time for retention of the animal under the search warrant has expired: see section 24V. This will be dealt with in more detail a little later.

14. In any event, where an animal has been seized under a search warrant, notice of seizure must be given to the owner, or reasonable steps taken to identify or contact the person in charge of the animal: see for example sections 24P and 24R. Where the welfare of an animal seized is not at risk, a notice of seizure must be given: section 24S. If the owner cannot be contacted, a notice of seizure must be left at or sent by post to the premises or any last address of the owner or person in charge: section 24S(4). Such notice of seizure must be sent on or before time expires for possession of the animal retained under the search warrant: section 24S(4)(c).

Section 24T provides for recovery or disposal of animals that are not at risk by the owner or person in charge.

Steps to keep an animal whose welfare is at risk

15. Section 24U provides for steps to be taken where the welfare of the animal is at risk. In summary, if the person who seized the animal “*reasonably believes* that the welfare of the animal is *at risk*” [emphasis added] and application has been made or is proposed to be made for a Court order for disposal of the animal under section 24X, a notice of seizure must be served in the manner stipulated, depending on whether the owner can be contacted or not.

Further, by section 24V, an animal seized under a search warrant may continue to be held for the purposes of a Court application under section 24X, despite the expiry of time for possession of the animal retained under the search warrant, if notice of seizure has been served. Otherwise, as noted earlier, when dealing with a time extension under section 24H (para 12 above), a time extension would need to be secured prior to the expiry of the time authorised by

the search warrant.

16. Section 24X provides for the circumstances in which a person who seized an animal may apply to the Magistrates' Court for an order for disposal of the animal. In summary, those circumstances are:

- (a) the owner or person in charge of the animal has been charged with an offence in relation to the animal; or
- (b) proceedings for an offence have been commenced; or
- (c) the owner or person in charge has been found guilty of an offence *in relation to the animal* within the last 10 years; or
- (d) *the person who seized the animal reasonably believes that the welfare of the animal is at risk.*

17. Section 24X(2) provides for the orders that may be sought, the principal relevant one of which is (d) providing:

“that the animal be disposed of in accordance with this Division if the Court reasonably believes that the welfare of the animal is at risk.”

If the Court is not satisfied an order should be made under subsection (2), “the Court *may* order that the animal be returned to the owner or person in charge of the animal.”

Disposal of an animal by sale etc

18. If an animal is authorised to be disposed of under Part 2A of the Act, section 24Y(1) provides for the manner in which animal may be disposed of, namely:

- (a) *if a court has ordered the manner of disposal of the animal, in that manner; or*
- (b) *if the Minister has authorised the manner of disposal of the animal under this Part, in that manner;*
- (c) *in any case to which paragraph (a) or (b) does not apply-*
 - (i) *by being sold; or*
 - (ii) *by being destroyed; or*
 - (iii) *by being given to a domestic animal business operating from a premises which is registered for the purposes of that business under the Domestic Animals Act 1994.*

Many organisations locate unwanted or abandoned animals to new caring owners. No specific

provision is made for animals seized to be given to such organisations for placement. Instead, where specific provision is made in subsection 1(c), the emphasis is upon sale so that the costs incurred in “maintenance, care, removal, transport and sale of the animal” (see section 24ZB(1)(a)) may be defrayed from the sale proceeds. The saving grace is subsection 1(a), which leaves open persuasion of a court to order a manner of disposal such as disposal to a rescue organisation.

Forfeiture of an animal to the Crown

19. Finally, a Court may order, where a person is found guilty of an offence under the Act or its regulations, that the animal be forfeited to the Crown: see section 24ZD. Once again, section 24ZD(2) contemplates proceeds from sale to be applied to the costs of maintenance, care, removal and transport of the animal.

Challenges of prosecution

Illegally gathered evidence

20. Victoria’s *Prevention of Cruelty to Animals Act* 1986 can pose challenges to a successful prosecution. Some examples are offered. First, there is the thorny issue of what course an RSPCA or other inspector charts if he receives information and a complaint by a person or persons who enter upon the premises for the specific purpose of obtaining evidence, or by a person who went undercover to do so. This of course has received a deal of media publicity.

Assuming that evidence so obtained is compelling, and it is desired to obtain a search warrant, interesting questions will arise as to whether the “reasonable grounds” requirement can be satisfied by arguably “illegally obtained” evidence. Is it sufficient that such evidence compellingly points to “reasonable grounds”? But if a search warrant issues and evidence is obtained thereby by the RSPCA or a police officer and a prosecution ensues, is the evidentiary fruit of the tree at the hearing tainted by the illegality of the evidence relied upon initially to obtain the search warrant? In other words, is there a relation back, and on which side of the balancing exercise is the admission or rejection of evidence sought to be adduced at the hearing

likely to fall? In an appropriate case, it is thought, the evidence would stand to be admitted.

Proof of ownership

21. Second, offences under section 9(1)(f) or (i) require proof that the accused was the owner of or had the possession or custody of the animals. The accused would likely stay silent on this question. Or, if the accused admits he or she is the owner of the animals, it will not infrequently be said that, at the time of the alleged offence, the owner had entered into an agreement with another person by which the other person agreed to care for the animals.

The section 9(2) defence

22. By section 9(2) this constitutes a defence to a cruelty charge. In one sheep cruelty prosecution, the owner said that she had made an oral agreement over the kitchen table with her son for the care of the animals.²²⁴ Obviously no informant is present at the time such an agreement is purportedly made, so how is the existence of such an agreement challenged? In that prosecution, for example, the accused in her evidence said that she had asked her son to assist her with the care of the animals as distinct from asking him to assume their care. This removed the defence offered by section 9(2).

Identification issues

23. Or assume that a cruelty charge alleges that a flock of sheep was not provided with sufficient food or drink for say a month before the relevant inspection by an inspector. How does the prosecution meet the contention that the sheep during the month in question were moved and dispersed between paddocks and other sheep brought in to relevant paddocks? Is the inspector, as it were, to daub with dye say 150 sheep and then wait a month? The answer, strategically speaking, is that usually a veterinarian will conduct a post-mortem on at least one sheep and closely examine say another 10 or 11 dead sheep. Accordingly, rather than seek to project from their condition the state of the flock of say 150 sheep generally, it is best to simply prosecute in respect of the sheep which were closely examined and thus avoid identification

224 See *Mansbridge v Nichols* [2004] VSC 530 (17 December 2004).

problems.

24. If ownership is contested, how does one prove ownership? It is not sufficient that they happen to agist on the land owned by the accused. It is unlikely one will get the opportunity (despite a subpoena) to trace an account with relevant invoices to one of the many possible stock and station agents through whom the sheep in question may have been purchased. And how would one then identify from the invoices the sheep in question, and relate them back to the flock in the paddock, or the carcasses examined? The ways of proving ownership will depend on the case in question. It is a threshold matter and cannot be overlooked if one wishes to avoid the risk of a successful no case submission.

The importance of a sample of a dead animal

25. Or again, if an inspector, say with the aid of a veterinary practitioner, proposes as part of a post mortem to take a sample of a dead sheep to send away for analysis, the inspector must under section 21ZO(1) of the Act:
- (a) advise the owner or person in possession or custody, if possible prior to taking the sample, that it is obtained for the purpose of examination or analysis; and
 - (b) if it is obtained for the purpose of analysis, and the owner or person in charge requests to be given a part of the sample, divide the sample into three parts and give one part to the owner, one part to the analyst and keep one part untouched for future comparison.
26. If the owner or person in charge does not admit such ownership or possession or custody at the time, one can still be met with the argument that they were not provided with the sample so that the conduct of their defence is prejudiced because any sample has now perished. It may be asserted for example that the request for a sample part had been made. At the time of obtaining the sample however, the informant or the inspector may not have even decided to prosecute, hoping instead to secure the suspected owner's co-operation as to appropriate treatment or care of the animal.

Further, the owner may stay silent on the question of ownership. It may be contended, when ownership is later admitted at the hearing, that the evidence relied upon by way of later analysis, was illegally obtained because the procedure prescribed by the Act to furnish the owner with a sample was not followed. There would be a further credit issue as to whether a request for a sample was made or not by the owner or person in charge. It is otherwise a short step to submit that the results of a sample's analysis should be excluded from the evidence.

Duplicity

27. Another difficulty is that an offence like that prescribed in section 9(1)(c) of the Act, which provides that a person who:

“does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal.”

is so generally expressed, and replete with different and/or alternative elements, that it invites extensive legal argument as to whether its elements have been satisfied on the evidence. Even with the particulars, such a charge can invite the submission that they suffer from duplicity and are therefore invalid. These charges need to be formulated with care,, given the difficulty also of having to later fend off say an application for certiorari on the basis that the charges below on which convictions were secured were duplicitous. In *Walsh v R* [2002] VSCA 98 at [40], Phillips and Buchanan JJA explained:

*“As we apprehend it, a count is bad for duplicity if it charges more than one offence; on the other hand, if the count charges but one offence and evidence is led of more than one instance of such offending, then the verdict, if against the accused, will be uncertain. This last is sometimes called latent uncertainty because it depends, not so much of the terms of the count, as upon the case sought to be made by the Crown. Suffice it to refer in this connection to *Johnson v Miller* ([1937] HCA 77; 59 CLR 467) and *R v Trotter* ((1982) 7 A Crim R 8).”*

For an example of such a case, and which went from an eight day hearing in the Magistrates' Court, to a rehearing by way of an appeal over a further eight days in the County Court, and then to a contested hearing on legal grounds in the Supreme Court of Victoria for some 16 days, see: *Mansbridge v Nichols* [2004] VSC 530 (17 December 2004).

The importance of expert testimony

28. Finally, in a difficult case the testimony of an expert witness such as the veterinary inspector who examines the condition of the animals in question, stands to be crucial. In such a case to simply rely upon the informant may invite problems of proof in contested areas.

11 Animal welfare law reform and the possible Commonwealth role

The case for Commonwealth responsibility

1. A number of factors impel law reform at the Commonwealth level:
 - (a) State and Territory animal protection laws sanction widespread exemptions for various practices or classes of animals from their reach so that presently the overwhelming mass of animals fail to be protected, some half a billion animals annually;
 - (b) the role of most State departments responsible for administering local animal protection statutes has been characterised by their active participation in formulating codes of practice favouring producer interest over basic animal welfare: these codes constitute a defence or exemption in nearly all States to the operation of the statute;
 - (c) any reform by way of, for example, legislative abolition of sale and production of battery hen eggs by a State or Territory legislature faces the all but insuperable impediment posed by the *Mutual Recognition Act* 1992 (Cth), which enshrines national market competition policy principles and requires unanimous agreement of the Commonwealth and the States and Territories for an exemption of any law to be created: see for example section 47;
 - (d) animal protection statutes, so far as they extend, remain largely unenforced: this turns on, first, leaving principally a charity with limited resources, the RSPCA, to

enforce a wide-ranging public interest statute; second, deficient powers of inspection; and third, the failure of State departments to discharge a meaningful investigative, prosecutorial or administrative role;

- (e) further to (d), the readiness of State departments to serve producer interests over basic welfare is further illustrated by the passage on 29 November 2007 in New South Wales of the *Prevention of Cruelty to Animals Amendment (Prosecutions) Bill 2007* removing the right of private prosecution: the written consent is now required of the Minister for Primary Industries or his Director General, an unlikely prospect. Further, private prosecutions are not permitted in Victoria or Western Australia;
- (f) further, State Departments of Primary Industries in, for example, New South Wales and Victoria, view themselves as the ‘friend of industry’ or producer interests, so that animal welfare is a poor second cousin despite their responsibility for administering and enforcing animal protection statutes. This gives rise to the most self-evident conflict of interest and explains the failure by those departments to enforce their animal protection statutes. Or again, a responsible department may be culturally indifferent, for example West Australia’s Department of Local Government and Regional Development. Only an order nisi for a writ of mandamus in the WA Supreme Court impelled the Department to agree to investigate the animal welfare society’s complaint which in turn led to the hearing of charges determined by the Magistrate in the *Emanuel Exports case*. Indeed, the Minister then intervened to discontinue the appeal filed in the WA Supreme Court Court of Appeal against the Magistrate’s decision on the section 109 point in the *Emanuel Exports case* (see further Chapter 3);
- (g) the Commonwealth legal regime regulating the trade in export of live animals is plainly deficient. There is little meaningful role in the investigation or

prosecution of breaches discharged by the federal Department of Agriculture, or its delegate, AQIS. Second, the laws by way of the Standards are relevantly deficient, lack clarity and are unnecessarily complex and discursive. Not only should the citizen be able to proceed about his or her business with certainty and without possible exposure to summary proceedings and penalty due to a lack of clarity. But it should also be clear whether a basis for prosecution exists;

- (h) further to (g), the Commonwealth legal regime for the export of live animals incorporates State laws, so that a large international trade is left in effect to the RSPCA de facto to enforce. Further, State animal protection statutes do not provide for the extra-territorial reach of their provisions;
- (i) the food labelling review by a federal parliamentary committee of inquiry at least opened the way, in its recommendations, to ultimately enabling an informed consumer choice on the question of the conditions in which the animals were raised for the animal products; see further Chapter 1, “The Animal Welfare Legal Regime – a critical overview”.
- (j) only the Commonwealth has the resources necessary to establish and fund a national statutory authority responsible for all animals, save those necessarily subject to State jurisdiction such as companion animals owned by individuals. Alternatively, in the case of the environment, it was by reason of an *Intergovernmental Agreement on the Environment* that the Commonwealth was enabled to enact the federal environment statute, the *Environment Protection and Biodiversity Conservation Act*. The environment was thought to require federal resources and regulation. Similarly, the case could be made for animal welfare. Certainly adequate power exists, such as:
 - the trade and commerce power (section 51(i));
 - the corporations power (section 51(xx));

- the territories power (section 122);
- the post and telegraph power (section 51(v));
- the power in respect of commonwealth instrumentalities and the public service (section 52);

In addition, there is of course section 109.

It is fundamental however that no such statutory authority be subject to appointment by or the dominion of the Commonwealth Department of Agriculture.

A more satisfactory alternative would be the Minister for the Environment or the Attorney General; and

- (k) finally, an animal's plight should not depend on which side of a State boundary it may fall. For example, the Draize test is all but abolished in Victoria, but not in South Australia.

The National Animal Welfare Bill 2005

2. In 2005, former Senator Bartlett of Queensland sponsored a *National Animal Welfare Bill 2005*. It was introduced in the Senate for its First Reading on 20 June 2005. A report on the Bill was produced by the Senate Rural, Regional Affairs and Transport Committee. The Bill ran to some 83 pages and obviously was the product of a great deal of thought. The adverse majority report by the Senate Committee on the other hand can only be described as both short and superficial.

Senator Bartlett is no longer a member of the federal Parliament. Plainly the Bill was sponsored by him with a keen eye on the political parameters within which the Bill would need to be presented. However, if enacted, it would have created substantial protection for most animals, although still short of the underpinnings necessary to ensure proper animal welfare.

Principal measures

3. The purposes of the Bill (clause 3) were to be primarily achieved by creating regulations for codes of practice so that code of practice became a sword as well as a shield; by providing for

the establishment of a National Animal Welfare Authority to implement the Act and advise the Minister; and by providing for the appointment of an inspectorate to investigate and enforce the Act. No doubt, as a nod to political reality, the ‘Minister’ was defined in schedule 2 to the Bill as the “Commonwealth Minister with responsibility for primary industries”. Having regard to the record of federal and State departments of agriculture in eroding the reach of State and Territory animal protection statutes, a threshold question for any Commonwealth Bill is the removal of animal welfare from the jurisdiction of the federal Department of Agriculture or its Minister.

Constitutional foundations

4. By clause 5, the constitutional foundations of the Bill were laid in obvious reliance on *inter alia* the external affairs power, the trade and commerce power, and the corporations power. By clause 6, State animal welfare laws were preserved in their operation where they were “capable of operating concurrently with this Act”. Such a phrase is seen in the *Export Control Act* as it applies to the live animal trade. The Bill provided for the Crown to be bound in all its capacities (clause 7).

The composition of the National Animal Welfare Authority

5. A National Animal Welfare Authority was provided for by clause 8 as “the regulatory body for animal welfare in Australia”. However the constitution of the Authority included commercial producers and scientists, as well as animal welfare non-government organisations. In addition, three persons out of a 14 member Authority were also to be appointed representing the Commonwealth. But all members were to be appointed by the Commonwealth Minister for Primary Industries. Although such appointments were to be made “on the basis of merit”, this could be easily satisfied by a Minister for Primary Industries otherwise intent on stacking the Authority with those sympathetic to industry: see clause 10(2).

Inspector’s power of entry

6. Importantly, the Bill provided for an inspectorate (clause 15 et seq). By clause 17(2) inspectors

were empowered to undertake random inspections of animals, pursuant to which they were also empowered to immediately seize an animal or animals, and administer analgesics to an animal (clause 17). The powers of entry under clause 18 were not on the basis of what the inspector reasonably *believed*, but rather on the ground of what he reasonably *suspected*. In other words, the basis for exercising a power of entry was rendered less onerous in contrast, for example, to the Victorian *Prevention of Cruelty to Animals Act* 1986.

That said, section 18(1)(e) and (f) empower an inspector to enter a place (other than a vehicle) only where he or she reasonably suspects that:

- (a) an animal has *just* sustained a *severe* injury; and
- (b) the injury is likely to remain untreated, or remain so for an unreasonable period; or
- (c) there is an *imminent* risk of death or injury to an animal at the place *because* of an accident or an animal welfare offence.

These circumstances provide for events which are at the acute end of the spectrum of matters whereby an animal's welfare may be at risk. Once again, it is expected this provision was drawn with one eye on political reality at the time. However, by clause 19(1), an inspector is empowered to enter and stay at a place while it is "... reasonably necessary to provide food or water" to the animal.

Search warrants

7. Under the Bill, an inspector was empowered to apply to a magistrate for a search warrant (clause 22) and, unlike the Victorian Act, could do so without the prior permission of a departmental head of a department of agriculture. Further, the magistrate or justice of the peace would only need to have been satisfied that there were "reasonable grounds for *suspecting*" (clause 23) by comparison with section 24G(2) of the Victorian Act that there are "reasonable grounds to believe". Further, by contrast with the Victorian Act, provision was made in clause 24 for application by an inspector for a "special warrant" by "electronic communication, fax,

phone, radio or another form of communication if the inspector considers it necessary” due to:

- (a) “urgent circumstances”; or
- (b) “other special circumstances” including, for example, the inspector’s remote location.

Urgent circumstances are not provided for under the Victorian Act where the Minister’s power of seizure requires seven days notice, and an inspector’s application for a search warrant requires the prior written permission of the Departmental Head.

Inspectorate’s general powers

8. The inspectorate was conferred with general powers by clause 33, including to take reasonable measures to relieve the pain of an animal at the place. Further, by clause 41, an inspector who had entered a place was empowered to seize an animal if the inspector reasonably believed that the animal:

- (α) was under an *imminent* risk of death or injury; or
- (β) required veterinary treatment; or
- (γ) was experiencing *undue* pain; and
- (δ) the interests of the welfare of the animal required its *immediate* seizure.

The italicised words were an unfortunate restriction, but perhaps understandable given political thinking at the time. Clause 49 provided for the circumstances in which a seized animal may be returned to the owner. It was not required to be returned where, inter alia, an application had been made for a disposal or prohibition order in relation to the animal. The power to forfeit the animal was also conferred under clause 51.

Animal welfare directions

9. Under Division 6 (sections 57-60) provision was made for an inspector to give “an animal welfare direction” requiring stated action about an animal or its environment. Failure to comply exposed a person to a maximum penalty of 100 penalty units or imprisonment for one year. In brief summary, an animal welfare direction could be given where an animal:
 - (a) was not being cared for properly; or

- (b) was experiencing *undue* pain; or
- (c) required veterinary treatment; or
- (d) should not be used for work.

The animal welfare direction could be given to a person in charge of the animal or a person whom the inspector reasonably believed was in charge of the animal. It extended to a direction requiring the person to care for or treat the animal in a stated way. The benefit of an animal welfare direction is that situations where the animal was at risk could be addressed ‘on the spot’.

Duty of care

10. Importantly, under clause 63 provision was made for a person in charge of an animal to owe a duty of care to it, breach of which was an offence. A duty of care is provided for in the Queensland *Animal Care and Protection Act* 2001, for example, but is not provided for in the Victorian Act. By subclause (3) it was provided that a person breaches the duty only if the person does not take reasonable steps to ensure that the animal’s needs for food and water, accommodation or living conditions or treatment for disease or injury were provided for, as well as appropriate handling.

Cruelty offences

11. Clause 64 provided for the cruelty offences. A deal of the language was similar to traditional language employed in the original prevention of cruelty to animal statutes and which are still employed in present animal protection statutes, such as “abuses”, “torments” or “overworks”. Regrettably, in clause 64(2)(h) the phrase “unjustifiably, unnecessary or unreasonably” appeared in relation to injuring or wounding an animal. Perhaps this phrase was adopted to grant a concession to the difficulties posed by present methods of feral animal control, such as aerial shooting. It may also have been provided for in acknowledgment of use of the phrase in animal protection statutes across Australia.

12. Importantly, by clause 66, it was an offence for a person in charge of an animal to abandon an animal without reasonable excuse or unless it was authorised by law. It will be appreciated that abandonment is a cause of animals' consignment to animal shelters with a more than likely prospect (roughly 70%) of being put down.

Prohibition of various procedures, including mulesing of sheep

13. Various procedures such as cropping dogs' ears, docking dogs' tails, debarking of a dog, and docking tails of cattle or horses were prohibited: see Division 3 of Part 4. Significantly, by clause 80, mulesing of sheep was prohibited. The Bill's presentation took place in the same year that different applications were made by the respondents in the *AWI v Newkirk* proceeding in the Federal Court (see Chapter 4).

By clause 81 the Draize test and the LD50 test were prohibited without the Authority's written approval. This is similar to the Queensland *Animal Care and Protection Act's* requirement for the permission of the chief executive.

14. Interestingly, although the language employed lacked clarity, clause 86 would appear to have provided that cruelty offences of the Bill were extended to apply to "an act done by a person to control a feral animal or pest, including, for example, by killing it". If this reading of the provision is correct, this indeed was an enlightened provision and ahead of its time.

Live animal exports

15. Part 5 (clause 88 et seq) provided for a legal regime to regulate live animal exports. A permit from the Authority was required (clause 88), but a permit could only be granted (clause 89) if the Authority was satisfied, inter alia, that:
- (a) the applicant would comply with clause 89 and any code of practice;
 - (b) an inspector would be available to inspect the facilities at the port of destination, including the abattoirs; and
 - (c) very importantly, that the laws and codes of practice relating to animal welfare "*that operate in the country to which the animals are to be exported provide comparable animal welfare*

standards and protection to the laws of Australia”.

This last provision would in effect have brought an end to the trade as no animal welfare standards have existed in Middle Eastern or other export destinations.

Animal product labelling

16. Clause 95 provided for the labelling of animal products with information about “the methods used to produce animal products” where relevant to, inter alia, animal welfare. A federal parliamentary committee in 2010 presented its final report on food labelling, including on questions of information for consumers about the manner in which the animals were kept or raised: see Chapter 1, ‘The Animal Welfare Legal Regime – a critical overview’.

Animals in research

17. Finally, Part 8 (clause 96 et seq) provided for regulation of ‘animals used for experimental purposes’. By clause 96 “animal” was defined to mean “an *invertebrate*, as well as a vertebrate animal other than a human being”. Thus, an invertebrate such as a squid or octopus or crustacea would have fallen within the definition of “animal”. “Pain” was defined to refer to psychological as well as physical pain. Compliance with the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* was required (clause 98). The Authority was to be responsible for issuing licenses for research, and for giving final approval in issuing licences to all research projects funded by a Commonwealth Department or program (clause 99).

By clause 108 every animal used in a research unit in an experiment that was *likely to* cause pain to the animal was required to be anaesthetised. During recovery from any procedure, analgesics adequate to prevent an animal suffering pain were required to be provided. The Australian code would thus have been overruled by the statute.

12 The Conception of Animals as Property

by Adam Ray

*Comparing the suffering of animals to that of Blacks ... is offensive only to the speciesist; one who has embraced the false notions of what animals are like.*²²⁵

Introduction

1. Human slavery has been considered the ‘pinnacle of exploitation’.²²⁶ It may generally be defined as the practice of subordinating individuals to the control or ownership of others, or treating them as property. It is usually accompanied by forced labour.²²⁷

In *Moore v Regents of the University of California*,²²⁸ Mosk J considered the institution of slavery to be “economic exploitation” of the “most abhorrent form”.²²⁹ It is now considered a crime against humanity. Its prohibition is a peremptory norm of international law.²³⁰ Yet it is estimated that there is still as many as 12 million slaves in the world today.²³¹

When one turns to animals, billions live as the legally sanctioned property of their human or corporate owners. This is despite almost universal acknowledgement that animals are sentient beings worthy of moral consideration.²³² Indeed, in Australia this purports to be recognised by the

225 Marjorie Spiegel, *The Dreaded Comparison: Human and Animal Slavery* (1988) 25.

226 Irina Kolodizner, ‘R v Tang: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31 *Sydney Law Review* 487, 492.

227 LexisNexis Encyclopaedic Australian Legal Dictionary.

228 (1990) 793 P 2d 479.

229 (1990) 793 P 2d 479; B. J. Edgeworth et al, *Sackville & Neave: Australian Property Law* (8th ed, 2008) 32.

230 Irina Kolodizner, ‘R v Tang: Developing an Australian Anti-Slavery Jurisprudence’ (2009) 31 *Sydney Law Review* 487, 487; *International Convention to Suppress the Slave Trade and Slavery 1926*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1927); *Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926*, opened for signature on 23 October 1953 212 UNTS 17 (entered into force 7 December 1953).

231 Beate Andrees and Patrick Belsler (eds), *Forced Labor: Coercion and Exploitation in the Private Economy* (2009) 1.

232 Robert Garner *Animal Ethics* (2005) pp 14-16.

federal department of agriculture.²³³

2. The principle of equal consideration of interests²³⁴ was a driver for the abolition of human slavery. In its application to the plight of animals, some theorists argue that their property status should be abolished.²³⁵ There is much legislation purporting to protect the interests of animals, and to curtail the rights attaching to their ownership. Yet the numerous exemptions, defences and qualifications to the application and enforcement of such legislation mean that the legislation fails to achieve any meaningful protection. Some argue this is due largely to the fact that such measures do not seriously challenge the underlying legal status of animals.
3. Certainly, at first blush, a parallel would appear to exist between the experience of human slaves and the treatment of animals arising from their status as property. Slaves were crammed into boats and shipped from Africa, inspected and sold in markets, deprived of natural social relations and subjected to scientific experimentation.²³⁶ The property status of animals permits countless chickens, cows and pigs to be raised intensively on factory farms with barely enough room to move. Millions of sheep and other animals each year endure poor conditions during a live export journey which ends in their brutal ritual slaughter. Calves of dairy cows are separated from their mothers shortly after birth. Animal testing and experiments are conducted of doubtful value.²³⁷ No budget exists to develop alternatives to their use.

It was not until the central legislatures resolved that the underlying economic interests could not justify the oppression of slaves that property in them as human beings ceased to be legally recognised. It may be thought that a similar challenge exists with the status of animals as property.

As Francione points out, our attitudes about animals are both complicated and the result of complex causes. The subordination of animals by their status as property begins in religious, cultural, scientific and economic foundations.

Justifications for status

Religious and cultural foundations

4. The belief that humans have inherent entitlement over persons or animals finds its source largely in Judeo-Christian teachings. Blackstone refers to the book of Genesis, which states that the

233 Commonwealth, Department of Agriculture, Fisheries and Forestry, Australian Animal Welfare Strategy (2008) 7.

234 For a detailed description of the principle, see Peter Singer, *Animal Liberation* (2002) 1-23.

235 For example, Francione argues that the right not to be treated as property is a 'pre-legal' right that serves as the precondition for the possession of morally significant interests: Gary Francione, 'Animals – Property or Persons?' in *Animals as Persons: Essays on the Abolition of Animal Exploitation* (2008) 49-51.

236 Spiegel above n 1, 41-49, 64.

237 Katrina Sharman, 'Farm Animals and Welfare Law: An Unhappy Union' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (2009) 35-47; see generally Peter Singer, *Animal Liberation* (2002).

‘Creator’ gave humans ‘dominion’ over the fish, fowl and every living thing that moves upon the earth.²³⁸ The word ‘dominion’ suggests that humans have an absolute claim to ownership in nonhumans upon the earth. Locke agreed that all living things were produced by the “spontaneous hand of nature” for the exclusive use of “the rest of mankind in common”.²³⁹ For Locke though, natural things would only become an individual man’s property when he mixes his labour with it, such as when one catches a fish out of the ocean.²⁴⁰

Similarly, the ‘curse of Ham’ in the book of Genesis, where Noah banishes his son Ham to a life of servitude for not covering up Noah’s drunken nakedness, has been used as justification for the enslavement of Black people.²⁴¹ While the race of Ham was not identified in the Bible, Jewish writers later identified him as being the father of the Black African race.²⁴² Proponents of slavery in the nineteenth century were known to often cite the story in response to abolitionists.²⁴³ Biblical-endorsement, along with other cultural differences such as dress, housing and family customs, led to the view that Africans could be distinguished from other human beings.²⁴⁴

Such religious and cultural foundations for the subordination of animals and Blacks supported one of the most powerful presuppositions in Western thought, the Great Chain of Being:²⁴⁵ a natural hierarchy which designated humans as above nonhumans and Whites above Blacks.²⁴⁶ Acceptance of evolutionary theory, however, has led us to a serious questioning of the Judeo-Christian tradition of seeing ourselves as apart from, and masters over, ‘nature’.²⁴⁷

The role of science

5. Charles Darwin showed that the difference between humans and animals is one of degree and not of kind.²⁴⁸ On this basis the absolute distinctions between humans and other animals, or between Blacks and Whites, are arbitrary and suggest a misunderstanding of evolution.²⁴⁹ Indeed, Spiegel points out that “[e]volution occurs as the result of random genetic mutation and there is no moral basis for declaring that the mutated form is better than the unmutated ... form.”²⁵⁰

238 Deborah Cao, *Animal Law in Australia and New Zealand* (2010) 70; Book of Genesis 1:28.

239 Ibid 71.

240 Ibid.

241 Derek W. St. Pierre, ‘The Transition from Property to People: The Road to the Recognition of Rights for Non-Human Animals’ (1998) 9 *Hastings Women’s Law Journal* 255, 263.

242 Ibid, citing Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* (1968) 35.

243 See generally Sylvester A. Johnson, *The Myth of Ham in Nineteenth-Century American Christianity: Race, Heathens, and the People of God* (2004).

244 St. Pierre above n 19, 263.

245 Steven Wise, ‘How Non-human Animals Were Trapped in a Nonexistent Universe’ (1995) 1 *Animal Law* 15, 24.

246 St Pierre above n 19, 263-264.

247 Jim Mason, ‘The Animal Question: The Key to Coming to Terms With Nature’ (2007) 13 *Animal Law* 197, 199.

248 Charles Darwin, *The Descent of Man* (1871) 72, 80.

249 Spiegel above n 1, 18.

250 Ibid 20.

But what is actually meant by the concept of ‘property’?

The concept of property

What is property?

6. Contrary to the popular usage of the term, ‘property’ in law does not refer to a thing; it is a description of a legal relationship with a thing.²⁵¹ Property is a broad concept, and thus necessarily abstract. But it primarily comprises control over access; a legally endorsed concentration of power over things and resources.²⁵² In the 18th century, William Blackstone endorsed the view that property referred to the absolute control of things by persons, stating that the right to property signifies ‘sole and despotic dominion’.²⁵³ It has since been recognised that such a conception is at odds with the reality of the law. Cochrane explains:

*[I]f I own a barrel of beer, I cannot simply sell glasses of it to passers-by on the street; if I own a house, I cannot refuse entry to all other people in all circumstances; and if I own a piece of land, I cannot simply build what I like upon it.*²⁵⁴

7. Property is more often conceived as a ‘bundle of rights’²⁵⁵ that may be exercised with respect to the subject of the property, such as the rights to possess and to use, and to the income gained from the use; to exclude others; and to dispose of the thing by sale or by gift.²⁵⁶ Yet, as Honore contends, each of the various ‘incidents’ of ownership need not be present for there to be property, and some of the ordinary rights that attach to ownership may be limited or even absent.²⁵⁷ The owner does, however, generally enjoy priority in these rights.²⁵⁸

Property and persons

8. A relic of Roman law in common law legal systems is the classification of law into the categories of persons, things and actions.²⁵⁹ Whereas a person had rights, a thing, in contrast, was the object of these rights.²⁶⁰ Indeed, Sackville and Neave point out that the two necessarily define each other: “[t]o be a person, it is said, is precisely not to be property”.²⁶¹ Effectively then, the only rights that

251 Yanner v Eaton (1999) 166 ALR 258, 264.

252 Ibid, citing Kevin Gray, ‘Property in Thin Air’ (1991) 50 Cambridge Law Journal 252, 299.

253 Alasdair Cochrane, ‘Ownership and Justice for Animals’ (2009) 21(4) Utilitas 424, 426, citing William Blackstone, Commentaries on the Laws of England, vol. 2: Of the Rights of Things (1766; London, 1979), 2.

254 Cochrane above n 33, 426.

255 Minister of State for the Army v Dalziel (1944) 68 CLR 261, 285.

256 Moore v Regents of the University of California (1990) 793 P 2d 479; A. M. Honore, ‘Ownership’ in A.G. Guest (ed) Oxford Essays in Jurisprudence (1961).

257 Cochrane above n 33, 427.

258 Honore above n 36, 134.

259 Cao, above n 16, 64, citing Justinian’s Institutes, translated with an Introduction by P Kirks and G McLeod, with the Latin text of P Krueger (1987).

260 Cao, above n 16, 64.

261 B. J. Edgeworth et al, Sackville & Neave: Australian Property Law (8th ed, 2008) 26.

exist in terms of property are the rights of the owner.²⁶² In this way, property can be seen as having value solely as a means to an end, whereas persons are ends in themselves.²⁶³ In addition to inanimate objects, the Romans classified all beings that were thought to be lacking free will – that is, women, slaves, children, animals and the insane – as things.²⁶⁴ Not surprisingly, it was those groups lacking political power that were deemed to be lacking free will and hence subordinated to the category of things.

9. The strong legal distinction between property and persons that prevails today has nonetheless been criticised as an oversimplified view of the law.²⁶⁵ For example, corporations are clearly *owned* by individuals with a share of equity in them, and this grants owners rights to possess, use, manage, buy, sell and derive income from them. On the other hand, corporations are recognised as having legal personhood which grants them, the corporations themselves, rights and responsibilities.²⁶⁶ Since corporations can simultaneously be characterised as property *and* persons, it may be argued that the two categories are not truly conceptually distinct. While this is true, it is important to distinguish between artificial and natural persons. The legal rights of corporations are of course exercised by natural persons,²⁶⁷ and courts have occasionally been willing to ‘pierce the corporate veil’ and effectively transfer the artificial person’s obligations onto the natural person. Thus, the conceptual difficulty presented by such marginal cases is somewhat illusory.

Implications of property status

10. While an inanimate object such as a chair will not be troubled by its owner’s exercise of the ‘bundle of rights’ over it, the interests of a sentient being may well clash with the incidents of ownership. In the 18th century case of *Gregson v Gilbert*,²⁶⁸ for example, where it was acknowledged that “a portion of our fellow creatures may become the subject of property”, the pushing of 132 human slaves from a boat running short of drinking water was held to constitute the mere throwing overboard of goods.²⁶⁹ The treatment of these human beings as property meant that the decision to disregard their inherent interest in living was far easier. Were the same act committed against legally recognised ‘persons’, the penalties for unlawful killing would have likely deterred such conduct. Indeed, Wise asserts that “personhood is the legal bulwark that protects everybody, every personality, against human tyranny. Without it, one is helpless. Legally, persons count; things

262 St. Pierre above n 19, 257.

263 Ibid, citing Bruce Ackerman, *Private Property and the Constitution* (1977) 27.

264 Cao above n 16, 64-65.

265 Cochrane above n 33, 432.

266 Ibid.

267 That is, the owners and managers charged with the power to decide on the entity’s relations.

268 (1783) 99 ER 629.

269 Ibid.

don't.”²⁷⁰

Human slavery

11. Human slavery existed before recorded history. Mention of it can be found in the earliest recorded body of law, Hammurabi's Code.²⁷¹ Although it is now formally abolished in most countries, the jurisprudential progression to abolition was not always a linear one. Common law rulings in England 'see-sawed' between showing sympathy for the plight of slaves on the one hand and their owners' economic interests on the other.²⁷²

The common law

12. In 1569, in a case known as *Cartwright's Case*,²⁷³ a man who was seen savagely beating another claimed in defence to the charge of battery that he had brought the victim from Russia as a slave. The court stated that "England was too pure an air for a slave to breathe in".²⁷⁴ This was later interpreted as authority for the notion that slaves become free when they arrive in England.²⁷⁵ Yet in the next century, the economic importance of slavery in England and the British colonies was to grow significantly with the rise of the African slave trade. The trade came to be heavily relied upon as a source of agricultural labour.²⁷⁶

With the passage in the second half of the 17th century of the *Navigation Acts*, trade between the British colonies was restricted to that conducted by English or colonial ships.²⁷⁷ It was initially unclear whether African slaves should be regarded as 'goods' and hence fall within the scope of the legislation.²⁷⁸

In 1677, it was confirmed in *Butts v Penny*²⁷⁹ that since Black slaves were 'infidels' and were commonly bought and sold among merchants, they could be regarded as goods and chattels.²⁸⁰

13. However, the decision in *Butts v Penny* did not sit comfortably with the *Habeas Corpus Act* 1679. That Act sought to strengthen the writ of *habeas corpus* by which an individual could seek to be released from unlawful detention.²⁸¹ As Africans were not excluded by its provisions,²⁸² this

270 Cao above n 16, 88, citing Steven Wise 'Animal Rights, One Step at a Time' in C R Sunstein and M C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (2004) 25.

271 St. Pierre above n 19, 262.

272 Mtubani, V.C.D. 'African Slaves and English Law' *Botswana Journal of African Studies* 3(2) (1981) 71, 74.

273 *Cartwright's Case* (1569) 2 Rushworth 468.

274 *Somerset v Stewart* (1772) 98 ER 499.

275 *Ibid.*

276 Mtubani, above n 52, 71.

277 *Ibid.*

278 *Ibid.*

279 (1908) 83 ER 518.

280 *Ibid.*

281 Mtubani, above n 52, 72-73.

282 *Ibid.*

appeared to contradict the common law's recognition of the legality of slavery.

That said, in 1694 in *Gelly v Cleve*²⁸³ a British Court directed compensation for the loss of a slave, stating "...that trover will lie for a Negro boy for they are heathens; and therefore a man may have property in them."

Yet only, three years later in *Chamberline v Harvey* 91 Eng. Rep 994 (K. B. 1697); 90 Eng. Rep. 830 (K.B.1697), the Chief Justice of the King's Bench, Sir John Holt, determined that trover would not lie for the taking of a negro, and neither would trespass, because each action could only be availed of by owners of chattels, and blacks could not be owned. Further, said Holt, the black was not a slave, but instead 'a slavish servant', a person akin to an apprenticed labourer. Whilst a master may recover the servant's loss of services by the ancient writ '*per quod servitium amisit*', said Holt, he could not do so in respect of the servant himself.²⁸⁴

14. Holt presided in 1701 in a second slavery case, *Smith v Brown and Cooper*. 91 Eng. Rep. 566 (K.B. 1701) challenging the legality of English slavery. In a dispute arising from a failure to pay the sale price of a slave, Holt said, 'As soon as a Negro comes into England, he becomes free... One may be a villain in England, but not a slave.'²⁸⁵

Some five years later in 1706 in *Smith v Gould* 2 Salk 666 (1706); Ray 1274, a jury awarded damages to the plaintiff in an action for a 'negro' and 'other goods' he had bought from the defendant. The defendant claimed that Smith could not sue in trover. Holt in his final case on slavery said that "the common law takes no notice of negros being different from other men. By the common law no man can have a property in another, but [only] in special cases, as in a villain, but even in him not to kill him: so in captives took in war, but the taker cannot kill him, but may sell them for ransom: there is no such thing as a slave by the law of England."²⁸⁶

The court, while declining to permit a trover action for a black, nonetheless held that an action for trespass *quare captivum suum cepit* was available;²⁸⁷ that is, where evidence was given by the plaintiff that the party was "his Negro".²⁸⁸ Although this somewhat limited the property rights associated with slavery,²⁸⁹ the property status *per se* remained intact.

15. But reference to 'infidels' in *Butts v Penny* suggested to those with sympathy for the plight of

283 [Gelly v Cleve](#) (1694) 1 Ld Raym 147

284 For this passage, the author is indebted to Steven Wise's book, 'Though the Heavens May Fall' (Da Capo), p.28.

285 For this passage, the author is indebted to Steven Wise's book, 'Though the Heavens May Fall' (Da Capo), p.29.

286 Ibid.

287 *Smith v Gould* (1706) 92 ER 338; William W. Wiecek, 'Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World' (1974) 42 University of Chicago Law Review 86, 93.

288 Ibid.

289 Wiecek, above n 68, 93.

African slaves that baptism might free them.²⁹⁰ This argument troubled slave owners. It led them in 1729 to seek a legal opinion on the issue from the Attorney-General, Philip Yorke and the Solicitor-General Charles Talbot.²⁹¹ In their opinion Yorke and Talbot stated that slaves did not become free upon arrival in Great Britain, nor did baptism bestow freedom.²⁹² While it cited no authority, it was widely published and given full approval twenty years later in *Pearne v Lisle*²⁹³ where Blacks were described as “like stock on a farm”.²⁹⁴ The African was seen as not entirely human and therefore not worthy of moral, and hence legal, consideration.

16. In 1762, a ruling in *Shanley v Harvey*²⁹⁵ reverted back to the 1569 decision in *Cartwright’s Case*, holding that a slave becomes free when he arrives in England.²⁹⁶ Furthermore, there were obiter comments to the effect that Africans may have a *habeas corpus* if restrained of their liberty, or may maintain an action against their masters for ill usage.²⁹⁷

A decade later, in the famous case of *Somerset v Stewart*,²⁹⁸ a writ of *habeas corpus* was issued in an attempt to free James Somerset held against his will in a ship that was on the Thames in England en route to Jamaica. Lord Mansfield, held that a slave could not be forcibly removed from England.²⁹⁹ The case is often cited as authority for the abolition of slavery in England. But Mansfield later stated that the ruling only decided the matter of forcible removal.³⁰⁰ Yet the version of Mansfield’s judgement as recorded by Capel Lofft, a reporter of decisions, was never disputed by Mansfield. Lord Mansfield was reported by Lofft to have said:

“The power of a master over his slave has been different in different countries. The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserves its force long after the reasons, occasion, and time itself from which it was created, is erased from memory. It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged.”

Simply put, the English common law would not recognise it. Only parliament could do so by enacting a statute, that is to say, a positive law. But, for the common law, “the state of slavery...is so odious that nothing can be suffered to support it...”.

The Court of Session in Edinburgh in 1778 in *Knight v Wedderburn* held that slavery, if not

290 Mtubani, above n 52, 72.

291 Ibid.

292 Ibid.

293 *Pearne v Lisle* (1749) 27 ER 47.

294 Ibid; Wiecek, above n 68, 94.

295 *Shanley v Harvey* (1762) 28 ER 844.

296 Ibid 844.

297 Ibid.

298 (1772) 98 ER 499.

299 Wiecek, above n 68, 106-108.

300 Wiecek, above n 68, 145.

supported by the slave's home jurisdiction, could not be legally recognised in Scotland.

Political tensions

17. Mtubani notes that English law was put into deep confusion because, on one hand, the Navigation Acts and case law supportive of Blacks being 'goods' were consistent with the continuance of slavery, but on the other hand, the *Habeas Corpus Act 1679* and these recent decisions suggested its illegality.³⁰¹

In the United States, a clear division had grown between the attitudes and economies of the Northern and Southern states, ultimately culminating in the American Civil War.³⁰² While slavery had been abolished for example in Massachusetts in 1783,³⁰³ slaves in Alabama were still seen prior to the civil war in 1861 as having "no legal mind, no will which the law can recognize."³⁰⁴

Abolition

18. In the United Kingdom, it was not until the *Slave Trade Act 1807* that further 'imports' of slaves from Africa were prohibited.³⁰⁵ Four years later in *R v Hodge*³⁰⁶ a slave owner was sentenced to death for murdering his slave,³⁰⁷ suggesting that rights exercisable over purported human 'property' had been significantly restricted. However, the abolition of slavery in the British Empire was not completed until the passage of the *Slavery Abolition Act 1833*.³⁰⁸

Similarly, in the United States, formal abolition of slavery did not occur until, as a first step, the right in any of the States to import such persons they thought proper to admit, ceased to have effect in 1808.³⁰⁹ Finally, when the Thirteenth Amendment to the United States Constitution secured passage at the end of the Civil War, slavery and involuntary servitude were abolished.³¹⁰

Domestic animals

19. Long settled³¹¹ principles of the common law for the ownership of animals distinguish between 'wild' and 'domestic' animals, commencing as early as 1682. Domestic animals - those that are commonly kept and cared for in and about human habitations³¹² - have been treated by the

301 Mtubani, above n 52, 74.

302 St. Pierre, above n 19, 265.

303 *Commonwealth v Jennison* (1783, unreported); St. Pierre, above n 19, 265.

304 *Cresswell's Executor v Walker* (1861) 37 Ala 229, 236.

305 *Slave Trade Act 1807* (UK).

306 *R v Hodge* (1811, The Library of Congress); The Library of Congress (US), *Slaves and the Courts, 1740-1860* (2002) <<http://memory.loc.gov/cgi-bin/query/r?ammem/llst:@field%28DOCID+@lit%28llst064%29%29:>> at 2 November 2010.

307 *Ibid.*

308 *Slavery Abolition Act 1833* (UK), repealed by *Statute Law (Repeals) Act 1998* (UK).

309 United States Constitution art 1 § 9.

310 United States Constitution amend XIII.

311 *Halsbury's Laws of England* (LexisNexis, London, 2008) [703].

312 *Attorney-General (SA) v Bray* (1964) 111 CLR 402, 425.

common law as absolute property.³¹³ Being unqualified, if such an animal is lost or strays, ownership is retained³¹⁴ (as is the case with inanimate chattel).³¹⁵ Furthermore, the owner of a domestic animal mother generally holds title in her young.³¹⁶ Farm animals, animals used in scientific research, companion animals, and animals used for entertainment purposes – that is, the plight of those which most concern animal advocates – all fall within this category. *Dead* wild animals, as a general matter, also fall within this category of absolute property.³¹⁷

Wild animals

20. Property in *living* wild animals, on the other hand, is qualified and carries more limited property rights.³¹⁸ If a wild animal is tamed, and is thus, temporarily at least, removed from the wild, an action for trespass or conversion at common law would lie against a person taking such an animal.³¹⁹ The same would apply against persons taking young wild animals born on a landowner's property who were not yet old enough to fly or run away.³²⁰ And it would apply to a landowner who had the exclusive right to hunt and kill wild animals on his or her land.³²¹ The qualification arises in the fact that the person retains title to such wild animals “only while they are in his or her keeping or actual possession”.³²² Beyond these instances, no property existed in wild animals at common law.³²³

While some legislation purports to vest ownership in wild animals in the Crown,³²⁴ it is questionable what degree of control or ownership is conferred. In *Yanner v Eaton*,³²⁵ for example, a majority of the High Court of Australia held that the statutory vesting of property in fauna in the state government of Queensland was nothing more than a “fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource”.³²⁶ In any event, the statutory vesting of ownership in wild animals usually facilitates the granting of licences or permits to persons for the purposes of the economic exploitation of wild animals.³²⁷

313 Putt v Roster (1682) 86 ER 1098; Saltoon v Lake [1978] 1 NSWLR 52.

314 Ibid.

315 Armory v Delamirie (1722) 93 ER 664 (Court of King's Bench).

316 Official Assignee of Bailey v Union Bank of Australia Ltd [1916] 35 NZLR 9, 18; Graf v Lingerell (1914) 16 DLR 417.

317 Cao, above n 16, 73.

318 Sutton v Moody (1865) 2 Salk 556; Yanner v Eaton (1999) 166 ALR 258, 265.

319 Case of Swans (1572) 77 ER 435; Yanner v Eaton (1999) 166 ALR 258, 265.

320 Case of Swans (1572) 77 ER 435.

321 Blades v Higgs (1865) 11 ER 1474.

322 Keeble v Hickringall (1706) 91 ER 659.

323 Yanner v Eaton (1999) 166 ALR 258, 265.

324 See for example Fisheries Act 1995 (Vic) s 10.

325 (1999) 166 ALR 258, 265.

326 Yanner v Eaton (1999) 166 ALR 258, 266, citing Toomer v Witsell (1948) 334 US 385.

327 For example, s 10(2) of the Fisheries Act 1995 (Vic) provides for the passing of property in wild fish and other

Implications for animals

21. It is thus uncontroversial that, at common law, animals are property, or at least legally capable of becoming property. Francione asserts that if animal interests are to be morally relevant, they must be accorded the basic right not to be treated as property.³²⁸ Similarly, St. Pierre states that “property is understood as that which does not have any interests of its own that must be respected.”³²⁹ Indeed, under traditional property principles, property is solely a means to its owner’s ends.³³⁰

Anti-cruelty legislation

22. Until the early 19th century, only common law principles went to the status of animals. From 1822, however, ‘anti-cruelty’ statutes commenced to be passed in an attempt to address the perceived immorality of cruelty to animals.³³¹

Now, in every Australian state and territory there is legislation prohibiting “cruel” behaviour, “acts of cruelty”, “ill treatment”, or similar acts towards animals.³³² Cochrane argues that such laws confer on animals the legal right to not be subjected to cruel treatment, and thus ownership itself is not necessarily linked to poor treatment or the ‘commodification’ of animals.³³³ However, the ‘anti-cruelty’ provisions of the animal protection statutes in Australia do not extend to the overwhelming mass of animals. This is dealt with in Chapter 1, ‘The Animal Welfare Legal Regime’.

Commoditisation

23. Indeed, the notion that animals are property, or mere commodities or chattels, is made clear by various statutes regulating commercial dealings. For example, section 4 of the *Competition and Consumer Act 2010* (Cth) and section 3 of the *Export Control Act 1982* (Cth), both provide definitions of “goods” where animals are specifically included. Similarly, expansive definitions of “goods” are provided by the *Goods Act 1958* (Vic) and the *Customs Act 1901* (Cth), with the result that animals would seem to fall within their scope.³³⁴

The significance of these provisions is that, despite the purported attempts of anti-cruelty

fauna and flora to the holders of various licences and permits.

328 Gary L. Francione, ‘Reflections on Animals, Property and the Law and Rain Without Thunder’ (2007) 70 *Law and Contemporary Problems* 9, 11.

329 St. Pierre, above n 19, 257

330 Ibid, citing Bruce Ackerman, *Private Property and the Constitution* (1977) 27.

331 Malcom Caulfield, *Handbook of Australian Animal Cruelty Law* (2009) 4.

332 See, for example: *Animal Welfare Act 1992* (ACT) s 7; *Prevention of Cruelty to Animals Act 1979* (NSW) s 5; *Animal Welfare Act 1999* (NT) s 6(1); *Animal Care and Protection Act 2001* (Qld) s 18(1); *Animal Welfare Act 1985* (SA) s 13(2); *Animal Welfare Act 1993* (Tas) s 8(1); *Prevention of Cruelty to Animals Act 1986* (Vic) s 9; *Animal Welfare Act 2002* (WA) s 19(1).

333 Cochrane, above n 33, 429.

334 See *Goods Act 1958* (Vic) s 3; *Customs Act 1901* (Cth) s 4.

legislation, the law still ultimately views animals as mere 'things' to be marketed, disposed of, bought and sold.³³⁵ Just as property status means the slave is "transmogrified from a human subject into a physical object",³³⁶ it is difficult to see how the interests of animals as sentient beings can be meaningfully respected when the law in the main treats them as mere 'goods' and thus as little more than a means to an owner's economic ends.

335 Katrina Sharman, 'An Emerging Field' (2006) 31(4) *Alternative Law Journal* 227, 228.

336 Steven Best, 'The New Abolitionism: Capitalism, Slavery, and Animal Rights' (2005) 55 *IMPACT Press* (available at <http://www.impactpress.com/articles/febmar05/best2305.html>).

13 Pioneering cases and legislative developments of interest

The 'happy cows' case

1. In *People for the Ethical Treatment of Animals, Inc v California Milk Producers Advisory Board*, 22 Cal Rptr. 3d, 900 (Cal. Ct. App. 2005) PETA claimed that the Board's 'happy cows' promotion of milk and dairy products in advertising breached California's unfair competition law because it was false and deceptive. The campaign depicted dairy cattle on grassy pastures with the tag line "Great Cheese comes from Happy Cows". PETA claimed that dairy cows were kept in significantly different and bleaker conditions.
2. The false advertising section of the Act prohibited "... *any person, firm, corporation or association or an employee thereof from falsely advertising goods or services*". The term "person" was defined by the statute to "mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organisations of persons". The Californian Supreme Court of Appeal held in accordance with prior case law dealing with the Act's definition of a "person" that a public entity did not fall within the definition. Accordingly, the Board could not be sued under the Act.

The white veal case

3. Similarly, in *Animal Legal Defense Fund Inc v Provimi Veal Corp*, 626 F. Supp. 278 (B. Mass., 1986) the ALDF sought an order obliging Provimi to inform retail consumers how the calves that Provimi bought were raised. The ALDF alleged such calves were raised in dark, confined pens; were fed iron-deprived diets so that they became anaemic and their meat white rather than red; and that their food contained antibiotic drugs at dose levels required below those required to treat an actual

disease but with the object of promoting growth and warding off disease. In short, it was alleged that Provimi bought “factory farmed” veal calves that were “confined, intensively raised, [and] special fed”. The ALDF alleged that Provimi acted unfairly and deceptively in breach of the Massachusetts consumer protection statute requiring retailers to inform consumers of relevant information the disclosure of which (such as the calves’ cruel treatment) may have influenced the buyer not to enter into the transaction. There was a further point about failure to inform consumers about the calves being fed antibiotics, and the transmission of resistant organisms passed to humans in meat.

4. The ALDF complaint was dismissed.

The case in summary did not turn on the merits of the ALDF allegations. Instead it turned upon a technical procedural requirement. If indeed the allegations about how the calves were raised was correct, this could create a violation of a criminal law concerning cruel treatment of calves. The effect then of an injunction obtained in a private lawsuit under the consumer protection statute would be to enforce a criminal statute, which in turn however was only enforceable by public prosecutors and, in certain legislatively-sanctioned circumstances, by private groups of which the ALDF was not one. The Court concluded that:

“However well intentioned it is, the ALDF is pursuing its goals along an improper avenue in this litigation. If convinced it has uncovered gross and systematic mistreatment of animals, the ALDF should concentrate its estimable advocacy urging public officials and the designated private animal protection organisations to proper action.”

For the record, veal crates were outlawed in the United Kingdom in 1990, and as of 2007 they are not permitted in the entire European Union.

The foie gras case

5. In August 2003, Israel’s Supreme Court – sitting as the High Court of Justice in the case of *Noah’ (The Israeli Federation of Animal Protection Organisations) v The Attorney General, The Minister for Agriculture, The Egg and Poultry Board, Moshe, Benishey and 31 Colleagues* by a majority (2:1) delivered a decision which determined that the practice of force-feeding of geese was to be phased out.
6. The case arose in this way. Israel’s Animal Welfare Law provided for a series of prohibitions, the

first one of which was expressed in these general terms:

“No one shall torture an animal, treat it cruelly or abuse it in any manner” (clause 2(a)).

However, the prohibition was said to give way in the face of certain uses of animals for human needs: see paragraph 9 of judgment of (majority) Justice (retired) T Strasberg-Cohen. Strasberg-Cohen J cited as an example that clause 22(1) stipulated that the law shall not apply to “killing animals for human consumption”. It may be argued though that clause 22(1) was not an “exemption” as described by Strasberg-Cohen J. The terms of the general prohibition in clause 2(a) rest upon prohibiting the inhumane treatment of an animal whilst the animal is alive. This would no doubt extend to abuse “in the manner (but not the fact) of killing”. “Abuse” and associated terms such as “torment” have long been adopted in the animal welfare legislation of many countries to apply in such circumstances only where the animal is alive. Accordingly, clause 22(1) could arguably have been interpreted to be consistent with clause 2(a).

7. The nub of the issue came down to this. Clause 19 of the Animal Welfare Law provided that:

“the Minister for Agriculture is responsible for implementing this law, and he may, with the approval of the Education and Culture Committee of the Knesset [Israeli parliament], while giving due consideration to the needs of agriculture, issue regulations to implement and achieve the aim of this law...” [emphasis added]

However, as the “needs of agriculture” may stand in conflict with the interest of animal protection, the dilemma was posed of how to resolve them in the case of the production of foie gras.

How foie gras is produced

8. Foie gras is produced by force-feeding geese by insertion of a tube into the bird’s oesophagus several times a day for several weeks from when it is about eight to 10 weeks of age. By force-feeding the goose high energy food, the aim is to produce an enlarged and fatty liver as the raw material for foie gras. After several weeks of force-feeding, the liver of the goose is several times its natural size: see further paragraph 2 of the (minority) judgment of Justice A Grunis.

The parties’ arguments

9. The plaintiff argued that the force-feeding of geese was forbidden by clause 2(a) of the Animal Welfare Law. It was further argued that the regulations contradicted clause 2(a) because they

permitted an agricultural practice that was inconsistent with clause 2(a). The respondents argued that if the appeal were to succeed an entire industry would be eliminated because without force-feeding the product sought by consumers could not be produced. The result would be to leave those who had produced this product in Israel for decades without a livelihood. There were further arguments, the principal one of which to note is that force-feeding did not constitute cruelty and the object of the regulations was to reduce the suffering of the birds during force-feeding.

The balancing of competing factors

10. It is plain from reading the judgments that the members of the Court wrestled long and hard with the issue. Reference was made to philosophical works including the legal conception of animals as property (see Grunis J's judgment, paragraph 15a), legislation in other countries and in particular the European Union, as well as prior case law in Israel. In round summary, the Court members resolved the issue by a balancing of the competing factors. First, Strasberg-Cohen J distinguished between mere staple food items "necessary for human existence" by comparison with foie gras described as a "luxury". Grunis J in contrast stated there was no relevant distinction as "substitutes" could be found and that endeavours to distinguish between different foods according to "how essential they are ... might open the door to the most microscopic distinctions".

11. All members of the Court were concerned with the consequence of their decision, namely, the annulment of all intensive production industries in Israel. The views of Grunis J on this point are persuasive. But no judge was prepared on that basis to set in train annulment of all intensive industries.

Second, in order to avoid making the agricultural practice of force-feeding illegal upon delivery of judgment, Strasberg-Cohen J adopted a principle of "relative invalidity" so that a period for phasing out of the practice was available.

12. Grunis J (at paragraph 32) concluded:

"At the end of the day I found that force-feeding does cause suffering to the geese. Nevertheless, in my

opinion, one should not justify preventing suffering to geese by causing suffering to farmers – the result of instantly depriving them of their livelihood.”

The dilemma so posed by Grunis J could have been addressed by the phase-out provided for in Strasberg-Cohen J’s principle of “relative invalidity”, assuming he found no difficulty in such a principle as a matter of law.

The proportionality issue

13. At paragraph 16 of his judgment Grunis J, relying upon a previous case, *Let the Animals Live v Hamat Gader Recreation Industries LCA 1684/96* (known as ‘*the Crocodiles Case*’), said that the three terms of torture, cruel treatment and abuse required examination of three elements. First, did the specific acts answer one of the three terms? Second, he said the degree of pain or suffering caused to the animal did not have to be particularly high. Third, he cited the test of proportionality, that is, is there a proper relation between the particular means and its purpose, noting this is at the heart of discussion under English law on whether an act causes unnecessary suffering.

At paragraph 31, he concluded that the main issue was whether “there exists the right proportionality between the means – force-feeding – and the purpose – food production”, noting that the starting point was “that force-feeding does cause suffering to the geese”. As has been noted, he concluded that the right proportionality did exist where the result for farmers was otherwise to instantly deprive them of their livelihood.

The principal majority judgment

14. Turning briefly then to the principal majority judgment of Strasberg-Cohen J, she similarly noted after examining prior case law in Israel, “... that the accepted approach in our legal system requires a balance between the interests of animal protection and *other worthy social values*” [emphasis added].

At paragraph 12, she continued that:

“This appeal raises the intrinsic and acute tension between the interests of animal protection and the use for which animals are employed in intensive agricultural industries that rear animals for human consumption.” [emphasis added]

Very importantly, at paragraph 12, she concluded in respect of the purported exemption from clause 2(a) of killing animals for human consumption as follows:

“Furthermore, the fact that the law exempts killing animals for human consumption, as well as the fact that farm animals are doomed to die at the end of the rearing process, does not justify, in itself, that up to the act of killing, the animals’ life should be one of continuous suffering.”

This passage is significant because it acknowledges the essential proposition of animal welfare that whilst animals live they should be treated humanely, albeit Strasberg-Cohen J spoke only in terms of there being no justification for “*continuous* suffering” as distinct from “any suffering”.

15. At paragraph 21 Strasberg-Cohen J concluded that the regulations did not stand the “abuse prohibition” test of the Law. This was because the regulations as to force-feeding were supposed to define the means to achieve the aim of the law in clause 2(a) (i.e. prevention of animal abuse), but they did not “achieve this goal”. The suffering to the goose could not be prevented (paragraph 22). Strasberg-Cohen J stated that, even after considering the needs of agriculture, the means employed by the regulations still seriously harm the interest of animal protection, and consequently, do not reflect the right proportion between the advantage to “needs of agriculture” and the harm to animals allowed under these regulations (paragraph 22). In short, the regulations did not “... stand the test of proportionality”.

Justice E Rivlin adopted the views of Strasberg-Cohen J where she disagreed with Justice Grunis.

An alternative thesis

16. Speaking from afar, the “needs of agriculture”, where they related to those of intensive production industries, could have been perhaps addressed by the option of a phase-out period under the principle of “relative invalidity”. As stated above, Grunis J’ observations were persuasive about distinctions between how essential a particular food was or was not. However, in terms of the Court’s decision, the distinction drawn in this regard by Strasberg-Cohen J helped avoid the consequence of annulling all intensive industries.

In the case of force-feeding of geese to produce foie gras, there was no alternative to adopt which would have alleviated their suffering. However, in the case of all other intensive industries, there are and were humane alternatives. Accordingly, the “needs of agriculture” could have been

addressed on the basis of a phase-out period to enable such alternatives to be taken up; and thus in a manner consistent with the general prohibition against cruel treatment of animals in clause 2(a), and which answered the test of proportionality. This would have been consistent also with the purported “exemption” by clause 21 of killing animals for human consumption because clause 2(a) could have been construed to apply to the treatment of animals whilst they lived, including as to the manner (but not the fact) of their killing for food. It would have eliminated the tension adverted to by Strasberg-Cohen J “between the interests of animal protection and other worthy social values” (see paragraph 59 above). That said, the foregoing may have been thought to be a step too far, as it may have appeared in that event the Court was ‘legislating’ rather than ‘interpreting.’

At a perhaps more philosophical level, it may be argued that “other worthy social values” stand to lose their potency if the price of their maintenance is the acute and extended animal suffering dictated by intensive production practices, and in respect of large numbers of animals.

Postscript

17. There is a postscript to this case: later attempts by the Ministry of Agriculture to circumvent the decision were all unsuccessful.

A successful collateral attack in the US

18. On 6 May 2010, a federal Court in Manhattan ruled in favour of the Humane Society of the United States in its federal lawsuit charging the nation’s largest foie gras factory farm with numerous violations of the federal *Clean Water Act*. Summary judgment was obtained and extensive injunctive relief granted by the Court against the respondent. So, here was a case where an animal society, by a collateral attack under federal pollution laws, impugned the operations of a foie gras factory farm producing a significant amount of waste, including manure and slaughter waste, discharged into a nearby river.

Legislative developments

Balearic Islands, and Spain

19. In 2007, the parliament of the Balearic Islands, one of the Autonomous Communities of Spain, approved a resolution to grant legal rights to great apes akin to that conferred upon a child or dependent adult. This in turn was presented to the Spanish government who subsequently adopted it in 2008 in terms that:

“... gives great apes the right to life and protects them from harmful research practices and exploitation for profit, such as use in films, commercials, and circuses and freedom from arbitrary activity and protection from torture.”

The resolution is expected to eventually become law and in its terms conforms with the goals of the Great Ape Project.

The Indian and German Constitutions

20. Further, it should be noted that the Constitution of India and that of Germany (Grundgesetz – the Basic Law) provide for clauses about animals. Clause 51A of the Indian Constitution provides that every Indian citizen is obliged “... to have compassion for living creatures”. Clause 20A of the German Constitution, by amendment in 2002, established that the State has the duty to the next generations to defend the natural foundations of life and animals.

The Swiss referendum

21. Finally, the Swiss Animal Protection League gathered the 100,000 signatures necessary to compel a referendum on whether animals should be permitted to be represented in Court by State-funded lawyers. That in itself was a major achievement, and attracted wide publicity. Although on 7 March 2010 70.5% of Swiss voters voted down the referendum’s proposal, it is a further and major achievement nonetheless that some 30% of Swiss voters thought animals should be legally represented. It indicates how the animal cause is on the march.

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