

## CHAPTER 7

# Enforcement

### *Summary and overview*

**7.1** In considering how animal welfare laws should be enforced, the UK Farm Animal Welfare Council recently commented that a UK enforcement agency should be established to be responsible for all animal health and welfare matters, including enforcement of the relevant laws. Such a body was said to be “essential if the government really does wish to give animal welfare issues a high priority in livestock farming.”<sup>1</sup> It does not seem unreasonable to suggest that should be the case in Australia.<sup>2</sup>

In Australia, the state of enforcement of animal cruelty laws is a serious issue. Not only are the laws across the jurisdictions lacking in uniformity, there is no independent body responsible for enforcement. There is not even a national database of animal cruelty investigations and prosecutions.<sup>3</sup>

### **The anomalous position of the RSPCA**

**7.2** In all States and Territories the (local) Royal Society for the Prevention of Cruelty to Animals occupies a special position in relation to the enforcement of the anti-cruelty laws. In large part this is a historical thing, reflecting the role of the RSPCA in England. When during the 19th century English laws and customs were imported into Australia, one of the imports was the role of the RSPCA in enforcing anti-cruelty laws.

When one reflects on this situation, it is evident that it would never have come about if, for example, anti-cruelty laws were being established for the first time in a modern setting, as the various local RSPCAs are private bodies (usually incorporated associations), responsible only to their members.

**7.3** The RSPCA in England adopted this role because at the time of the first anti-cruelty law (Martin's 1822 Act), there was no police force (the Metropolitan force was not set up until 1829) and the State did not, in the main, bring

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1 Farm Animal Welfare Council (1999) *Enforcement of Animal Welfare Legislation*

2 Note that the failed *National Animal Welfare Bill* 2005 of Senator Andrew Bartlett included a provision for the establishment of a National Animal Welfare Authority

3 see the excellent article by Steven White (2003) *Legislating for Animal Welfare – Making the Interests of Animals Count* *Alternative Law Journal* 28, 277

prosecutions.<sup>4</sup> Prosecutions were usually initiated by private individuals. It was with this background that a meeting at Old Slaughter's Coffee House in London's St Martin's Lane resolved to establish the Society for the Prevention of Cruelty to Animals. It is notable that Martin himself was reticent about giving an emphasis to prosecution as a role for the Society, saying “although prosecutions might be adopted in some cases, it would be ill-judged to stand forward as a prosecuting society”.

Radford in his book *Animal Welfare Law in Britain*<sup>5</sup> notes that by the end of the 19th century the English RSPCA was becoming very respectable, such that its “preoccupation with established respectability caused it to lose touch with the more progressive and inspirational elements in the animal welfare movement.” This is another reason for not giving responsibility for the enforcement of part of the criminal law to a private society. There is the potential for shifts in direction and emphasis, under the influence of whoever happens to be in power, such that proper independent enforcement is compromised.

Another major problem with the RSPCA is that it can never be adequately funded to properly investigate and prosecute breaches of the anti-cruelty laws. It will certainly wish to avoid fighting cases where it is not guaranteed a win – a big loss could be financially catastrophic.

Regardless of ideal considerations, the fact is that the various RSPCAs are in a position of power and influence concerning animal cruelty law and its enforcement. Unfortunately, the 19th century concerns alluded to in the previous paragraphs are still completely relevant today. In 2004 the Australian Broadcasting Corporation, in a programme entitled “A Blind Eye”, reported on the “uncomfortably close relationships that the RSPCA is forging with key industry groups – intensive poultry, pork and live exports”, raising the obvious question of conflicts of interest.<sup>6</sup>

### *The Law – detail*

#### **Who is responsible for enforcing the law?**

**7.4** The *Animal Welfare Act* 1993 (Tas) arguably can be said to impose a duty on someone to enforce the law. Section 13A of the *Animal Welfare Act* says that the functions of an “officer” include “to investigate whether this Act has been contravened and, if so, take appropriate action.” This may also be the effect of section 115 of the *Animal Care and Protection Act* 2001 (Qld), which says that the

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4 A good review of the relevant history can be found in Radford's book *Animal Welfare Law in Britain* (2002) Oxford: Oxford University Press

5 Footnote 4

6 see <http://www.abc.net.au/4corners/content/2004/s1137257.htm>

functions of an inspector (include) “to...enforce compliance with this Act.”

### *General inspectors*

**7.5** All jurisdictions allow the person responsible for enforcing the relevant act (or another person with responsibilities under the statute in relation to enforcement) to appoint a person with enforcement powers (usually an “inspector”).<sup>7</sup> Inspectors have powers of:

- entry and search;
- examination and inspection;
- gathering evidence;
- requiring assistance;
- seizure of animals;
- taking action to alleviate suffering.

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7 ACT: s76(1) *Animal Welfare Act* 1992

NSW: s4 of the *Prevention of Cruelty to Animals Act* 1979 defines “officer” to mean a member of the police force or an inspector within the meaning of the *Animal Research Act* 1985, an officer of an approved charitable organisation who is a special constable within the meaning of the *Police Offences Act* 1901 or a public servant who is appointed by the Minister or by an officer of the Department of Primary Industries authorised by the Minister as an officer for the purposes of this Act; section 24D of the Act defines an inspector as an officer other than a police officer who is the holder of an authority issued by the Minister, the Director-General or a Deputy Director-General of the Department of Primary Industries for the purposes of Division 2 of the Act  
NT: s57 *Animal Welfare Act* 1999

Qld: s114 *Animal Welfare and Protection Act* 2001; the Chief Executive may appoint an individual who is a public service officer or employee or a person who is employed by the RSPCA (Qld) or included in a class of individuals; declared under a regulation to be an approved class of persons (regulation 29 of the Regulations says that officers of the RSPCA Qld are an approved class of persons for section 99 – concerning authorised officers, while regulation 30 says that the employees of an incorporated association whose objects include animal welfare or the provision of facilities to care for animals are an approved class of persons for section 114 – concerning inspectors; the Qld Act also states the functions of an inspector are to investigate and enforce compliance with the Act: s115

SA: s28 *Animal Welfare Act* 1985 provides that the Minister may appoint a qualified person to be an inspector for the purposes of the Act; “qualified person” means a person who has successfully completed training as prescribed by the regulations (ss5). Regulation 17 of the *Animal Welfare Regulations* 2000 sets out which training, which must be approved by the Minister, meets those requirements.

Tas: s13 *Animal Welfare Act* 1993 The Minister may appoint person to be officers; ss 36 and 37 provides that officers or other persons may be appointed as inspectors for the administration and enforcement of Part 4 of the Act (relating to use of animals for scientific research); the powers of those inspectors, which are set out in s38, include entry, search, etc

Vic: s18 *Prevention of Cruelty to Animals Act* 1986 general inspectors include an inspector of livestock appointed under the *Livestock Disease Control Act* 1994 or a full-time or part-time officer of the RSPCA or a person who is an authorised officer under s72 of the *Domestic (Feral and Nuisance) Animals Act* 1994, and who are approved as general inspectors by the Minister. The Victorian Act also refers to “POCTA Inspectors” which includes general inspectors and “specialist inspectors” (the latter being appointed by the Minister under section 18A)

WA: s33 *Animal Welfare Act* 2002; the Chief Executive Officer may appoint as general inspectors those members of staff of the RSPCA nominated by the RSPCA and others who may be a member of staff of the Department, Agriculture WA, CALM, Fisheries Western Australia or a local government, or any other person

The detailed provisions relating to these powers are:

#### Entry and search

ACT: other than premises (which includes a vehicle: s2) used for scientific research etc or an abattoir (unless the inspector is a veterinary surgeon or accompanied by a veterinary surgeon) where there are reasonable grounds, either with the consent of the occupier, or enter business premises during business hours or in accordance with a warrant under s 90 or where there are serious and urgent circumstance requiring exercise of powers without a warrant (in which case reasonable force may be used to effect an entry): ss80 and 81 *Animal Welfare Act* 1992; see also section 88 regarding consent to entry. Section 89 of the *Animal Welfare Act* 1992 requires an inspector or authorised officer to provide an occupier of commercial premises who has consented to entry with a report of the inspection within 30 days after the entry.

NSW: an inspector may enter land (which includes premises or a vehicle, vessel or aircraft) for the purpose of exercising any function under Division 2 (but can only enter a dwelling with consent of the occupier or under the authority of a search warrant or if the inspector believes on reasonable grounds that an animal has suffered significant physical injury or is in imminent danger of suffering significant physical injury or has a life threatening condition that requires immediate veterinary treatment and it is necessary to exercise the power to prevent further physical injury to the animal or to ensure that it is provided with veterinary treatment: s24E; if a police officer suspects on reasonable grounds that a vehicle or vessel contains an animal in respect of which an offence against ss5-8 has been or is being committed and that the animal is in distress (defined as suffering from exposure to the elements, debility, exhaustion or significant physical injury) the officer may stop the vehicle or vessel, enter the vehicle or vessel, enter any land for those purposes and examine the animal (there are also provisions relating to directions which the officer may give to the person operating the vehicle or vessel): s24H; the time an inspector spends on the land must be no longer than is reasonably necessary to achieve the relevant purpose (similar restrictions apply in relation to the time for which a vehicle or vessel may be detained: s24L *Prevention of Cruelty to Animals Act* 1979).

NT: in relation to any premises other than a vehicle that the inspector believes on reasonable grounds are not licensed premises (ie licensed for teaching or research) and in relation to a vehicle, that vehicle is not connected with licensed premises; the same conditions and restrictions apply as are applicable to an “officer”: s62 *Animal Welfare Act* 1999; an “authorised person” (ie an inspector or an officer) may enter premises with the consent of the occupier (which must be in writing: s63 of the Act), or if that person believes on reasonable grounds that the circumstances are so serious and urgent as to require the immediate

exercise of a power under s66 or 67, without the occupier's consent or the authority of a search warrant. An inspector may not enter licensed premises unless accompanied by an officer and may not enter an abattoir unless he or she is a veterinarian or is accompanied by an officer or a veterinarian (s62(6)); there is a provision in the Act (s65) allowing entry onto Aboriginal land for the purpose of exercising a power under the Act even though the person does not hold a permit under the *Aboriginal Land Act*; where, after giving notice, an authorised person enters commercial premises or licensed premises for the purposes of an inspection pursuant to s66, the person must provide the occupier with a written report of the inspection (s68 of the Act).

Qld: s108 *Animal Welfare and Protection Act 2001*: (for authorised officers in relation to scientific use): with consent of the occupier, or where the officer has given the occupier at least 48 hours notice or if the occupier has been given a relevant animal welfare direction (there is provision for written acknowledgement of consent, which may be given: s109); ss111 and 112 deal with entry to vehicles. Chapter 5 provides that other powers relating to inspectors (ss134, 135, 168, 169, chapter 6, part 2, division 3 (but not s137(d), chapter 6, part 2 division 5 and chapter 6 part 3) apply to authorised officers as if they were inspectors; s122: for inspectors, entry to premises (see ss130 -135 for vehicles) is permitted with consent, the entry is authorised by a warrant, the occupier has been given a relevant animal welfare direction, the inspector reasonably suspects an animal at the place has just sustained a severe injury and the injury is likely to remain untreated or untreated for an unreasonable period, the inspector reasonably suspects there is an imminent risk of death or injury to an animal at the place because of an accident or from an animal welfare offence or the inspector reasonably suspects any delay in entering the place will result in concealment, death or destruction of anything at the place that is evidence of an animal welfare offence or being used to commit continue or repeat an offence; the procedure for entry with consent is set out in s124; ss136 – 141 relate to general powers of entry.

SA: s30 *Animal Welfare Act 1985*: An inspector may enter and search and if necessary use reasonable force to break into or open premises or a vehicle to which the section applies or part of or anything in or on premises or a vehicle to which the section applies; an inspector may only exercise the powers conferred as reasonably required for the administration and enforcement of the Act and may only exercise the power to use force on the authority of a warrant issued by a magistrate or in circumstances in which the inspector reasonably believes that urgent action is required in order to prevent or mitigate serious harm occurring to an animal; section 31 deals with "routine inspections" and says that an inspector proposing to exercise powers under the Act to conduct a routine

inspection of premises or a vehicle in circumstance where there is no suspicion of an offence the inspector must give the occupier of the premises or the owner of the vehicle reasonable notice of the proposed inspection and also give a reasonable opportunity to persons such as the occupier to accompany the inspector during the inspection and take such steps as are necessary in the circumstances to minimise any adverse effect of the inspection on the business or activities of the occupier of the premises or the owner of the vehicle (although no notice is required to be given of a routine inspection where the inspector reasonably suspects there is an animal in respect of which an animal welfare notice or animal welfare order is in force; subsection 5 sets out the premises and vehicles to which the section applies.

Tas: s16 *Animal Welfare Act 1993*: An officer may enter search and inspect any premises (apart from those being used as a dwelling) if the officer reasonably believes there is on the premises an animal in respect of which an offence under the Act has been or is being committed; an officer authorised by the Minister to do so may at any reasonable time enter search and inspect any premises where animals are sold, presented for sale, assembled or kept for commercial purposes (Dr Richard Butler, Chief Executive Officer of the RSPCA, has informed the author that the Minister has given that authorisation); in entering premises, an officer may use such force as is reasonably necessary and stop any vehicle or conveyance.

Vic: s23 *Prevention of Cruelty to Animals Act 1986*: If a POCTA inspector suspects on reasonable grounds that on any premises (that is not a person's dwelling) baiting, trap-shooting or the use of animals as lures is occurring, the inspector may, with any assistance that is necessary enter the premises and inspect and examine any animals etc that the inspector reasonably believes is being used for those purposes; if a POCTA inspector suspects on reasonable grounds that there is on any premises (that is not a person's dwelling) any animals that are ruminants (defined) that have been confined without food or water for more than 36 hours or any animals being mammals other than ruminants or birds that have been confined without food or water for more than 24 hours, the inspector may enter the premises and feed and water the animals; 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 in an entanglement, tether or bog or that is showing signs of pain or suffering as a result of any injury or disease, the inspector may enter the premises and free any animal (without removing it from its housing or the premises) or if any animal on the premises is showing signs of pain or suffering as a result of injury or disease, inspect the animal in order to determine whether the animal requires treatment by a veterinary practitioner; 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 behaving in such a

manner and there are such circumstances that it is likely that the animal will cause death or serious injury to any person or another animal, the inspector may enter the premises and contain or destroy any such animal. There is also an “emergency power” of entry under s24, whereby a POCTA inspector may enter the premises if he or she 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 destroy or seize the relevant animal or leave notice of his or her intention to seize the animal if the inspector is not contacted by the owner or person in charge within 2 days of giving the notice (and if that person does not contact the inspector as required he or she may enter the premises and seize the animal); s24L gives power to a specialist inspector, with the authority of the Minister, to enter premises (other than a person's dwelling) in or on which an animal or animals or housed or grouped for any purpose (there are other provisions about inspections and observations).

WA: s38 *Animal Welfare Act 2002*: may enter a place with the consent of the occupier or person apparently in charge of the place, or with at least 24 hours notice, under a warrant, in the case of a place occupied by a scientific establishment, at any time, in the case of any other non-residential place if the inspector reasonably suspects that an offence under Part 3 has been or is being committed at the place or is likely to be or to continue to be committed at the place if entry is not effected; s39 an inspector may enter a vehicle with consent of the occupier or person apparently in charge of the vehicle, under a warrant or (unless the vehicle is a residence) if the inspector reasonably suspects that the vehicle has been or is being used in the commission of an offence under Part 3 or is likely to be or to continue to be used in the commission of an offence under Part 3 unless entry is effected (vehicle includes a train, vessel, aircraft and any other thing used as a means of transport: section 5); s47(1)(a) subject to ss 38, 39, 42 and 43 an inspector may search a place or vehicle.

#### Examination and inspection

ACT: s82(1)(a) and (c) *Animal Welfare Act 1992*.

NSW: s24I *Prevention of Cruelty to Animals Act 1979*: inspector may examine an animal if the inspector suspects on reasonable grounds that an offence against the Act or the regulations is being has been or is about to be committed in respect of the animal or the animal has not been provided with proper and sufficient food or drink during the previous 24 hours (or in the case of the provision of food to an animal of a class prescribed by the regulations, during the period prescribed for that class of animal) and is still not being provided with that food or drink or the animal is so severely injured, so diseased or in such physical condition that it is necessary that the animal be provided with veterinary treatment and the animal is not being provided with that treatment

or the animal is so severely injured so diseased or in such a physical condition that it is cruel to keep it alive and the animal is not about to be destroyed or is about to be destroyed in a manner that will inflict unnecessary pain on the animal; see also regulation 5 of the *Prevention of Cruelty to Animals (General) Regulation 2006* which in effect provides that where there are “drought conditions” and ruminant stock animals are being fed stored or purchased feed, 72 hours is the time prescribed.

NT: s66 *Animal Welfare Act 1999*; an authorised person who enters premises may examine any animal in or on the premises, inspect the premises and any thing in or on the premises.

Qld: s137 *Animal Care and Protection Act 2001*: an inspector may examine or inspect or film, photograph, videotape or otherwise record an image of an animal, document or thing at a place.

SA: s31A *Animal Welfare Act 1985* an inspector may examine an animal and its living conditions and if the inspector suspects on reasonable grounds that the animal is suffering or may if urgent action is not taken suffer unnecessary harm provide treatment and care for the animal, cause the living conditions of the animal to be modified or seize and retain the animal for treatment and care.

Tas: s16(4A) *Animal Welfare Act 1993*; s25: An officer may require a veterinary surgeon to carry out any examination or take any sample as may be necessary to determine the extent of any injury, disease or suffering endured by an animal, whether any substance was being administered to an animal or the cause of death of an animal.

Vic: s24A *Prevention of Cruelty to Animals Act 1986*: an inspector entering premises under the Division may inspect anything on the premises and may open any container for the purpose of inspection or taking a sample of the contents.

WA: s47(1)(b) *Animal Welfare Act 2002*: an inspector may examine and take samples from an animal, place, vehicle or thing, (h) open a container, (i) examine a record, (k) conduct examinations and make inquiries that the inspector considers are necessary to check whether the Act is being complied with or to investigate a suspected offence.

#### Gathering evidence

ACT: take copies of documents, make photographs, films, videotapes: ss82(1)(d), (e); seize documents: s82(1)(f) *Animal Welfare Act 1992*.

NSW: demand name and address, s24A; where a driver of a motor vehicle is alleged to have committed an offence, the person responsible for the vehicle must disclose the identity of the driver who commits the offence, s24B; an inspector who is lawfully on any land investigating a suspected commission of an offence against the Act or the regulations may seize any thing that will afford evidence of the commission of the offence (and may retain the thing until the completion of any relevant proceedings) – there are provisions for copies of documents to be given to the person from whom the documents were seized and for a person aggrieved by the seizure to apply for relief to the court, s24K *Prevention of Cruelty to Animals Act 1979*.

NT: take copies of or extracts from documents in or on the premises; take photographs or make films or videotapes of the premises or animals or things in or on the premises (s66 *Animal Welfare Act 1999*); ask questions of persons in or on the premises (s66(g) of the Act).

Qld: an inspector may take a sample of or from an animal for analysis or testing, or copy a document: s137 *Animal Care and Protection Act 2001*; s163: may require a person to state their name and address; an inspector may require a person to give information about a contravention (including a veterinary surgeon in certain circumstances): s165; it is an offence not to comply with the requirement: s166 or to give false and misleading information: s167; an inspector may require production of relevant documents – which include documents required to be kept): s168; failure to comply is an offence: s169, as is giving documents containing false information: s170.

SA: s30(1)(c): an inspector may require a person to produce a document, including a written record that reproduces in an understandable form information stored by a computer, microfilm or other process and (d) examine, copy or take extracts from a document or information so produced or require a person to provide a copy of any such document or information and (e) take photographs, films or audio, video or other recording and (h) require a person who the inspector reasonably suspects has committed is committing or is about to commit a contravention of the Act to state the person's full name and usual place of residence and to produce evidence of the person's identity and (i) require a person who the inspector reasonably suspects has knowledge of matters in respect of which information is required for the administration or enforcement of the Act to answer questions in relation to those matters.

Tas: s16A *Animal Welfare Act 1993*: an officer may, for the purpose of the Act, take photographs and make films or videos; s26 may require a person to provide name and address, answer questions, provide a document or a copy of a

document or provide other information.

Vic: s24A: an inspector entering premises under the Division may inspect and take photographs (including video recordings) or make sketches; take and keep samples of or from any animal or thing; s24J concerns seizure of things (including an animal) that an inspector reasonably believes has been used in connection with the commission of an offence against the Act or regulations; demand name and address (s24ZT).

WA: an inspector may seize any [other] thing that the inspector reasonably suspects is being or has been used to commit or may afford evidence of the commission of an offence under the Act: s43 *Animal Welfare Act 2002* (the owner or person in charge must be notified: s44); an inspector who reasonably suspects a person is committing or has committed an offence under the Act may ask the person for the person's name etc: s46; s47(1): an inspector may: (b) take samples, (f) take photographs, video recordings or other recordings of an animal, place, vehicle or thing; (g) take measurements or recordings of any sort, (i) examine, take extracts from or copy a record.

Requiring assistance

ACT: s82(1)(g) *Animal Welfare Act 1992*.

NT: s66(f) *Animal Welfare Act 1999*.

Qld: ss138 - 141 *Animal Care and Protection Act 2001*.

SA: s30(4) *Animal Welfare Act 1985*: an inspector may require an occupier of premises or a person apparently in charge of a vehicle animal or other thing to give to the inspector or a person assisting the inspector such assistance as is reasonably required by the inspector for the effective exercise of powers under the Act.

Seizure of animals

ACT: where the inspector has a reasonable belief it is connected with an offence: s82(1)(f) *Animal Welfare Act 1992* (“connected with” means if it is an animal in relation to which the offence has been committed, will provide evidence of the offence or was used or is or was intended to be used to commit the offence: s74 *Animal Welfare Act 1992*); a veterinary surgeon may take a sample of tissue, blood, urine or other bodily material from a seized animal: s84A *Animal Welfare Act 1992*.

NSW: if after examining an animal in accordance with Division 1 (powers of

officers generally) an inspector suspects on reasonable grounds that the animal is in distress as referred to in section 24H(5) or any of the circumstances referred to in section 24I exist in relation to the animal, the inspector may take possession of the animal (including a carcass), remove the animal or carcass to such place as the inspector thinks fit, retain possession of the animal or carcass, provide the animal with necessary food, drink or veterinary treatment or destroy the animal in a manner that causes it to die quickly and without unnecessary pain. The animal or carcass to which section 24I(a) applies may be retained for a period not exceeding 60 days or where within that 60 day period proceedings are commenced in respect of the offence concerned until the proceedings are finally determined (unless the relevant court otherwise directs) (and regardless, an animal retained under the section that is in distress or to which section 24I(b), (c) or (d) applies may be retained for such period of time as is sufficient for the animal to be provided with necessary food, drink or veterinary treatment or to be destroyed in a manner that causes it to die quickly and without unnecessary pain, as the case requires); note section 31A of the Act gives a “charitable organisation” rights to sell or rehome animals retained by an officer of the organisation, a stray or abandoned animal in its possession or an animal surrendered to it (“charitable organisation” is defined to include the RSPCA (NSW) and any other not for profit organisation having animal welfare objectives).

NT: seize animals or things that the authorised person believes on reasonable grounds to be connected with an offence (s66(e) *Animal Welfare Act* 1999).

Qld: s142 *Animal Care and Protection Act* 2001: an inspector who reasonably suspects an animal or thing is evidence of an offence against the Act or reasonably believes seizure of an animal or thing is necessary to prevent it being destroyed hidden or lost or used to commit continue or repeat an offence, may seize it; an inspector may also seize an animal or thing if the inspector reasonably believes it has just been used in committing or is the subject of an animal welfare offence (or with the written consent of a relevant person – including a person in charge of an animal); s144 *Animal Care and Protection Act* 2001: an inspector may seize an animal if he or she reasonably believes the animal is under an imminent risk of death or injury, requires veterinary treatment or is experiencing undue pain and the interests of the welfare of the animal require its immediate seizure; an inspector may also seize an animal if the person in charge of the animal has contravened or is contravening an animal welfare direction or relevant court order; s145 *Animal Care and Protection Act* 2001: an inspector may seize an animal or thing despite another person having a security interest in it; see also ss146 – 157 concerning seizure directions and other provisions relating to seizure, including forfeiture. Note that in Queensland, ownership of

animals forfeited etc may be transferred to a “prescribed entity”.

SA: s30(1)(f) *Animal Welfare Act* 1985: an inspector may seize and retain any animal or other thing that the inspector reasonably suspects has been used in or may constitute evidence of a contravention of the Act; s31A(1)(c) *Animal Welfare Act* 1985: an inspector who suspects on reasonable grounds that an animal is suffering or may if urgent action is not taken suffer unnecessary harm may seize and retain the animal for treatment and care.

Tas: s16(2A) *Animal Welfare Act* 1993: an officer entering premises under section 16 may seize anything found on those premises that the officer reasonably believes is being or has been used in committing an offence against the Act or is evidence that an offence is being or has been committed (s16(2A)); s17: if the officer is satisfied that an offence under the Act has been or is being committed and unless possession is taken the animal's life will be endangered or any pain or suffering it is undergoing will be unreasonably or unjustifiably prolonged, he or she may take possession of an animal and detain it in a safe place; s18: if a person is arrested for an offence under the Act in respect of an animal, the officer may take possession of the animal; there are provisions relating to the return of animals (ss19, 20); a court may order the continuing detention of an animal: s21, or may order the sale of an animal: s22.

Vic: s22 *Prevention of Cruelty to Animals Act* 1986: a POCTA inspector who finds an animal in a public place and the inspector reasonably believes the animal is abandoned, may seize the animal; s24E: the Minister may serve notice he or she intends to authorise seizure of an animal if he or she 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 (there are provisions regarding the service of the notice); 7 days after the service of the relevant notice, a specialist inspector may be authorised to seize the animal and dispose of it in a manner determined by the Minister or otherwise in accordance with Division 6: s24F.

WA: s42 *Animal Welfare Act* 2002: an inspector may seize an animal if the inspector reasonably suspects that an offence under Part 3 is being or has been committed in respect of an animal or under a warrant.

Taking action to alleviate suffering

ACT: if he or she believes on reasonable grounds an animal has not been provided with proper or sufficient food or drink during the previous 24 hours or is so severely injured, overworked, so diseased or in such a physical condition that it is necessary the animal be provided with veterinary treatment or it would be cruel

to keep such an animal alive (where such an animal is not about to be destroyed or is about to be destroyed in a manner that will inflict unnecessary pain on the animal): s85(1) *Animal Welfare Act* (1992); in those circumstances the inspector may seize the animal, give assistance to the animal and remove it to any place he or she thinks fit; however, in relation to an animal where “it is cruel to keep it alive etc” the inspector may only destroy the animal with the written consent of a person in charge of the animal unless the inspector after making reasonable enquiries is unable to locate the person or the inspector is a veterinary surgeon: s85(3) *Animal Welfare Act* 1992.

NSW: section 30 of the *Prevention of Cruelty to Animals Act* 1979 provides that, where a court has convicted a person of an offence against the Act or regulation in respect of an animal, the court may in certain circumstances make an order that the animal be destroyed.

NT: if an authorised person believes on reasonable grounds that an animal has not been provided with appropriate or sufficient food or drink during the previous 24 hours, an animal is so severely injured, overworked, diseased or in such a physical condition that it is necessary for the animal to be provided with veterinary treatment or an animal is being treated in a manner that is likely to cause it suffering, the authorised person may take the action he or she believes is necessary to alleviate the animal's suffering (defined to include pain and distress); which action includes providing the animal with food or drink, seizing the animal and removing it to a place the authorised person considers appropriate or giving a notice requiring action to be taken (s67 *Animal Welfare Act* 1999); if an authorised person is of the opinion that an animal is so severely injured, diseased or in such a poor physical condition that it is cruel to keep it alive and the animal is not about to be destroyed or is about to be destroyed in a manner that will inflict unnecessary suffering on it, the authorised person may destroy the animal or cause it to be destroyed in a manner that causes it to die quickly and without unnecessary suffering (but only with the consent of a person in charge of the animal unless after making reasonable enquiries the inspector is unable to locate the person or the inspector is a veterinarian).

Qld: s123 *Animal Care and Protection Act* 2001: if an inspector reasonably suspects an animal at a place other than a vehicle is suffering from lack of food or water or is entangled and the person in charge of the animal is not or is apparently not present at the place and the animal is not at a part of the place at which a person reside or apparently resides, the inspector may enter and stay at the place while it is reasonably necessary to provide the food or water or to disentangle the animal (and must leave a notice giving relevant details); s137 (d) says an inspector may take reasonable measures to relieve the pain of an animal at the place; an

inspector may destroy an animal or cause it to be destroyed if an inspector has seized the animal (or with written consent of the person in charge) and the inspector reasonably believes that the animal is in pain to the extent that it is cruel to keep it alive: s162 *Animal Care and Protection Act* 2001.

SA: s31A *Animal Welfare Act* 1985: an inspector may destroy an animal if of the opinion that the condition of the animal is such that the animal is so weak or disabled (whether physically or mentally) or in such pain that it should be destroyed; the power must not be exercised unless the owner of the animal consent, the owner of the animal has refused or failed to give consent and a magistrate has on application by an inspector issued a warrant authorising the destruction of the animal, the inspector has been unable to determine who owns the animal or has been unable to contact the owner after taking reasonable steps to do so or the inspector is satisfied that the animal is wild.

Tas: s23 *Animal Welfare Act* 1993: An officer may supply food or drink to an animal or authorise a veterinary surgeon to administer medical treatment to an animal if the officer is of the opinion that the animal is not provided with a sufficient quantity of food or drink fit for its consumption or is suffering from any injury or disease or is otherwise suffering; s24: An officer or veterinary surgeon may kill an animal if in their opinion the animal is injured or diseased or is otherwise suffering and they reasonably believe that the injury, disease or other suffering will cause the animal continued and excess suffering; a justice may authorise in writing any person to kill a specified animal in the circumstances referred to.

Vic: s24C *Prevention of Cruelty to Animals Act* 1986: if a POCTA inspector reasonably believes that treatment by a veterinary practitioner is necessary for the welfare of an animal (subject to ss2) the inspector may arrange for that treatment; ss2 provides that the owner or person in charge, if contactable, must be given the opportunity for a veterinary practitioner of his or her choice to undertake the required treatment; s24D gives powers to veterinary practitioners and superintendents of saleyards to destroy an animal, where an animal is behaving in such a manner and there are such circumstances that the relevant person believes the animal is likely to cause death or serious injury to any person or another animal or the animal is abandoned, distressed or disabled if the relevant person reasonably believes that the animal's condition is such that it would continue to suffer if it remained alive.

WA: s40 *Animal Welfare Act* 2002: an inspector may provide to an animal or direct a person in control of an animal to provide to the animal any food, water, shelter, care or treatment the inspector considers necessary to ensure the welfare, safety and health of the animal; s41: an inspector who reasonably believes an animal is

suffering so severely that destroying it would be a humane thing to do, may destroy the animal in a human manner (there are provisions for notifying relevant persons).

**7.6** Recent legislative amendments in South Australia qualify the right to entry where there is no suspicion of an offence. The effect of section 31 of the *Animal Welfare Act* 1985 is to require an inspector wishing to conduct a “routine inspection” in such circumstances to give the occupier of the premises “reasonable notice”. This resolves a long-running controversy whereby the South Australian RSPCA had maintained it did not have the power to inspect intensive animal farming establishments without the consent of the occupier. One contrasts this with the situation in Tasmania where an almost identically-worded provision is regarded by the RSPCA and the responsible Minister as giving the RSPCA to inspect intensive animal farming operations without notice.

**7.7** All jurisdictions provide that members of the relevant police force have powers to enforce the relevant act or have other relevant enforcement powers.<sup>8</sup> In Tasmania a police officer may arrest without warrant a person the officer reasonably believes is committing or has committed an offence under the Act.<sup>9</sup> In some cases other bodies or persons are given such powers.<sup>10</sup>

**7.8** There are provisions in the relevant Acts enabling grant of a search warrant (or equivalent) allowing entry into premises in relation to enforcement of the act.<sup>11</sup>

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8 s76(2)(b) *Animal Welfare Act* 1992 (ACT); ss4, 24D, 24H, *Prevention of Cruelty to Animals Act* 1979 (NSW); ss4 & 57 *Animal Welfare Act* 1999 (NT); the Queensland provisions are in Chapter 6 of the *Police Powers & Responsibilities Act* 2000. This deals with offences involving animals and vehicles, stopping animals, removing animals, seizing animals, giving animal welfare directions (ss142 – 145); powers in relation to an offence involving an animal, including powers of entry, inspection and seizure and powers to provide relief to an animal (ss146 – 149); s18(1)(a); s3 *Animal Welfare Act* 1985 (SA); s3 *Animal Welfare Act* 1993 (Tas); s3 *Prevention of Cruelty to Animals Act* 1986 (Vic); s5 *Animal Welfare Act* 2002 (WA)

9 s15(1) *Animal Welfare Act* 1993; the officer in those circumstances may also require the relevant person to provide details including name and address, and may arrest the person if they refuse to give that information or the officer reasonably believes the information to be false

10 ACT – the Animal Welfare Authority; s76(2)(a) *Animal Welfare Act* 1992 (ACT); NSW – officer of an approved charitable organisation; public servant appointed by the Minister (or an officer of the Department of Primary Industries authorised by the Minister); such a person (other than a police officer) is an inspector when so authorised under section 24D of the *Prevention of Cruelty to Animals Act* 1979

11 ACT: s90 *Animal Welfare Act* 1992; where there are reasonable grounds for suspecting that there is an animal or thing connected with a particular offence against the Act or connected with a contravention of or requirement imposed by or under the Act, or an animal referred to under s85

NSW: s24F *Prevention of Cruelty to Animals Act* 1979; an inspector may apply to an authorised officer (see *Law Enforcement (Powers and Responsibilities) Act* 2002) for a search warrant if the inspector has reasonable grounds for believing that there is, in or on any land an animal in respect of which an offence against the Act or regulations is being or has been committed or is about to be committed or evidence of an offence against the Act or the regulations that had been committed; s24G applies to land used for the purpose of a sale-yard or animal trade and land in or on which an animal is being used or kept for use in connection with any other trade, or any business or profession (including a place used by a veterinary practitioner for the purpose of carrying on his or her profession) (animal trade means a trade, business or profession in the course of which any animal is kept or used for a purpose prescribed for the purposes of the definition and sale-yard means any

**7.9** Many jurisdictions contain provisions relating to enforcement which allow actions falling short of prosecution of a breach of a statute. In the ACT, a “regulatory body”<sup>12</sup> can take “regulatory action”<sup>13</sup> against the holder of authorisations, licences or permits in cases where there has been (for example) false information provided in relation to a grant or renewal or contravention of a condition.<sup>14</sup> Section 37A of the *Prevention of Cruelty to Animals Act 1986* (Vic), sections 43A – 43H of the *Animal Welfare Act 1993* (Tas) and Division 3 of the Western Australian Act allows an authorised officer, an officer and inspector (respectively) to issue infringement notices.<sup>15</sup>

premises or public place used or established for use wholly or partly for the sale of stock animals), and gives powers to an inspector to inspect and examine the land, any animal that is in or on the land and any accommodation or shelter that is provided in or on the land for any animal, inspect and examine any register that is kept under the Act or the regulations that is in or on the land (and require any person found in or on the land to produce any such register, and take copies of or extracts or notes from any such register); s29C of that Act provides that a court may make an order regarding the care of animals in certain circumstances.

NT: s64 *Animal Welfare Act 1999*; an authorised person (ie officer or inspector) may apply to a Justice by information on oath for a search warrant if that person believes on reasonable grounds that an offence against the Act or the Regulations is about to be, is being or has been committed in or on premises; there is in or on premises an animal or thing connected with an offence or there is in or on premises an animal referred to in section 67

Qld ss126 – 129 *Animal Care and Protection Act 2001* an inspector may apply to a magistrate or a qualified justice of the peace for a warrant: s126 (see also ss127 - issue and 128 – special warrant for urgent circumstances or special circumstances); s129 sets out the procedure for entry with a warrant

SA: s31D *Animal Welfare Act 1985*

Tas: s16(3) *Animal Welfare Act 1993*

Vic: s24G *Prevention of Cruelty to Animals Act 1986* a POCTA inspector with the written approval of the Department Head may apply to a magistrate for the issue of a search warrant in relation to premises including residential premises if the inspector believes on reasonable grounds that there is in or on the premises an abandoned, diseased, distressed or disabled animal or an animal the welfare of which the inspector believes on reasonable grounds is at risk or an animal in respect of which a contravention of ss9, 19(1), 11A, 13(1) or the regulations is occurring or has occurred or an animal in respect of which the person in charge is in contravention of an order under s12(1) or an interstate order (see s12A) that is registered under that section.; s24K allows the issue of a warrant in relation to a “thing or things...connected with a contravention of the Act or regulations; Division 5 contains general provisions as to search warrants, concerning what must be stated (s24M), the rules to be observed (s24N), announcement before entry (s24O), details which must be given to the occupier (s24P), seizure and taking of samples (s24Q), duties and powers as to seized animals (ss24R – 24ZD) and other things seized (ss24ZE – 24ZN), taking samples (s24ZO) and other matters (ss24ZP - 24ZS)

WA: ss59 – 62 *Animal Welfare Act 2002*

12 Which is the animal ethics committee in relation to scientific research etc or the issuing authority in the case of a circus permit holder or travelling zoo permit holder or trapping permit holder (s73A *Animal Welfare Act*)

13 Which can be putting a condition on or amending a condition of a person's approval, suspending approval for a stated period, cancelling the approval or disqualifying a person from applying for an approval: s73C *Animal Welfare Act*. The regulatory body must first issue a “regulatory notice”: s73D *Animal Welfare Act*; see Part 6A of that Act for other details

14 s73B *Animal Welfare Act*

15 s43A of the *Animal Welfare Act 1993* (Tas) says that an officer may serve an infringement notice on a person if the officer is of the opinion that the person has committed an offence under the Act or the regulations; payment of the prescribed penalty has the effect of preventing a prosecution for the relevant offence; s37A of the Vic Act: a notice may be served on any person that the officer has reason to believe has committed an offence against s15A(2) (dogs on vehicles) or a prescribed offence. The prescribed offences are listed in Schedule 6 of the *Prevention of Cruelty to Animals Regulations 2008* (Vic) (see also reg 110) and include offences relating to rodeos, use of electronic devices, and breaching the law relating to transport of animals in motor vehicles; s65 *Animal Welfare Act 2002* (WA) an inspector who reasonably suspects that a person has committed a prescribed offence may give an infringement notice to that person within 28 days of when the

Inspectors or other authorised persons may issue directions or notices, including in situations where the inspector or authorised person believes there are circumstances such that an offence against the relevant act has been committed.<sup>16</sup> Failure to comply with a direction or to pay the penalty specified in a notice is an offence carrying a penalty less than the penalty for contravention of a “cruelty” provision.<sup>17</sup>

### *Scientific inspectors*

**7.10** In some cases a distinction is drawn between those who have the power to enforce “general offences” and those who have power to enforce statutory provisions

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offence was allegedly committed; s66 provides that a modified penalty may be prescribed for infringement notices; by s69, if a modified penalty is paid within 28 days of the notice being given (and that time can be extended under s67) the bringing of proceedings and the imposition of other penalties in relation to the alleged offence are prevented

16 ACT: s85(5) *Animal Welfare Act* 1992 (strict liability offence);

NSW: s24N *Prevention of Cruelty to Animals Act* 1979 (failure to take the action specified in the notice is admissible in any proceedings against the person given the notice for an offence against the Act or the regulations relating to the alleged contravention in respect of which the notice was given or an alleged contravention of a similar kind occurring after the notice was given; s33E: an inspector may serve a penalty notice where it appears to the inspector that the relevant person has committed an offence against the Act or the regulations where that offence is prescribed as a penalty notice offence (the notice is to the effect that the person on paying the stated penalty can not then be proceeded against in relation to the alleged offence: ss4); regulation 23 and Schedule 3 of the *Prevention of Cruelty to Animals Regulation* 2006 sets out which offences are penalty notice offences.

NT: section 67 of the *Animal Welfare Act* 1999 gives an authorised officer power to issue a notice requiring a person in charge of an animal (which includes an owner of the animal and a person who has the animal in his or her possession: s4) to provide the animal with the specified rest, food, drink shelter or treatment that is necessary in the interests of the animal's welfare and if necessary to obtain veterinarian (sic) treatment for the animal within the specified period that is reasonable in the circumstances; footnote 12 sets out the circumstances in which an authorised officer may issue a notice; Part 5 of the *Animal Welfare Regulations* 2000 allows an inspector or officer to serve an infringement notice (as specified in Schedule 2) requiring an alleged offender to pay a prescribed amount, which if paid serves to expiate the offence (although the only offence this applies to is transporting an unrestrained dog in or on a moving vehicle)

Qld: s158 *Animal Care and Protection Act* 2001 if an inspector reasonably believes a person has committed, is committing or is about to commit an animal welfare offence or an animal is not being cared for properly, is experiencing undue pain, requires veterinary treatment or should not be used for work he or she may give an animal welfare direction under s159 to a person in charge of the animal or a person whom the inspector reasonably believes is in charge of the animal. The direction may require action including the person care of or treat the animal in a stated way, provide the animal with stated accommodation, food, rest, water or other living conditions, consult a veterinary surgeon about the animal's condition before a stated time, move the animal from the place where it is situated to another stated place or not to move the animal from the place where it is situated; action may be required only if the inspector considers it to be necessary and reasonable in the interests of the animal's welfare. s160 sets out the requirements for giving a direction.

SA: s31B *Animal Welfare Act* 1985 If an inspector believes on reasonable grounds that the exercise of powers under the section is warranted, the inspector may by written notice direct the owner to provide the animal with such food, water, shelter, rest or treatment as the inspector thinks necessary; require the owner to ensure the animal is not worked or used for any purpose specified for such period as specified; require the owner to ensure the animal is exercised as stipulated or direct or require the owner to take any other action specified within the time specified

Tas: s14 *Animal Welfare Act* 1993 instructions as may be necessary to enable an officer to assess or ensure the welfare of an animal can be given to persons who: have the care or charge of the animal, usually have the care or charge of the animal, the officer has reasonable grounds for believing will have the care or charge of the animal in the future

WA: s40 *Animal Welfare Act* 2002 (re food, water, shelter, care or treatment the inspector considers necessary to ensure the welfare, safety and health of the animal); s47 – re inspection, examination, evidence gathering; see

relating to the use of animals in scientific research etc.<sup>18</sup> The New South Wales *Animal Research Act* 1985 allows for the appointment of inspectors with powers to enforce the relevant provisions of the Act.<sup>19</sup> In WA scientific inspectors have additional powers to suspend the use of animals and refer a matter to the relevant animal ethics committee,<sup>20</sup> give directions to a licensee or other relevant person regarding actions required to be taken<sup>21</sup> and require information.<sup>22</sup>

In Queensland Chapter 5 of the *Animal Care and Protection Act* 2001 deals with compliance with the “scientific use code”;<sup>23</sup> The basis of the requirements for authorised officers<sup>24</sup> monitoring a code requirement is a monitoring program

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- also s50 concerning directions given by scientific inspectors
- 17 ACT: 50 penalty units; s85(6) *Animal Welfare Act* 1992  
 NSW: see Schedule 3 *Prevention of Cruelty to Animals (General) Regulation* 2006  
 NT: 50 penalty units or imprisonment for 6 months: s67(3) *Animal Welfare Act* 1999  
 Qld: Maximum penalty 100 penalty units or 1 year's imprisonment: s161 *Animal Care and Protection Act* 2001  
 SA: Maximum penalty \$2,500: s31B *Animal Welfare Act* 1985; there is an “expiation fee” of \$210 in relation to this offence; the regulations may prescribe expiation fees in relation to alleged offences against the regulations: s44 *Animal Welfare Act* 1985  
 Tas: 10 penalty units  
 WA: Penalty \$20,000 and imprisonment for one year: s40(2) *Animal Welfare Act* 2002
- 18 ACT – an “authorised officer” (who must be a veterinary surgeon) may, where he or she believes it is necessary to do so for the purposes of the Act, enter premises he or she believes on reasonable grounds to be used for research etc using animals, with similar conditions as set out in s81: ss77 and 84 *Animal Welfare Act* 1992. The powers of an authorised officer are similar to those of an inspector, with the additional power to take tissue samples (etc): ss 84 and 85 *Animal Welfare Act* 1992  
 NT: the Authority may appoint a veterinary surgeon to be an animal welfare officer: s58 *Animal Welfare Act* 1999; that person has power to enter premises licensed for teaching or research using animals, for the purpose of exercising the power of inspection under s66 or exercising a power to alleviate an animal's suffering under s67: s62 *Animal Welfare Act* 1999; an occupier (being the occupier or person in charge: s56) must be given 7 days notice of entry for purposes of an inspection unless the officer believes on reasonable grounds there is in or on the premises an animal or thing connected with an offence (s56(3) defines the latter phrase to be an animal or thing in respect of which an offence is being or has been committed; it will provide evidence of the commission of an offence or it was used or is intended to be used for the purpose of committing an offence); an officer may not enter premises that are not licensed premises unless accompanied by an inspector (s62(6))  
 WA: s34 *Animal Welfare Act* 2002
- 19 s49; s50 of the Act gives inspectors powers of entry and search, power to collect evidence; note the powers, including the power of entry and search, may be exercised without notice to the occupier of the relevant premises; a warrant may be granted under s51 which in effect enables an inspector to enter premises (including residential premises) where the inspector has reasonable grounds for believing a provision of the Act or regulations is being or has been contravened and to seize anything which may constitute evidence of a contravention; seizure of animals is authorised by s51 A (where an inspector is of the opinion that an offence against the Act or regulations has been or is about to be committed); s52 allows an inspector to demand a person gives his or her name or address in certain circumstances
- 20 s49 *Animal Welfare Act* 2002
- 21 s50 *Animal Welfare Act* 2002 where a scientific inspector suspects that a licensee or other relevant person has failed to comply with a licence condition
- 22 s51 *Animal Welfare Act* 2002
- 23 The *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* published by the National Health and Medical Research Council (see section 49)
- 24 Authorised officers are appointed by the Chief Executive; they must be a public service officer or employee or a member of a class of persons declared by regulation to be an approved class of persons (s99 *Animal Welfare and Protection Act* 2001)

published by the Chief Executive.<sup>25</sup> The powers of authorised officers are set out in that Chapter, but are referred to above under the section relating to powers of inspectors.

### *Veterinary surgeons*

**7.11** In the ACT, a veterinary surgeon has power in certain circumstances to seize an animal, give it assistance, remove it to another place and destroy it painlessly.<sup>26</sup> There are similar provisions in the New South Wales Act (note sale-yard or abattoir managers also have power to destroy animals<sup>27</sup>),<sup>28</sup> the Northern Territory Act,<sup>29</sup> and the South Australian Act.<sup>30</sup>

## **Prosecutions**

**7.12** There is no consistency between jurisdictions regarding the limitation period for commencement of a prosecution.<sup>31</sup>

## **Orders prohibiting keeping or acquiring animals**

**7.13** Where a person has been convicted of an animal cruelty offence, the court can make orders in effect forbidding that person from buying or having in his or her possession a specified type of animal.<sup>32</sup> In Victoria there is a provision relating to

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25 s95 *Animal Care and Protection Act* 2001 s95; the draft programme must be published in a newspaper and comments must be invited (s96); the Chief Executive must consider the comments before making a final monitoring programme (s97); the final programme is made by gazettal (s98)

26 If in the opinion of the veterinary surgeon the animal is so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive and it is not about to be destroyed or is about to be destroyed in a manner that will inflict unnecessary pain on the animal: s86 *Animal Welfare Act* 1992

27 s26B *Prevention of Cruelty to Animals Act* 1979

28 s26AA *Prevention of Cruelty to Animals Act* 1979

29 s22 *Animal Welfare Act* 1999; s23 also give a veterinarian power to conduct a post-mortem examination if he or she considers it necessary or desirable for the purposes of the Act

30 s34B *Animal Welfare Act* 1985

31 ACT: Section 192 of the *Legislation Act* 2001 says “a prosecution for the following offences against an ACT law may be begun at any time: (a) an offence by an individual punishable by imprisonment for longer than 6 months; (b) an offence by a corporation punishable by a prescribed fine (c) an aiding and abetting offence by an individual in relation to an offence by a corporation punishable by a prescribed fine (being 100 penalty units or more, or \$50,000 or more).” Prosecutions for any other offence must be begun not later than 1 year after the day of commission of the offence (or as otherwise provided in a law)

NSW: 1 year, s34(4) *Prevention of Cruelty to Animals Act* 1979

NT: 1 year, s71 *Animal Welfare Act* 1999

Qld: 1 year after the commission of the offence or 6 months after the offence comes to the complainant's knowledge but within 2 years after the commission of the offence: s178 *Animal Care and Protection Act* 2001

SA: 2 years: s52 *Summary Procedure Act* 1921

Tas: 5 years for offences against section 9 or 10, or 2 years in relation to any other provision: s48C *Animal Welfare Act* 1993

Vic: 3 years for offences under sections 9 and 10, Part 3 or any regulations relating to that Part: s41AC *Prevention of Cruelty to Animals Act* 1986

WA: 2 years after the offence was allegedly committed: s82(2) *Animal Welfare Act* 2002

32 ACT: s101 *Animal Welfare Act* 1992; NSW: s31 *Prevention of Cruelty to Animals Act* 1979 (where the court is satisfied that, were the person to be in charge of an animal he or she would be likely to commit another such offence);

“interstate orders” which has the effect that breach of a court order made in another jurisdiction, where that breach occurs in Victoria, is an offence in Victoria.<sup>33</sup> There is a similar provision in Tasmania.<sup>34</sup>

## Review of decisions

**7.14** In the ACT decisions in relation to the grant of licences etc concerning activities such as trapping, and decisions of an animal ethics committee relating to use of animals in scientific research etc, can be the subject of a review by the AAT.<sup>35</sup>

The Queensland Act provides that orders prohibiting a person from keeping an animal can be reviewed.<sup>36</sup> It also provides for application to the Chief Executive for review of decisions (“original decisions”) relating to registration, disclosure exemption, seizure, forfeiture or issue of animal welfare directions.<sup>37</sup> An appeal may be made to the Magistrate’s Court concerning a review decision of the Chief Executive;<sup>38</sup> the decision of that Court may be appealed to the District Court on a question of law.<sup>39</sup>

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NT: s76 (in similar terms to the cognate section in the NSW Act);

Qld: ss182–188 *Animal Care and Protection Act 2001* concern disposal and prohibition orders; disposal orders may be made against a person convicted of an animal welfare offence and may relate to an animal other than the animal the subject of the conviction; similarly with prohibition orders; an order may be made against the owner where the conviction involves someone other than the owner if the owner contributed to or allowed the offence: s184;

SA: s32A *Animal Welfare Act 1985* a court may on finding a person guilty of an offence against the Act or on declaring a person charged with an offence against the Act liable to supervision under Part 8A of the *Criminal Law Consolidation Act 1935* make orders including directing the person to surrender the animal to an inspector

Tas: s43 *Animal Welfare Act 1993* if a person has been convicted of an offence under the Act in respect of an animal and the court considers the offence to be of a sufficiently serious nature, it may order the person be disqualified from having custody of any animal or any animal of a kind or class specified; s43AA provides that on the application of an officer a magistrate may order that an animal is forfeited to the Crown where the magistrate is satisfied a person has custody of an animal in contravention of an order made under s43; s43AAB sets up a system of “interstate orders”, whereby contravention of such an order in Tasmania is an offence

Vic: s12 *Prevention of Cruelty to Animals Act 1986* if a person has been convicted of one or more offences under the Act and a court considers that the offence or offences is or are of a serious nature, the court may order that the person be disqualified for a period (not exceeding 10 years) from being a person in charge of an animal of a kind or class specified in the order (a court can also make a seizure order regarding such animals);

WA: s55 *Animal Welfare Act 2002* a court convicting a person of an offence under the Act may make other orders against the offender including prohibiting the offender from being in charge of or having contact with a specified animal, an animal of a specified kind or an animal of a kind; order removal from the offender of an animal of which the offender is in charge, order forfeiture to the Crown, order human destruction of an animal, suspend or revoke or impose conditions on a relevant licence or disqualify the offender from obtaining a licence

33 ss12A and 12B *Prevention of Cruelty to Animals Act 1986*; the corresponding laws in other jurisdictions which relate to the subject orders must be declared as such by Order of the Governor in Council (s12B)

34 s43 AAB *Animal Welfare Act 1993*

35 Part 8 *Animal Welfare Act 1992*

36 s188 *Animal Care and Protection Act 2001*

37 ss193–198 *Animal Care and Protection Act 2001*

38 ss199–204 *Animal Care and Protection Act 2001*

39 s205 *Animal Care and Protection Act 2001*

The provisions in the *Prevention of Cruelty to Animals Act 1986 (Vic)* concern decisions relating to grant of licences for scientific research and other related licences.<sup>40</sup>

In Western Australia a person aggrieved by various decisions by the Minister in relation to licences and by inspectors (in relation to matters including giving directions) may object to the decision.<sup>41</sup>

### **Gathering evidence**

**7.15** Any cruelty occurring in the intensive animal farming industry is, in the main, carried out “behind closed doors”. In practical terms, this means that evidence of cruelty in such establishments is only obtained where those legally empowered to inspect do so, where employees are prepared to inform on their employers or where those interested in the welfare of those animals trespass in order to obtain evidence.

**7.16** Recently in South Australia a group of piggery workers sought to expose cruelty in the piggery in which they were employed. Complaints to the police and the RSPCA were initially ignored. A further complaint on another instance of cruelty made to the RSPCA was communicated to the complainant's employer, with the consequence the employee was sacked. After considerable debate in the media and in Parliament, and correspondence with the relevant Minister, a provision was incorporated into the South Australian Act which essentially protected such whistleblowers from victimisation by their employers.<sup>42</sup>

**7.17** The intensive animal farming industry, and particularly those keeping pigs and chickens, have repeatedly claimed that trespass on intensive animal farms by those seeking to gather evidence of cruelty “compromises biosecurity”. The concept of “biosecurity” is useful to the intensive animal farming industry as a way of claiming that trespass on their property is capable of inflicting severe damage on commercial operations by virtue of introducing infections to animals which were previously infection-free. The effectiveness of this strategy is illustrated by the adoption of this argument by the Primary Industries Ministerial Council (PIMC).<sup>43</sup> This Council responded to the representations by industry concerning “disruptive activities” by asking its standing Committee to develop options for a nationally consistent approach to deal with “such illegal activities”. The draft national policy

40 s33 the section refers to grant, renewal, imposition of conditions, suspension or cancellation; a person whose interests are affected by the decision may apply to the Victorian Civil and Administrative Tribunal for review of the decision

41 ss 71 & 72 *Animal Welfare Act 2002* The Minister must give the person a reasonable opportunity to make submissions (s73); a person aggrieved by a reviewable decision and who has not lodged an objection (or has not been given a notice within the required time) may apply to the State Administrative Tribunal for a review of that decision (s74); where an objection has been lodged and a decision made, the person who lodged the objection may apply to the Tribunal for a review of the Minister's decision on the objection: s74(2)

42 s43B *Animal Welfare Act*

43 Primary Industries Ministerial Council, Eleventh Meeting, November 2006

framework subsequently developed by the Commonwealth Department of Agriculture, Fisheries and Forestry was endorsed by PIMC (except for New South Wales). The framework particularly emphasised the issue of trespass potentially compromising “biosecurity status” and PIMC stated that the trespass issue should be further considered in this context. The framework included the proposed introduction of new offences including for “breaching biosecurity status” and for “promoting or supporting activities that may cause damage to facilities, functions or commercial operations of an animal enterprise”.

The animal factory farming industry has similarly persuaded the responsible New South Wales Minister of the truth of its assertions concerning biosecurity. The *Prevention of Cruelty to Animals Amendment (Prosecutions) Bill 2007* sought to prevent private prosecutions under the *Prevention of Cruelty to Animals Act 1979*.<sup>44</sup> In introducing the Bill, the Parliamentary Secretary directly drew comparisons between “biosecurity breaches” in intensive animal farms and the consequences of the equine influenza outbreak and the outbreak of Newcastle Disease in 1999.

This indicates the remarkable leverage of the intensive animal farming industry over the executive and politicians in Australia. It immediately raises the question why the existing law of trespass is not adequate to deal with these activities. Trespass in all jurisdictions is a criminal offence. Likewise, in all jurisdictions, a person whose legal commercial activities have been disrupted by trespass may obtain redress in the civil courts by way of damages. But that requires proof of damage. What is alarming about some of these proposed new laws is that they seem to be trying to establish an offence of trespass which may cause damage. The proposed new offence of “promoting” or “supporting” illegal trespass in this context is also clearly adequately dealt with by criminal offences and civil causes of action relating to conspiracy, aiding and abetting and the like.

### **Ensuring cruelty complaints are acted on**

It appears to be the case that certain of the various RSPCAs and government departments are sometimes reluctant to investigate and prosecute breaches of the anti-cruelty statutes by agribusiness interests. This has resulted in considerable interest in the identification of measures to either take action against those responsible for cruelty or to persuade those who should be enforcing the law to do so.

#### **7.18 Private Prosecution**

In the view of the author, private prosecution should be a last resort. The laws relating to animal cruelty should be enforced by the state authorities whose duty it is

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44 And the cognate Act took effect from 1 January 2008

to enforce those laws. As Lord Justice Salmon said in *Blackburn*,<sup>45</sup> “it seems to me fantastically unrealistic for the police to suggest, as they have done, that their policy decision (not to prosecute certain offenders) was unimportant because the applicant was free to start private prosecutions of his own and fight the gambling empires, possibly up to the House of Lords, single-handed.”

### States and Territories anti-cruelty law

Any person can commence a prosecution if the breach of law is of a public nature, providing there is no statutory bar.<sup>46</sup> The ACT *Animal Welfare Act* 1992 is silent on the issue of who can commence a prosecution for breach of its provisions.<sup>47</sup> In the Northern Territory, there is nothing in the *Animal Welfare Act* 2005 concerning the initiation of prosecutions.<sup>48</sup> Offences against the *Animal Care and Protection Act* 2001 (Qld) are summary offences<sup>49</sup> and it appears that anyone may commence a prosecution for breach of the provisions of the Act. In South Australia the *Animal Welfare Act* 1985 says nothing about the persons who can commence a prosecution for breach of the act. The Magistrates Court has jurisdiction in relation to offences against the Act.<sup>50</sup> There is a similar situation in Tasmania.<sup>51</sup> However, there are provisions in those jurisdictions to the effect that the Director of Public Prosecutions can intervene in a case and should he or she so decide, discontinue it.<sup>52</sup>

The NSW Act says that proceedings for an offence against the Act or the regulations may be instituted only by an approved charitable organisation,<sup>53</sup> an inspector, a police officer or the Minister or Director-General of the Department of Primary Industries (or a person with the written consent of the Minister or Director-General).<sup>54</sup> The New South Wales *Animal Research Act* 1985 provides

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45 *R v Police Commissioner of the Metropolis ex parte Blackburn* [1968] 1 All ER 763, 774

46 *Brebner v Bruce* (1950) 82 CLR 161

47 Proceedings may be started in the Magistrates Court by information: s25 *Magistrates Court Act* 1930

48 Section 121A of the *Justices Act* 1979 provides in effect that an offence may be dealt with summarily as a minor indictable offence.

49 Section 178

50 which are minor indictable offences: *Magistrates Court Act* 1991 (defined as those for which the prescribed sentence may be a term of imprisonment of less than 5 years: *Summary Procedure Act* 1921)

51 See section 38 *Acts Interpretation Act* 1931 re simple offences punishable on summary conviction (which is not a “crime” under the *Criminal Code Act* 1925) and the provisions of the *Justices Act* 1959

52 ACT: ss6 and 8 *Director of Public Prosecutions Act* 1990 (where the DPP has been requested to do so by the Attorney-General; NT: s13(b) and s13(d) *Director of Public Prosecutions Act* 1990; Qld: s10(1)(c)(ii) *Director of Public Prosecutions Act* 1973; Tas: s12(1)(a)(ii) *Director of Public Prosecutions Act* 1973; and see s7(1)(i) *Director of Public Prosecutions Act* 1991 (SA), which does not give a specific power but arguably implies that power

53 that is, the RSPCA (NSW) and the NSW Animal Welfare League; Clause 8 of Schedule 2 of the *Prevention of Cruelty to Animals Act* 1979 says that section 34AA does not apply to offences committed before the commencement of that section (which commenced on 1 January 2008)

54 s34AA *Prevention of Cruelty to Animals Act* 1979; s34 says that proceedings for an offence against the Act or the regulations may be dealt with summarily before a Local Court constituted by a Magistrate sitting alone or by the Supreme Court in its summary jurisdiction (in the former case the maximum pecuniary penalty which

that proceedings for an offence against the Act or the relevant regulations can only be commenced by the Director-General of the Department of Primary Industries (or a person authorised by the Director-General).<sup>55</sup>

s24ZW of the *Prevention of Cruelty to Animals Act* 1986 (Vic) provides that a charge for a cruelty offence (and other offences) may only be filed by a member of the police force or a person who is authorised for that purpose and who is (in essence) a public servant, or officer of a council (for certain limited cases) or a full-time member of the RSPCA. In WA proceedings for an offence under the *Animal Welfare Act* 2002 may be commenced by the Chief Executive Officer of the Department of Local Government and Regional Development, an inspector, or an officer of the Department authorised by the CEO;<sup>56</sup> these are the only persons who may commence proceedings.<sup>57</sup>

One of the responses to the criticism in Parliament and the media of the South Australian RSPCA for its failure to act on complaints of cruelty in a piggery was the introduction of a provision in the amended South Australian Act requiring an inspector dealing with a complaint to advise the informant of action taken in response to the complaint.<sup>58</sup>

### 7.19 Live export (and other breaches of Commonwealth law)

One of the main problems with the Commonwealth law relating to live export is that those responsible for overseeing live export of animals are reluctant to prosecute export licence holders for breaches of their licence conditions. This is despite the fact that there are severe penalties which can be imposed in the event there are breaches of conditions. Thus, section 54(3) of the *Australian Meat and Livestock Industry Act* (1997) (“AMLI Act”) says: the holder of an export licence must not contravene a condition of the licence either intentionally or being reckless as to the condition (Penalty: imprisonment for 5 years, or an appropriate fine imposed instead of or in addition: subsection 4B(2) *Crimes Act* 1914).<sup>59</sup>

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can be imposed is 200 penalty units)

55 s57

56 s82 *Animal Welfare Act* 2002

57 s20(2) *Criminal Procedure Act* 2004 says (in relation to summary offences) “if another written law limits who may commence a prosecution for an offence, a prosecution for the offence may only be commenced in accordance with that law”

58 s43A *Animal Welfare Act* 1985

59 Chapter 2 of the Criminal Code applies to all offences under the AMLI Act: section 6 AMLI Act. Section 5.2 Criminal Code (“Intention”) says: (1) A person has intention with respect to conduct if he or she means to engage in that conduct (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. Section 5.4 Criminal Code (“Recklessness”) says: (1) A person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. (2) A person is reckless with respect to a result if (a) he or she is aware of a substantial risk that the result will occur and (b) having regard to the circumstances known to him or her it is unjustifiable to take the risk. (3) The question whether taking a risk is unjustifiable is one of fact. (4) If

Section 4G of the *Crimes Act* 1914 says: "offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences unless the contrary intention appears."

The offence under section 54(3) of the AMLI Act is an indictable offence.

The considerations relevant to the issue of limitation periods relating to prosecution (private or otherwise) for a breach of section 54(3) of the AMLI Act are set out in paragraph 4.46 of Chapter 4.

Regarding private prosecutions, the *Crimes Act* 1914 (Cth) section 13 says:

*Unless the contrary intention appears in the Act or regulation creating the offence, any person may:*

*(a) institute proceedings for the commitment for trial of a person in respect of any indictable offence against the law of the Commonwealth, or*

*(b) institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction.*

However, section 69 of the *Judiciary Act* 1903 (Cth) says: "Indictable offences against the law of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf". This provision and section 13 of the *Crimes Act* were considered by Hely J in *Commonwealth Bank of Australia v Gargan* (2004) 206 ALR 571, who remarked that it was "at least doubtful" whether a person could institute and maintain a private prosecution for a breach of a Commonwealth law.

Furthermore, section 9(5) of the *Director of Public Prosecutions Act* 1983 (Cth), in essence allows the DPP to "take over" and discontinue any prosecution in relation to breach of a Commonwealth law.

## **7.20 Mandamus**

States and Territories anti-cruelty law

None of the anti-cruelty laws (with the possible exception of the Tasmanian Act) impose any duty on the RSPCA or its inspectors to enforce the law. Given this, and given that the RSPCA is a private body, it is very unlikely a court will grant a writ of mandamus to someone seeking to compel the RSPCA or an inspector to investigate or prosecute a cruelty complaint (see *Neat Domestic Trading Pty Ltd v AWB*

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recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

*Limited*<sup>60</sup>). Section 43A of the *Animal Welfare Act 1985* (SA) requires an inspector who receives a complain alleging a contravention of the Act to inform the complainant (if practicable) of any relevant action taken concerning the allegation.

Police officers in all (non-Commonwealth) jurisdictions are given powers under the relevant anti-cruelty statutes to enforce breaches of the relevant law. In the leading English case of *R v Police Commissioner of the Metropolis Ex parte Blackburn*<sup>61</sup> Lord Denning said (of the Commissioner of Police):

*“I hold it to be the duty of the Commissioner of Police as it is of every chief constable, to enforce the law of the land...He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought...The responsibility for law enforcement lies on him...it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in any particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area...but there are some policy decision with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 pounds in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.”*

The authors of *Judicial Review of Administrative Action* note that "mandamus is at its least effective where the gist of the complaint is that there has been a systemic failure to perform a public duty, rather than an isolated failure." In *King-Brooks v Roberts* (1991) 5 WAR 500, there was an application for mandamus in which it was alleged that the police turned a blind eye to the operation of brothels in Kalgoorlie providing they operated according to certain guidelines. The Court offered limited support for the proposition (as set out in English cases) that mandamus would be available where an enforcing authority had illegally decided not to enforce some laws at all.

However, there have been several cases concerning the Australian Federal Police in which writs of mandamus have been sought and in which the court has appeared to adopt the reasoning in *Blackburn*. From this, it appears that mandamus may be available against State and Territory police commissioners in relation to possible breaches of anti-cruelty laws.

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60 (2003) 216 CLR 277; [2003] HCA 35

61 [1968] 1 All ER 763

Recently, it has been said (in connection with a request to the Federal Police to investigate a matter) that "there can be no general duty, justiciable or otherwise, to comply with such a request from a member of the public to investigate a perceived offence".<sup>62</sup>

In *Hinchcliffe v Commissioner of Police of the Australian Federal Police*,<sup>63</sup> the Court said (regarding the duty of the Commissioner to enforce the law):

*"Australian courts...have accepted that whilst a commissioner of police has a duty to enforce the law, he or she also has a broad discretion as to the manner in which he or she chooses to fulfil the responsibilities of office...The authorities do not support the proposition that the respondents owed a duty of the kind pleaded...(ie a duty to investigate their complaint and to consider whether any person should be prosecuted in consequence of such investigation)."*

There is further judicial support for the contention that an authority invested with responsibility to enforce a statute can not be directed by a court as to how to exercise its discretion in deciding whether or not to investigate or prosecute a complaint regarding a breach of the statute.<sup>64</sup>

However, the courts may be prepared to intervene to compel a person to enforce the law where the responsible authority has adopted a policy which results in a failure to fulfil the duty to enforce the law.<sup>65</sup> The statement to this effect by Lord Denning in *Blackburn* has been quoted several times with approval.<sup>66</sup>

In *O'Malley v Keelty*,<sup>67</sup> Emmett J also noted "*...if the evidence suggests that an honest police officer acting reasonably could not properly come to the view that the matter was not capable of investigation there may be, and I emphasise may be, a basis upon which the Court could interfere.*"

## 7.21 Commonwealth

Section 39B of the *Judiciary Act* 1903 (Cth) says: "the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth."

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<sup>62</sup> *O'Malley v Keelty* (2005) 148 FCR 179; [2005] FCA 861 per Madgwick J.

<sup>63</sup> (2001) 118 FCR 308

<sup>64</sup> *Hussein v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2006] 286; *O'Malley v Keelty* [2004] FCA 1688; *Scott v Northern Territory of Australia* [2003] FCA 658.

<sup>65</sup> *Hussein*, at 26.

<sup>66</sup> *Hussein*, 26; *Hinchcliffe*, 33.

<sup>67</sup> [2004] FCA 1688.

The term "officer" includes "public servant".<sup>68</sup> Generally speaking, there must be a refusal (actual or constructive) by the relevant official to perform a duty. None of the relevant legislation imposes a duty on any person to enforce the legislation. The Commonwealth Department of Agriculture, Fisheries and Food (DAFF) is the department responsible for administering the legislation relevant to live export.

In *Hinchcliffe v Commissioner of Police of the Australian Federal Police*, the Court said: "...there can be no duty to consider prosecution if there is no duty to undertake an investigation."<sup>69</sup> There is nothing in either the AMLI Act or the *Export Control Act* (1982) which imposes a duty on DAFF or any of its officers to investigate or prosecute breaches of export licences. In *Western Australian Field and Game Association v Minister for State for Conservation*<sup>70</sup> Malcolm CJ noted that where a Minister had a discretionary power granted by statute, it did not follow that the Minister was under any duty to consider whether to exercise that power. He went on to say that the power must be exercised consistently with the scope of the legislative power of Parliament and that what was necessary or desirable for those purposes was a matter of policy for the Minister or the government to determine. It was not an area into which the courts will intrude. Similarly in *Ainsworth v Criminal Justice Commission*<sup>71</sup> the majority of the High Court held that the Commission was under no duty to carry out the investigation sought by the appellant. Given this, it appears that mandamus will not lie against DAFF or any of its officers in relation to a failure to investigate and prosecute breaches of live export licences.

However, it appears clear from the cases concerning complaints to the Australian Federal Police referred to above that the Commissioner is under a duty to exercise his or her discretion whether or not to investigate a complaint that there has been a breach of the Commonwealth criminal law. Consequently, mandamus will be available against the Commissioner to compel him or her to fulfil that duty where there has been a failure to do so.

## 7.22 Standing

The accepted test for standing in relation to an application for mandamus is the "special interest test" as set out in *Australian Conservation Foundation Inc v Commonwealth*.<sup>72</sup> A "special interest" is not a "mere intellectual or emotional concern". A person has a "special interest" where they are likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or

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68 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 65

69 (2001) 118 FCR 308.

70 (1992) 8 WAR 64, 86 (per Malcolm CJ)

71 (1992) 175 CLR 564

72 (1980) 146 CLR 493.

winning a contest if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs if his action fails. The Court also said: "*a belief, however strongly felt, that the law generally or a particular law should be observed...does not suffice...*" to give standing. This test was recently applied by the Court in *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs* (the "Tampa" case),<sup>73</sup> which involved (amongst other things) an application for mandamus.

There are signs that the test for standing (at least in some courts of first instance) is being relaxed in recent times. In 1989, Davies J of the Federal Court granted standing to the Australian Conservation Foundation and said: *in my opinion, the community at the present time expect that there will be a body such as the ACF to concern itself with this particular issue and expects the ACF to act in the public interest to put forward a conservation viewpoint as a counter to the viewpoint of economic exploitation.*<sup>74</sup>

More recent cases which indicate that the courts are prepared to give standing to advocacy groups are: *North Queensland Council Inc v Executive Director Queensland Parks & Wildlife Service*,<sup>75</sup> *Save Bell Park Group v Kennedy*,<sup>76</sup> *Save the Ridge v Australian Capital Territory*<sup>77</sup> and *Alliance to Save Hinchinbrook v The Chief Executive*<sup>78</sup>.

In *Hussein v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*<sup>79</sup> (which was an application to strike out the applicant's claim for, amongst other things, mandamus), Graham J (at 50) referred to the "special interest" test and noted that the applicant in that case, who had lodged a complaint with the Federal Police about an alleged breach of the *Migration Act 1958* (Cth), had at least an arguable case for standing in relation to his claims against the Commissioner, although he noted that issue should be determined at trial.

### **7.23 Commentary**

An important unresolved question is whether other bodies which have powers to investigate possible breaches of anti-cruelty legislation and in some cases power to initiate prosecutions can be compelled to carry out those investigations, or at least to

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73 (2001) 110 FCR 452, [2001] FCA1297.

74 *Australian Conservation Foundation v Commonwealth* (1989) 19 ALD 70, 74.

75 [2000] QSC 172

76 [2002] QSC 174

77 [2004] ACTSC 13

78 QSC [2006] 084

79 FCA [2006] 286

properly exercise their discretion in deciding whether or not to investigate. The answer to the question seems to lie in the answer to another question, which is "have they a duty to enforce the law"? The statement in the *Hinchcliffe* case (paragraph 7.21) that there can be no duty to consider prosecution if there is no duty to undertake an investigation is relevant. But where does the duty arise? The finding in *Western Australian Field and Game Association* (paragraph 7.21) that a statutory grant of a discretionary power does not thereby impose a duty on the person granted the power to exercise that power seems to imply that, without more, bodies such as the RSPCA will never be under a duty to investigate alleged breach of an anti-cruelty statute. The same could be said about the government department responsible for administering the statute. But this seems to lose sight of the main finding in the *Blackburn* case (paragraph 7.20 - seemingly accepted in Australian courts at least insofar as it relates to the Australian Federal Police) that the Commissioner of Police is under a duty to enforce the criminal law. The duty arose not because of any compulsion arising from statute, but because that is what the court decided. All three members of the bench in that case (Denning, Salmon and Edmund Davies LJJ) stated categorically that a police officer was under a duty to enforce the criminal law, but did not identify the source of that duty. Edmund Davies LJ hinted at it by saying the law enforcement officers of the country owed the public a duty to perform those functions "which are the *raison d'être* (sic) of their existence".

It may well be that the time has come for the proposition to be tested in an Australian court that the RSPCA and responsible government departments are, by analogy with the police, likewise expected by the public to enforce the law relating to animal cruelty, that they are therefore under a duty so to do and are thereby susceptible to compulsion by the court to perform that duty in the event they do not perform it appropriately.