CHAPTER 8

Case Studies

CASE 1 – Live Export

8.1 The *Al Kuwait* case

The details of this Western Australian Magistrates Court case are included because it involves and illustrates many of the legal and practical points relating to live export and indeed to general questions concerning the effectiveness and enforcement of animal welfare laws. In her reasons, Crawford M considered in some detail the meaning of important aspects of the relevant anti-cruelty provisions in the *Animal Welfare Act* 2002 (WA). The events the subject of the case (which occurred in November 2003) happened at a time prior to the *Cormo Express* incident and prior to the reforms of the legislation and relevant standards. Consequently, at the time the relevant standards were the *Australian Livestock Export Standards* (ALES), and *Marine Orders Part 43* (made under the *Navigation Act*) contained references to matters concerning animal welfare.

Department of Local Government & Regional Development v Emanuel Exports Pty Ltd & Ors (Perth Magistrates Court, Crawford M)[1]

On 8 February 2008 Crawford M handed down reasons for judgment. She found the relevant elements of one of the charges laid had been satisfied, but acquitted the accused because she also found there was a direct inconsistency between the relevant Commonwealth legislation which authorised the export and the relevant part of the Western Australian *Animal Welfare Act.*

The Complaint

8.2 In November 2003, Animals Australia and Compassion in World Farming conducted an investigation of the voyage of the *Al Kuwait*, carrying sheep from Fremantle to Kuwait. This was in every way a typical live export voyage to the Middle East. Investigators obtained evidence that numbers of sheep unloaded from the vessel at Kuwait City were suffering from various ailments, including broken limbs and blindness (probably caused by the disease infectious keratoconjunctivitis, or "pink eye"). Investigators also observed a significant number of sheep carcases aboard ship. Scientific studies (involving on-board

1 A copy of the reasons for judgment are available at http://www.AnimalsAustralia.org

observations, post-mortems and land-based studies)[2] carried out principally by Norris, Richards and colleagues in the late 1980s and early 1990s have indicated that the main causes of sheep mortality during sea transport were inanition (ie failure to eat – sheep suffering from this syndrome are often called "shy feeders") and salmonellosis (infection with *salmonella* bacteria, which can cause profuse diarrhoea, resulting in dehydration). These two causes accounted for about 75% of all mortalities in the voyages studied. There was probably some interaction between the two conditions, in that animals suffering from inanition were found to be likelier to contract salmonellosis. The data from these studies also indicated that sheep deaths caused by inanition during a voyage were in effect entirely predictable, in that sheep which did not eat aboard sheep were a sub-set of sheep (about 7% to 15%) which did not adapt to the pelleted feed given to them during their pre-embarkation feed acclimatisation in the feedlot. The studies identified the main risk factors as including failure to eat pelleted feed, the farm of origin of the sheep, age, time of year and fatness. Sheep suffering from inanition in the feedlot could be identified by a dye-marking technique. Thus, there is a method available for the identification of shy feeders and exclusion of shy feeders pre-embarkation would undoubtedly greatly reduce on-board sheep mortality. Exporters have not adopted this practice, presumably because it would entail unacceptable additional costs.

8.3 Based on this evidence and these data, Animals Australia lodged a complaint with Western Australia Police. The complaint was that the animals aboard the *Al Kuwait* had been transported in a way that caused or was likely to cause them unnecessary harm, in breach of section 19(3)(c) of the *Animal Welfare Act* 2002 (WA) (the "WA Act").[3] In March 2004, several months after the complaint was laid, Western Australia Police advised Animals Australia that it was the policy of the organisation to refer such complaints to the RSPCA. Animals Australia lodged the file with the RSPCA(WA), but in June 2004 decided to take the complaint to the Director-General of the Department of Local Government and Regional Development (responsible for administering the WA Act).[4] In January 2005 Animals Australia filed a writ seeking mandamus against the Director-General of the Department to compel her to exercise her discretion regarding the investigation of the complaint. In April 2005 the State Solicitor's

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2 A summary of these studies and references to the original journal papers can be found in Norris RT & Norman GJ (2007) *National livestock exports mortality summary 2006* published by Meat & Livestock Australia.

3 Proceedings for an offence under the Act may only be commenced by the Chief Executive Officer of the department responsible for administering the Act, an inspector or an officer of the department authorised by the Chief Executive Officer: section 82. An "inspector" includes a police officer: section 5.

4 This decision was partly in response to what Animals Australia regarded as an inappropriate response to the complaint, and partly because it appeared to Animals Australia that at least two members of the governing Council of RSPCA(WA) were involved in the live export trade. See the transcript of the ABC "4 Corners" report "A Blind Eye" at http://www.abc.net.au/4corners/content/2004/s1137257.htm.

Office advised Animals Australia that it would be investigating the complaint. In November 2005 (just before the expiry of the limitation period for commencement of prosecutions: section 82(2) of the WA Act) the State Solicitor's Office, acting for the Department of Local Government and Regional Development, commenced proceedings against the exporter, Emanuel Exports Pty Ltd (Emanuel) and two of its directors[5] (Graham Daws and Michael Stanton) in relation to the complaint. The matter was heard in the Perth Magistrates Court commencing 5 February 2007.[6]

The Trial

The reasons for judgment in the trial were handed down nearly one year after the trial itself. It is interesting to note that it is unusual for written reasons to be given (at least in Western Australia) for a judgment in a magistrate's court. In this case, the reasons included a detailed analysis of the evidence (which was often based on complex scientific data) and, the author submits, a well-argued analysis of the relevant law.

The prosecution laid 3 charges against the defendant. They were all based on alleged breach of section 19(1) of the WA Act, which says that a person must not be cruel to an animal. Subsection (3), under which the charges were brought, further defines ways in which a person "in charge of" an animal can be cruel to that animal.[7]

The charges did not relate to all of the sheep aboard the vessel, unlike the complaint by Animals Australia. Instead, the charges were restricted to particular sub-classes of sheep[8] (ie heavier and fatter sheep[9]) which it was alleged were particularly susceptible to harm.

5 section 80 of the WA Act extends an offence committed by a body corporate to its officers. There is a defence to a charge against those officers if they can prove that the offence was committed without the officer's consent or connivance and the officer exercised all such due diligence to prevent the commission of the offence as the officer ought to have exercised having regard to the officer's functions and to all the circumstances: sub-section 80(2) WA Act

6 *State Solicitors Office v Daws & Ors*, Perth Magistrates Court matters FR9975-7/05; FR10225-7/05.

7 and the charges relating to that person were that the relevant animals were: transported in a way that was likely to cause them unnecessary harm; were confined in a manner that was likely to cause them unnecessary harm and were not provided with proper and sufficient food or water (pursuant to sub-sub sections (a), (b) and (d), respectively

8 The charges did not identify a particular animal. Section 43 of the *Justices Act* 1902 (WA) allows the joinder of multiple matters of complaint in one complaint, where the matters of complaint are substantially of the same act or omission on the part of the defendant or when several simple offences are alleged to be constituted of the same acts or omission or by a series of acts done or omitted to be done in the prosecution of a single purpose (see *Royal Society for the Prevention of Cruelty to Animals Western Australia Inc v Hammarquist* [2003] WASCA 35). The defence argues that each animal be considered individually, Crawford M appeared to be unimpressed with this contention.

9 Being A Class wethers (4,101) and so-called Muscat wethers (9,153), which suffered a mortality of 3.4% and 2% (approximately) compared to an overall voyage mortality rate of 1.3% - the average for the year was 0.9%. There were 13,163 sheep in these groups

As an aside, it is interesting to note that the position of the Western Australian government is that the charges involve a specific alleged incident which could not be related to the live export industry as a whole in Western Australia.[10] Clearly the political fallout from a decision which could be said to relate to an isolated incident would be less than a decision which could potentially be applied to every live sheep export voyage. Defence counsel during the trial also commented that "we understood the prosecutor's opening to be very careful to attempt to avoid asserting that they're seeking to shut down the live export trade by saying the case is only about two classes of sheep...".[11]

Evidence

8.4 The prosecution sought to have admitted into evidence the daily reports sent during the voyage by the ship's master to Emanuel, which then forwarded them to the Australian Quarantine and Inspection Service (AQIS) (as required under the relevant Commonwealth legislation), on the basis that these documents were "business documents" of Emanuel and thereby admissible under sections 79C(2a) and 79B of the *Evidence Act* 1906 (WA).[12] The defence argued that it was not part of the business of Emanuel to count the number of mortalities (which were recorded, amongst other things, in the reports) and that the records per se were not records of Emanuel. They were merely records received from a third party and were not documents used by Emanuel to record a matter. The defence further objected that the witness called by the prosecution (an Export Manager employed by Emanuel) was not a "qualified person" as required by the *Evidence Act.*[13]

Crawford M ruled that the objection that the witness was not a "qualified person" was not valid, as the relevant section (79C) of the *Evidence Act* did not require that the person through which the business records were sought to be tendered should be a qualified person, but that the documents themselves contain a statement

10 Statement by JJM Bowler, Minster for Local Government and Regional Development, Parliament of Western Australia Hansard 10 November 2005, page 7130b

11 Transcript of hearing on 8 February 2007, page 14

12 Section 79C(2a) of that Act says: "Notwithstanding subsections (1) and (2), in any proceedings where direct oral evidence of a fact or opinion would be admissible, any statement in a document and tending to establish the fact or opinion shall, on production of the document, be admissible as evidence of that fact or opinion if (a) the statement is, or directly or indirectly reproduces, or is derived from, a business record; and (b) the court is satisfied that the business record is a genuine business record; section 79B of that Act defines "business record" to mean "a book of account or other document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business".

13 Sub-section 79C(2b) says: "Where a statement referred to in subsection (2a) is made by a qualified person that person shall not be called as a witness unless the court orders otherwise; "qualified person" is defined by section 79B to mean "in relation to a statement...a person who (a) had, at the time of making of the statement, or may reasonably be supposed to have had at that time, personal knowledge of the matters dealt with by the statement; or where the statement is not admissible in evidence unless made by an expert on the subject of the statement, was at the time of making the statement such an expert

which would tend to establish a fact or opinion is made by a qualified person. On the second issue of whether the documents were business records, Crawford M noted that the documents were received by Emanuel in the course of its business for the purpose of conveying the information to AQIS (being a Commonwealth authority concerned with the export of animals) and on that basis they were used in the ordinary course of Emanuel's business. She therefore ruled that they be admitted.

Territorial jurisdiction

8.5 Fremantle Port, where the *Al Kuwait* was loaded, is Commonwealth property. The WA Act applies at Fremantle Port by virtue of the *Commonwealth Places (Application of Laws) Act* 1970 (Cth),[14] and applies to foreign ships in Western Australian territorial waters by virtue of the application of the *United Nations Convention on the Law of the Sea*.[15] Western Australian jurisdiction is extended to 200 nautical miles from the coast of Western Australia, or the outer limit of the continental shelf (whichever is the greater) under the *Crimes at Sea Act* 2000 (WA) and the *Crimes at Sea Act* 2000 (Cth). However, the charges were restricted to the first 24 hours of the ship's journey, during which it was agreed by both parties the ship would be within Western Australian territorial waters.

Person in charge

8.6 To be liable for a breach of sub-section 19(1) (as qualified by sub-section 19(3)) of the WA Act, the prosecution had to establish that Emanuel was "a person in charge" of the relevant animals. The prosecution argued that, because Emanuel allegedly engaged the onboard stockman for the *Al Kuwait*, it was a person in charge, as that phrase is defined by section 5 of the WA Act to include: "(b) a person who has actual physical custody or control of the animal; (c) if the person referred to in paragraph (b) is a member of staff of another person, that other person". The section also defines "staff" to include "...all the people...engaged by that person, whether as officers, employees, agents, contractors, volunteers or in any other capacity. The prosecution argued that the stockman was a "person in charge", as he had "actual physical custody or control" of the sheep and Emanuel was "a person in charge" by virtue of being "that other person".

Crawford M referred to the case of *Song v Coddington*,[16] where the Court considered the meaning of the phrase "person in charge" in the cognate New South Wales Act and said the "the concept of person in charge...refers to a person's ability and authority to take positive steps to affect the immediate physical circumstances

14 See *Song v Coddington* (2003) 59 NSWLR 180; *Cameron v The Queen* [2004] WASCA 16

15 article 27; the Convention came into force generally and for Australia on 16 November 1994

16 (2003) 59 NSWLR 180

of the animal so that person's authority might be employed to ensure care, treatment in a humane manner and the welfare of the animal". There was reference to a definition of "person in charge" in the Act which it was said referred particularly to a physical relationship in which the person is able to exercise some degree of ultimate responsibility or authority over an animal in its physical environment and "whether on their own or in combination with others, have that degree of authority and responsibility as would enable the person to engage in the physical disposition of the [animals]".

The prosecution argued that, as Emanuel was obliged under the standards which applied at the time (ie the Australian Livestock Export Standards) to look after the welfare of the sheep and had engaged the stockman who was authorised to humanely destroy any sick or injured animals, he had control of the sheep and was a "member of staff" of Emanuel (as that phrase is defined in the WA Act).

An important plank of the defence's case was that the sheep were sold "free alongside" to the importer, a Kuwaiti company (KLTT). Furthermore, the ship was owned by KLTT, not Emanuel and the captain of the ship (who had ultimate control over the animals on the ship) was an employee of KLTT, not Emanuel. This being so, the defence said that the stockman had no effective control of the sheep and if that was the case, Emanuel could not be a "person in charge" as alleged. Moreover, the defence relied on evidence that the stockman was not in fact paid by Emanuel, but was paid by KLTT and that the stockman was not engaged by Emanuel (although an employee of Emanuel had acted as a "go-between" in Mr House's alleged employment by KLTT), and was not working for Emanuel; he was therefore not a "member of staff" of Emanuel. The defence argued that, taken together, these facts indicated that the only "person in charge", so far as the WA Act was concerned, was the master of the ship, as the stockman was not in actual physical custody and control of the animals. Defence counsel pointed out that the relevant ALES standard (7.9.13) did not require the stock person to be employed by the exporter.[17] Crawford M remarked that, in view of this, the stockman "had no means of controlling any of the acts or omissions alleged to have constituted animal cruelty."

Also, the defence case was that a letter of instruction, stated to be "for Norm House" (the stockman),[18] on Emanuel letterhead, which set out matters which should be addressed by the shipboard stockman, did not constitute an engagement

17 ALES Standard 7.9.13 says "Each exporter must ensure that there is a suitably experienced stock person on board whose duty to care for the animals takes priority over other duties...". Note that ASEL (Version 2.1) Standard 4.5, which is currently in force, says "An accredited stock person who is employed by the exporter and who is not ordinarily a member of the ship's crew must be appointed to accompany each consignment of livestock for export to its destination..."

18 The letter was signed by the stockman and the ship's master

of the stockman by Emanuel.[19] Crawford M referred to this letter in some detail. She pointed out that Standard 7.9.15 of ALES required the exporter to provide the ship's Master with clear written instructions of standard operating procedures covering various matters.[20] She remarked that the Standards provided that the instructions be issued to the Master of the ship; in fact they were issued to the stockman. Also, the Standards said that the exporter must be contacted where there was "an animal health or welfare emergency"; the instructions to the stockman referred to contacting the exporter in the event of "any unusual occurrences out of the ordinary". Finally, the Standards required the Master be instructed as to "reporting procedures during and on completion of the voyage". The instructions (apart from referring to the load plan and the counting of mortalities during the voyage) did not comply with this requirement, although the contact details given in the letter were those of Emanuel and named one of the defendant directors (Daws) as the contact person.

It is interesting to note that this evidence, presented by the defence to support its contention that it was not a "person in charge", had the effect of also establishing that it could not comply with several of its obligations under the Commonwealth legislative scheme. Indeed, defence counsel said in this context "this may be completely ineffective on one view to satisfy the Commonwealth obligation. Indeed, one can't necessary (sic) assume the Commonwealth obligation was actually satisfied...one could take a strict view of a Commonwealth obligation and say "ensure" means you must have a contract which guarantees you're in a position to ensure. If that's the interpretation of that, we plainly didn't do that...I readily accept that if one takes a particular view of what "ensure" means...this thing doesn't come within a bull's roar of satisfying it".[21]

The response of the prosecution to this argument was that the stockman was acting under the control of Emanuel, even though he was not employed by Emanuel. In particular, the prosecution pointed out that the definition of "staff" included people engaged by Emanuel, including those engaged as "volunteers or in any other capacity". Counsel referred to the Victorian Supreme Court of Appeal case of *R v ACR Roofing Pty Ltd*,[22] in which the meaning of the word "engaged" (in an employment context) was considered by Ormiston J. He said that the meaning was not confined to arrangements with persons employed in the strict sense, nor to those employed in a somewhat looser sense as is used in relation to the acquisition of the services of an independent contractor. He went on to say that, in its

19 Amongst other things, the letter purported to authorise the stockman to destroy any sick or injured animals

20 Including quantity and type of feed to be provided, frequency of feeding, if water is not freely available, the quantity of water and frequency with which it is to be supplied, the authority to humanely destroy and animal that is seriously ill or injured.

21 Transcript of the hearing on 14 February 2007, page 88

22 [2004] VSCA 215

context, the natural meaning of the word "engaged" is to secure or obtain the services of, whether or not there be a direct payment to that person for those services. Counsel for the defence pointed out that this case did not relate to the present case, as it involved legislation imposing duties on employers relating to safety at work, and related to those persons who had control of the relevant premises (and this was not the case with Emanuel and the *Al Kuwait*). The response of the prosecution was that the stockman was in fact under the control of Emanuel.

The judgment referred to the features of a "person in charge" set out in *Song v Coddington* (see above) and concluded that the stockman was given responsibility for caring for the sheep and made decisions about humane destruction. These responsibilities were discharged with the authority and co-operation of the ship's master.[23] The stockman satisfied the test in *Song v Coddington* and as a consequence Emanuel, through the stockman, was a "person in charge" of the sheep, in that he was engaged by Emanuel (at least) in "any other capacity".[24] The Magistrate noted that the definition of staff in the Act was broad in its reach and having regard to the stated intentions of the legislation[25] there was no doubt that Parliament intended to cover a wide range of situations not limited to relationships of employment, agency or contractor.

Transported in a way likely to cause unnecessary harm

8.7 The first charge referred to section 19(3)(a) of the WA Act. Subsection (3) (a) says: "Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal – is transported in a way that causes, or is likely to cause, it unnecessary harm". The prosecutor noted that liability arose for the "person in charge" even though the "transport" was done under the control of another person.

In essence the charge was that the particular identified sub-groups of sheep were transported in the second half of the year, whereby there was an increased likelihood of harm, in that they were likelier to suffer inanition and salmonellosis.

23 Other relevant factors were that the stockman had a longstanding relationship with Emanuel and (as set out in the "Stockman's Handbook" - a publication by LiveCorp issued to House), the stockman was "Emanuel's man" on the ship

24 s5 *Animal Welfare Act* 2002; Crawford M during the trial also repeatedly commented that Emanuel were responsible for putting the animals on the ship and in effect also referred to this factor in her reasons (at 14)

25 s3(2) of the Act says the purposes include the intention to: (a) promote and protect the welfare, safety and health of animal; (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for

Transport "in a way"

The prosecution submitted that the element of the alleged offence referring to transport "in a way" likely to cause harm referred to all the relevant circumstances surrounding the transport of the animals. This included transport in the second half of the year, which thereby resulted in an increased likelihood the animals would suffer inanition or salmonellosis, as well as the age and heaviness of the sheep.[26] The prosecution referred to the case of *William Holyman & Sons Pty Ltd v Eyles*,[27] which involved the transport of horses aboard ship and where the allegation was there had been a breach of a statutory provision referring to "transport in a manner" which caused harm.[28] The prosecution argued that in any case, "manner" had a broader meaning than "way", but regardless of that, the Chief Justice in *Holyman* said that "manner" related to the circumstances during the journey, rather than the manner of conveyance (ie aboard ship) *per se*.[29] Thus the "way" of shipping the sheep included the time of year having regard to the circumstances, where it was known that there was an increased risk of harm to the relevant sub-groups of sheep by shipping them at that time of year (ie the second half). Crawford M cited the passage from *Holyman* referred to and said "transport in a way" should be given a construction which is informed by the purpose of the Act, which included ensuring the proper and humane care and treatment and management of animals in accordance with generally accepted standards. She said that the obligation imposed required reference to the particular attributes of the animal concerned and the impact of the transport and the particular conditions to which the animal would be subjected. "Transport in a way" should therefore be interpreted as including all relevant circumstances of the particular transport event concerned. Crawford M concluded that this element included whether the subject sheep were transported in the second half of the year.

"Likely" to cause unnecessary harm

8.8 The prosecution argued that the word "likely" in the relevant section should be interpreted to mean "less than a probability, but more than a remote possibility, or a real or not remote chance of possibility regardless of whether it is

26 This was based on substantial scientific research published in the late 1980s and early 1990s

27 [1947] Tas SR 11

28 The relevant provision says "if any person shall convey or carry or cause or procure or, being the owner, permit to be conveyed or carried any animal in such manner or position so as to cause the animal any unnecessary suffering": section 1 *Protection of Animals Act* 1911 (Imp)

29 at 16: "Has it been proved that it was because of the manner or position in which the horses wee conveyed that they were caused suffering? This section relates to how, on a journey, the animals are conveyed, that is, it assumes the journey itself to be something lawful, and is concerned with manner only upon the journey. In that view, one might say that it was not how the conveying on the journey which causes suffering in this case, since the horses were conveyed in a well recognised manner, in horseboxes universally used and rope, as horses always are. But I think that is too narrow a view. The manner of conveying these horses was on the top deck of a heavily rolling ship where they were being buffeted about and wetted with a least spray in circumstances likely to promote panic among them..."

less or more than 50%".[30] The prosecution also referred to *Waugh v Kippen*[31] in which there was a statement that "the likelihood of injury must be judged in the light of the circumstances which are known or ought ot have been known to [the person]...on whom the duty is cast. The position of the defence was that the sheep in question had a 2% of dying, which meant death was a remote possibility and not "likely". Crawford M rejected this proposition because she said it ignored forms of harm short of death and that the higher mortality rate for heavy sheep by comparison with younger lean sheep meant deaths in the former category were greater (in historical terms) than deaths in the second category. She pointed out that, given there were 13,163 sheep in the two relevant classes, the defence was attempting to say the case against them was that the sheep had a 2% chance of dying, that is 263 were likely to die. In fact, 415 of the relevant sheep died.

The prosecutor claimed that it was only necessary to show that harm was likely at the time the sheep were transported within the jurisdiction of Western Australia; evidence that some sheep died on the voyage was relevant to the issue of likelihood. The particular harm alleged was the injury, pain and distress likely to be caused by inanition and salmonellosis, whereby the injury was death (resulting from starvation and illness), the pain was that experienced prior to death during the course of starvation and illness and the distress was evidenced by death, being a severe, abnormal physiological reaction.[32]

Crawford M said that the prosecution was not required to prove actual harm; the issue was whether the harm was likely. She found that the transport by sea of the relevant groups of sheep in the second half of the year was associated with a greater risk to them of fatal inanition and salmonellosis, compared to younger or leaner sheep.[33] She did not accept the defence submission that the "farm of origin factor" was relevant to the other proven risk factors of age, season or fatness of sheep.[34] She found that the transport by sea of the relevant groups of sheep exposed them

30 In *Waugh v Kippen* (1986) 160 CLR 156 the High Court considered a rule made under a Queensland statute which proscribed certain practices which were "likely to cause" risk of injury. It referred with approval to *Sheen v Fields Pty Ltd* (1984) 51 ALR 345 which considered that the word "likelihood" meant "a real or not remote chance or possibility regardless of whether it is less or more than fifty per cent". In *Boughey v R* (1986) 161 CLR 10, the High Court referred to these two earlier cases and said that in the phrase "likely to cause death" in section 157 of the Tasmanian *Criminal Code* the word "likely" meant a "substantial – a "real and not remote" - chance regardless of whether it is less or more than 50 per cent" although in that case, relating to a person charged with murder, the Court did say "in these circumstances it would be draconian for the person if "likelihood" simply meant "a remote possibility"".

31 (1986), at page 166, quoting from the judgment of Gibbs CJ in *Sheen v Fields Pty Ltd* (1984) 51 ALR 345

32 Section 5 of the WA Act says that "harm" includes injury, pain and distress evidenced by severe, abnormal physiological or behavioural reactions

33 She pointed out that the increased likelihood of harm to adult fat sheep transported in the second half of the year was known and accepted by LiveCorp and by inference, the industry (at 24)

34 The evidence she accepted was that some of the contribution to risk of death of farm group could be explained by the risk factors of age, fatness and season, but some could not (at 22); the latter 3 factors accounted for most of the variation

to a greater risk of death from inanition and salmonellosis than would have been the case for younger or leaner sheep. She noted that the legal meaning of "likely" was that referred to in *Waugh* and *Boughey* (see above) and that there was scientific evidence establishing that older, fatter sheep, shipped in the second half of the year were likely to suffer significantly higher mortality rates, as there was a real prospect of that occurring.

Crawford M also addressed the issue of whether sheep suffering from inanition or salmonellosis (or both) suffered "harm" as defined in the Act. She said the evidence had established that sheep which died from inanition suffered various metabolic insults, including kidney and liver failure and she found that sheep suffering from inanition which die suffer distress in the form of severe abnormal physiological reactions. They therefore suffered "harm".

An important point sought to be raised by the defence, and dismissed by Crawford M, was that the charge only related to the first day of the voyage and the prosecution evidence did not address conduct on that one day. It was based on reports of voyages over a period of time. Crawford M said that the offence went to the likelihood of harm as at the day the voyage commenced. Proof of actual harm within the relevant time of the charge was not required, nor was it necessary to establish harm was likely within the first 24 hours of the journey.

"Unnecessary" harm

8.9 The prosecution case was that the harm was "unncecessary" because it could have been avoided or reduced if the sub-classes of sheep referred to (ie heavier, fatter sheep – the A Class wethers and Muscat wethers) were not transported in the second half of the the year. In *Ford v Wiley*[35] the court said, in the context of determining what was cruelty (within the meaning of the relevant statute):

"the mere infliction of pain, even if extreme pain, is manifestly not by itself sufficient... [it] involves a consideration of what "necessary" and "necessity" mean in this regard. It is difficult to define these words from a positive side, but we may perhaps approach a definition from the negative. There is no necessity and it is not necessary to sell beasts for 40 shillings more than could otherwise be obtained for them nor to pack away a few more beasts in a farmyard or a railway truck than could otherwise be packed, nor to prevent a rare and occasional accident from one unruly or mischievous beast in injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any sure reason be called necessary."

35 (1889) 23 QB 203

Defence counsel pointed out that the judgments in *Ford v Wiley* qualified the references to necessity and reasonableness by saying the issue was not merely the inadequacy of commercial gain as a justification for cruelty, but that the extent of the harm caused must be weighed in proportion to the overall objects sought to be achieved. He went on to note that compliance with the "national standard" (one presumes the LEAP standards) could be taken to be relevant to the concept of the "necessity" of the harm (ie in the context of whether the harm was "unnecessary", as set out in the section 19(3)(c) of the WA Act).[36] Crawford M did not accept this, as (she said) the Commonwealth legislation and Standards focused on facilitating the export of livestock as cargo and not on animal welfare *per* se.

Defence counsel had the following to say during submissions on "unnecessary harm":

> *So even if injury could be death, death can't be a relevant injury here, because it's got to be unnecessary harm and their case is these sheep should have been shipped in a different time of year; shipped where? To the Middle East for slaughter, so they were going to die in any event. That's a hard fact. All of the sheep, even on the ship, were bound to die either at the end of that voyage, or if one could postulate another alternate voyage at a different time of the year, at the end of any such alternate voyage.*[37]

From this, it could be said that part of Emanuel's defence was that, as the animals were going to be die in any case (ie be slaughtered after the end of the voyage), there was no point in taking steps to reduce the risk of harm to the animals, because their inevitable demise meant any harm they were likely to suffer was somehow "necessary" (the author found this argument a little hard to follow).

Crawford M said that Emanuel knew of the greater risk of mortality to adult fat sheep exported in the second half of the year but chose to ignore it in order to fulfil the order placed by KLTT. There was a commercial motive for transporting those sheep in the second half of the year. She referred to *Ford v Wiley*, emphasising the principle that "necessity" requires proportionality between object and means. The only necessity for the transport of those sheep at that time was "the prospect of profit"; there was no evidence that failure to transport those sheep would jeopardise the whole shipment. In balancing the commercial gain with the likelihood of pain, injury or death to those particular sheep, Crawford M found that any harm suffered in this instance was unnecessary.

36 Trancript of the hearing on 14 February 2007, page 12

37 Transcript of the hearing on 14 February 2007, pages 15-16.

Honest and reasonable but mistaken belief

Section 24 of the Western Australia *Criminal Code* relieves an accused person of criminal liability where there is a finding of an honest and reasonable but mistaken belief in a state of things.[38] This defence was raised by the defendants, asserting that it (through its agents, including, somewhat strangely, the stockman - who it had submitted was not under Emanuel's control) had done everything to look after the sheep. Crawford M dismissed this defence, noting that neither Emanuel nor its directors gave evidence (amongst other things), so that there was no evidence of the state of mind of Emanuel or its directors before the Court.

Confined in a manner likely to cause unnecessary harm

8.10 The second charge alleged a breach of section 19(3)(b)(ii) of the WA Act, which again refers to subsection 19(1) and says that "a person in charge of an animal is cruel to an animal if the animal is confined...in a manner that...is likely to cause it unnecessary harm."

The "manner" in which the animals were said to be confined is the act of putting sheep in pens whose structure and configuration made it impossible for those responsible for the animals' welfare to identify readily any sheep suffering from inanition or salmonellosis, thereby preventing those persons from taking appropriate action to treat the sheep (ie to isolate and treat them or to kill them humanely). In particular, the prosecution alleged that the poor lighting and relationship between the walkways on the pen sides did not allow adequate observation of the sheep in this regard.

Crawford M found that the manner of confinement made it practically impossible to observe relevant clinical symptoms of the animals, and that often symptoms such as diarrhoea or weight loss were not identified prior to an animal's death. However, she found that the prosecution had not established that the confinement "caused more harm than it offset".[39]

Failure to provide proper and sufficient food and water

8.11 The third charge was that the defendants, being persons in charge of the animals, failed to provide them with proper and sufficient food or water during the voyage.[40] The prosecution alleged that the defendants should have provided hay or chaff for animals suffering from inanition or salmonellosis, as those feeds could have been used to treat those conditions (and referred to scientific evidence

38 The Accused were under an evidentiary onus to adduce evidence of their belief

39 Primarily because she said the evidence, in essence, established that there was virtually nothing which could be done to treat an animal which had contracted salmonellosis or was suffering from inanition. With respect, this ignores the fact that such animals, if identified, could be euthanased.

40 Sub-section 19(3)(d) of the WA Act says "Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal is not provided with proper and sufficient food or water

supporting that contention).

Crawford M dismissed this charge on the basis that it had not been established that carrying hay or chaff would have decreased the mortality of the relevant sheep.

Commonwealth Constitution section 109

8.12 This section says: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

The defence position was that a "law of the Commonwealth" includes acts and regulations. Defence Counsel also asserted that the orders made under the relevant legislation (ie the EC Act, the AMLI Act and the Navigation Act) were also "laws of the Commonwealth", in particularly because they were legislative in character.[41] Compliance with the relevant standards (ALES) was said to be mandatory under the relevant legislation. Thus, it was said, there was inconsistency between the WA Act and the Commonwealth legislative regime.

The prosecution also addressed the question of whether the orders made under the relevant Commonwealth legislation were "laws of the Commonwealth". Counsel for the prosecution noted that the defence had referred to sub-section 25(4) of the EC Act and suggested that sub-section had the effect of deeming the EC Orders to be regulations.[42] Counsel pointed out that this sub-section in fact only provided that the Orders should be treated in regard to the effect of the *Acts Interpretation Act* as if they were regulations, but did not deem them to be regulations. Referring to the AMLI Act, prosecution Counsel asserted that the orders made under that act, and the ALES referred to the regulations made under that act, were not laws of the Commonwealth.[43]

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41 In this regard, Counsel referred to *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, in which Gummow J of the Federal Court considered whether a Ministerial determination was of an administrative or legislative character for the purposes of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)

42 The sub-section says: "Sections 48, 48A, 48B, 49 and 50 of the *Acts Interpretation Act 1901* apply to orders as if in those sections references to regulations were references to orders and references to an Act included references to regulations

43 *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1, per Taylor J, who said: "the reference to "other instruments" is intended as a reference to Air Navigation Orders, Aeronatuical Information Publications and Notices to Airmen by means of which the Director-General of Civil Aviation is authorized by the Regulations to give such instructions and directions on matters within the functions o f Air Traffic Control as he considers necessary. These "other instruments" do not, however, constitute laws of the Commonwealth in spite of the fact that non-compliance with instructions or directions so given may constitute an offence under the Regulations (at p30); Menzies J said: "The only attack upon the validity of the State Transport (Co-ordination) Act is on the ground of inconsistency with the Commonwealth law, namely the Air Navigation Act and the Air Navigation Regulations, and, so it is claimed, "other instruments duly made and issued pursuant thereto". The question can, however, be determined by reference to the Act and the Regulations and without regard to administrative directions given thereunder which do not in themselves constitute laws of the Commonwealth for the purposes of s. 109 of the *Constitution.* These directions I

Defence Counsel said that the state law could not apply, because it sought effectively to take away a right or privilege conferred by the Commonwealth law (ie "direct inconsistency" between the Commonwealth and State law).[44] The prosecution disputed whether the Commonwealth legislative scheme governing live export created a right or privilege and said that instead the laws imposed a prohibition on export, which was then relieved by the grant of a licence.[45]

The defence also said that the legislative scheme governing live export was an elaborate and detailed approach to the many aspects of the field, which thereby evidenced an intention to "cover the field" (ie "indirect inconsistency" between the Commonwealth and State law). [46] The prosecution noted, on the point of the intention to "cover the field" that the ALES standards themselves (at Standard 1.3) said that "the animal welfare legislation in each state and territory specifies the mandatory animal welfare requirements that must be met in that state or territory..." and thereby expressly contemplated that the Commonwealth scheme did not "cover the field". The defence also suggested that in order to determine whether Commonwealth legislation was intended to cover the field, it was permissible to have regard to several separate pieces of Commonwealth legislation as if they were one piece of legislation (although he agreed that there was no judicial support for this proposition). Counsel for the prosecution disagreed with this proposition and said that the exercise must be done an an act by act basis. He also said that, once it was accepted that the only relevant "laws of the Commonwealth" were the acts and their regulations, it could be seen that none of those laws were inconsistent with the WA Act.

Finally, the prosecution argued that *Marine Orders Part 43*, made under the

therefore disregard." (at p47)

44 In *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 (at 460), Mason J said: "If, according to the true construction of the Commonwealth law, the right is absolute, then it inevitably follows that the right is intended to prevail to the exclusion of any other law. A State law which takes away the right is inconsistent because it is in conflict with the absolute right and because the Commonwealth law relevantly occupies the field. So also with a Commonwealth law that grants a permission by way of positive authority."

45 In *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 66 ALR 217 at 224 et seq, the joint judgment of Wilson, Deane and Dawson JJ says: "...we think that in the circumstances of this case there is only one question to be determined. The question is directed to the nature of the rights conferred and the obligations imposed upon the grantee of the licence under the Commonwealth Act...in the present case, our construction of the Commonwealth Act leads us to conclude that it does not purport to state exclusively or exhaustively the law with which the operation of a commercial broadcasting station must comply. The Act prohibits broadcasting without a licence. The prohibition is removed upon the grant of a licence subject to certain conditions...Failure to comply with the conditions may result in a revocation or suspension of the licence, thereby reinstating the prohibition...There is is nothing in the Act which suggest that it confers an absolute right or positive authority to broadcast so that the grantee, because he has a licence, is immune or exempt from compliance with state laws. On the contrary, in concentrating on the technical efficiency and quality of broadcasting services, the Act leaves room for the operation of laws, both state and Commonwealth, dealing with other matters relevant to the operation of those services...The relaxation of the prohibition by the granting of a licence does not confer and immunity from other laws..."

46 See *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565

Navigation Act, were themselves invalid by virtue of being inconsistent with the objects and purposes of that Act, which did not in any way concern animal welfare.

Crawford M found:
- the relevant Orders were legislative in character and were laws of the Commonwealth;
- while ALES were not laws of the Commonwealth, compliance with ALES was a condition of the export licence;
- the AMLI Act was directed to matters including control of meat and livestock exports; the EC Act is concerned with broad control of exports; the *Navigation Act* was concerned with regulating shipping, including the operation of ships and matters concerning safety on ships.
- the AMLI Act, its Regulations and Orders, the EC Act, its Regulations and Orders and the *Navigation Act* and its Marine Orders comprised a regime for regulating transport of sheep by sea for export;
- the AMLI Order contemplated the shipment of sheep between July and November to the Middle East;
- there was no evidence the Commonwealth intended to regulate animal welfare *per se*, or to "cover the field" of animal welfare; issues covered which were relevant to animal welfare were within the context of export of live animals as cargo and in relation to matters such as the safety of those on ships and the integrity of the cargo;
- because the relevant Commonwealth officers were satisfied (as required by the legislation) of the adequacy of relevant arrangements for export of the sheep and Emanuel obtained an export licence and an export permit, it was authorised by the Commonwealth to export the relevant sheep at the relevant time;
- the WA Act sought to make that authorised export illegal and there was therefore "operational inconsistency"[47] between the WA Act (in that regard) and the Commonwealth legislation. The WA Act sought to alter or impair the right or authority granted to Emanuel to export the sheep. It sought to impose a higher obligation than the Commonwealth law. To that extent, the WA Act was inoperative.
- the Commonwealth law was not intended to "cover the field" relating to animal welfare,[48] rather it sought to regulate export of livestock, under its trade and commerce power. There was no indirect inconsistency between the relevant State and Commonwealth law.

47 *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; *Victoria v Commonwealth* (1937) 58 CLR 618 per Dixon J at 630

48 *Ex parte McLean* (1930) 43 CLR 472, 483

CASE 2 – Live Export

8.13 *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2007] FCA 1535
Overturned on appeal: [2008] FCAFC 156

This case stirred up a lot of interest at the time. It involved animal activists "contaminating" with ham the feed of some sheep bound for live export to the Middle East. Because this may have caused difficulties for the Muslim (ultimate) consumers of the sheep meat, export of many of the sheep was delayed and some of the sheep could not be exported. The applicant feedlot owners claimed that the defendants had breached the "secondary boycott" provisions of the *Trade Practices Act* 1974 (Cth) ("TPA").

It was alleged there had been breach of section 45DB of the TPA.[49] There is an "exemption"in section 45DD of the TPA, which provides (amongst other things) that a person does not contravene subsection 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection. The primary judge found Hahnheuser did have the primary purpose of environmental protection and the "exemption" applied. This finding was reversed on appeal.

Rural Export and Trading (WA) ("RETWA") is a subsidiary of a Kuwaiti company KLTT. The second applicant was Samex Australian Meat Co Pty Ltd, which was the relevant holder of the live export licence for the subject sheep. In November 2003 those sheep, numbering about 72,000, were to be loaded aboard a KLTT ship (the *Al Shuwaikh*) at Portland. Those sheep were put into two feedlots, one of which was owned by a Mr Peddie.

Ralph Hahnheuser and others placed some ham and water which had previously been mixed with ham into two feed troughs at the the feedlot. Video recordings of the preparations for this and the adding of the ham and ham-contaminated water were made available to the media. In response, the Secretary of the Department of Agriculture, Fisheries and Food issued a direction under Order 10A of the *Export Control (Animals) Orders* in effect banning the export of the sheep on the grounds the importing country would not permit entry of the animals. A couple of weeks later this direction was varied to allow the export of the animals other than those

49 Which provides:
(1) A person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia
(2) A person is taken to engage in conduct for a purpose mentioned in subsection (1) if the person engages in the conduct for purposes that include that purpose

which had allegedly been exposed to the ham in their feed. The remaining sheep (1,694) were subsequently slaughtered.

CASE 3 – Mulesing

8.14 *Australian Wool Innovation Ltd v Newkirk*

This very important case, brought by AWI, the peak body representing Australian wool growers, was an attempt by the growers to suppress the activities of the US organisation PETA, which included a call to major overseas retailers and wool buyers to boycott the purchase of Australian wool until wool growers ceased the practice of "mulesing".[50] The case cost the AWI a significant sum in legal fees (about $4 million). It was ultimately settled, with each party bearing its own costs.

On 9 November 2004, Australian Wool Innovation (AWI), which claimed to represent about 30,000 Australian woolgrowers, filed a statement of claim naming 10 respondents, including People for the Ethical Treatment of Animals (PETA), its President (Ingrid Newkirk), various of its employees, and others.

The basis of the claim was the action which PETA had been taking to alert potential buyers (mainly in the USA and Europe) that Australian wool was sourced from animals which had been subjected to a painful procedure without anaesthetic, namely mulesing (the process, named after Mr Mules, the stockman who "invented" it, involves cutting off a significant amount of skin and flesh from the rump and breach of a sheep, with the object of causing scar tissue to form, which has the beneficial effect it is said of preventing "flystrike" - the laying of eggs in the sheep's folds of skin in that area, resulting in maggots which can (literally) eat away the affected area). PETA also wished to alert purchasers of Australian wool to the fact that significant numbers of Australian sheep were subjected to the cruelty associated with live export.

AWI asserted that PETA and the others were intimidating retailers and wool buyers with the intention of persuading them to stop buying Australian wool. One of the key claims was that this contravened sections 45D and 45DB of the *Trade Practices Act* 1974 (Cth) (the TPA) – the "secondary boycott" provisions. In particular, it was said that the conduct of the respondents would (or would be likely to) hinder or prevent acquirers of Australian wool from acquiring wool from the applicants; it was said the respondents' conduct was engaged in for the purpose of and would have or be likely to have the effect of causing substantial loss or damage to the business of the applicants.

50 PETA also tied the campaign to the issue of live exports from Australia, but this received considerably less attention than the mulesing question

The statement of claim was defective in several respects and the respondents were successful in various aspects of a strike-out application.[51] His Honour Justice Hely remarked that the fourth version of the statement of claim was "seriously deficient particularly as it did not in general expose the factual basis on which the applicant was putting its case.[52] Examples of deficiencies included: it is an essential element of a contravention of section 45D of the TPA that a respondent must act "in concert with a second person..." in relation to the alleged conduct. This aspect was not adequately pleaded; in pleading the section 45D case, the applicant simply repeated the relevant language of the TPA, rather than pleading relevant facts which would bring the claim within the section; claims of conspiracy and intimidation were inadequately pleaded and were struck out.

Despite strenuous objection from AWI, PETA and the other parties were awarded their costs in relation to the strike out applications (ultimately there were four versions of the statement of claim).

The conspiracy claim was subsequently struck out of an amended statement of claim because it "is not open to a party to plead as an alternative to a substantive cause of action already pleaded, the tort of conspiracy to commit that substantive wrong.

By July 2005 the statement of claim had grown to 60 paragraphs. At the time of the hearing on 29 July 2005, Hely J, having heard AWI's barrister describe the "road map" of evidence, was interested to find out what it was about PETA's conduct which supported AWI's assertion that it "hindered or prevented" acquisition of goods. In this regard, it is interesting to note in passing that the concept of hindering or preventing had been dealt with in *BLF v J-Corp Pty Ltd*[53] (by Spender J of the Full Court of the Federal Court) as follows:

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

51 *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290

52 Transcript of proceedings, 13 April 2005

53 (1993) 114 ALR 551

or prevented' the prospective customer from entering the shop."

The "hindering" aspect must be given a broad meaning, such that it may apply where the "ease of the usual way" of performing the activity concerned is affected "to an appreciable extent."[54] From this, one gets the feeling that AWI were perhaps going to have some difficulty establishing that the conduct of PETA, in informing consumers or purchasers of wool (and no more) that the wool was produced by a cruel process, was "hindering or preventing" those consumers from buying the wool.

Part of the response of AWI's barrister was to say that "by threatening retailers with making false representations about members, they're (ie PETA) inducing them to not stock ultimately our product, and that that ultimately is designed to hinder us selling out product into the market...'[55] So the AWI view appeared to be that there was some sort of "threat", which involved "false representations" which in some way amounted to "hindering" supply under the section. In the author's opinion, it was unfortunate that this view of the law was never tested in court.

After several interlocutory hearings, one interesting thing which emerged was that AWI did not proceed with a claim of actual monetary damage to woolgrowers, but rather proceeded on the basis that they would not particularise any loss but would point rather to the loss of the levy which woolgrowers paid (indirectly, via the Commonwealth) to AWI, being a portion used by AWI to fund its legal case.[56] One of the problems with this position was that the relevant payments were compulsory and were assessed and made before any of the activities alleged to be relevant to the case. Another difficulty was that AWI was not able to point to what it would have done with the money if it had it and a further difficulty was that in any case AWI has $100 million in the bank.

In a nutshell, the AWI case was based on the claim that mulesing was necessary and there was no viable alternative. PETA's claims there were alternatives were described as "some sort of gobbledygook you would expect from somebody who doesn't breed sheep and comes in from the United States waving an animal rights flag.'[57]

It appears that one of the issues which contributed to the complexity of the case was the joinder by AWI of 106 wool growers. This clearly gave rise to the possibility that there would be virtually 106 separate trials, particularly if it could

54 See, for example the judgment of Mason CJ in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32

55 Transcript of proceedings 29 July 2005

56 Transcript of proceedings, 2 November 2006

57 Transcript of proceedings 16 February 2007 (Mr A Bannon, SC)

be established that there was not uniformity in the way the mulesing procedure was carried out.[58] Once it became apparent this was going to cause problems, AWI sought to have its claim hived off from the other applicants' claims in a separate hearing. During discussion of this, it emerged that the damages claim of the non-AWI applicants amounted to roughly $410 each. His Honour Justice Rares was very uncomfortable about hiving off the non-AWI cases, as he felt it would be a denial of justice to the respondents to prevent them from being able to cross-examine the applicants about their practices.

An interesting point emerged when the applicants sought to pursue a misleading and deceptive conduct case against PETA (section 52 TPA). This required them to establish that PETA's conduct was "in trade or commerce"; in order to do that, they sought to discover records of donations to PETA, as well as sales of merchandise and the like over a period of several years. This would have involved many thousands of documents. Discovery was not ordered in that form.

The parties went to mediation in June 2007. The outcome of that was the proceedings were discontinued (with PETA and AWI paying their own costs – AWI claimed its legal costs were around $4 million) and AWI making a range of concessions, including:
- fast-tracking development of sheep breeds not requiring mulesing;
- not standing in the way of labelling to identify wool from non-mulesed sheep;
- giving quarterly reports detailing its investments and progress in development of genetically-based alternatives to mulesing.[59]

In the words of Fraser Shepherd (of Sydney law firm Gilbert and Tobin - PETA's lawyer) the whole exercise served as "a clear lesson to other industries that it is extremely unwise to try to silence their critics by using heavy-handed litigation, rather than sensible dialogue."

And the person who pushed the case in the first place, Ian McLachlan, has since been replaced as Chairman of AWI, which is now saying it is committed to phasing out mulesing by 2010.

58 Transcript of proceedings 20 March 2007

59 see the PETA website at http://www.savethesheep.com/f-wool_boycott_update.asp

CASE 4 – Intensive piggeries

8.15

Wasleys Piggery and Ludvigsen Family Farms

Recent events in South Australia have served to highlight why the RSPCAs should not be involved in enforcement of animal cruelty law, and illustrate why the intensive animal farming industry should be the subject of particularly intense scrutiny regarding animal cruelty and breach of animal cruelty laws.

The South Australian RSPCA ("the RSPCA") in 2003 prepared a review of the *Prevention of Cruelty to Animals Act* 1985 (SA) ("the Act"), with focus on issues relating to enforcement. On completion of that review, the RSPCA wrote to the responsible Minister[60] proposing that certain changes should be made to the Act. In 2005 the Minister put out a paper for public discussion. One of the key proposals was that inspectors should be allowed to routinely inspect intensive animal farms. It is obvious that such a power, exercisable without the need for prior notification of an inspection, is essential for the proper enforcement of animal cruelty law as it applies to those establishments.

At this juncture it is educational to pause and ask what the provisions are in the Act as it existed at the time relating to inspections. Section 29 of the Act said (relevantly):

> "*...an inspector may...at any reasonable time enter any premises or vehicle that is being used for holding or confining animals that have been herded or collected together for sale, transport or any other commercial purposes*"

Given that the Minister in the Second Reading Speech introducing the *Prevention of Cruelty to Animals Bill* (1985) said that inspectors "...will have the power to enter...premises where animals are kept for commercial purposes", one might have thought that there was already power in the Act allowing inspectors to carry out, in effect, unannounced inspections. The RSPCA in Tasmania, where there is a very similar provision, certainly thinks that is so.[61] However, the RSPCA in South Australia thinks that their inspectors "cannot enter a farm unless they obtain a warrant after receiving evidence of an offence or unless they receive an invitation

60 Minister for Environment and Conservation

61 Section 16(2) of the *Animal Welfare Act* 1992 (Tas) says "[a]n officer, authorized 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, RSPCA Tasmania; personal communication).

by the owner to inspect the farm.'"[62]

Notwithstanding this, the public discussion paper proposed the Act be amended to "empower animal welfare inspectors to routinely inspect intensive farming establishments...".[63] After receiving about 70 submissions, the government prepared a draft Bill which was released for public consideration in November 2006. That Bill contained sections effectively empowering routine inspection of "premises...that an inspector reasonably suspects is being used for or in connection with a business...involving animals, with "reasonable notice" to the occupier. This is now what the amended Act says.[64]

While all this was happening, others with an interest in the welfare of intensively farmed animals were gathering information about how well the Act was working in relation to those animals.

Wasleys piggery

In June 2006 Animal Liberation NSW obtained video footage of sow stalls in Wasleys piggery in South Australia. They obtained evidence that pigs were being kept in under-sized stalls.[65] That visit was the subject of much media attention, including programmes aired by Channel 7's Today Tonight. Two TAFE students who had done work experience at the piggery came forward and gave evidence to the RSPCA of other instances of what appeared to be serious cruelty. the author has seen copies of the statements taken by the RSPCA inspector concerned and they are of such a low standard as to be worthless as evidence. The students subsequently provided detailed written statements to Lyn White of Animals Australia (who is a former SA police officer of over 20 years experience). Animals Australia supplied those statements to the RSPCA.[66] Today Tonight also recorded footage (taken from a helicopter) indicating that large numbers of pigs and piglets had been killed and buried. By the time the RSPCA got around to investigating the piggery (ie 3 days after what appeared to be a "clean up"), all they could find was that several stalls were smaller than the dimensions referred to in the relevant Code of Practice.[67] One would have thought that would have been enough for the RSPCA to bring a prosecution. However, the RSPCA (and indeed

62 See "Intensive piggeries – the RSPCA's position" on the RSPCA website at http://www.rspcasa.asn.au/page?pg=445&stypen=html (accessed on 4 April 2008).

63 See the Department website at http://www.environment.sa.gov.au/animalwelfare/issues.html#poctaa (accessed 4 April 2008).

64 s 31 *Animal Welfare Act* 1985; see paragraph 7.5

65 Uniquely in Australian jurisdiction, regulations made under the Act require compliance with a range of "animal welfare codes", including one for pigs which specifies minimum dimensions for a sow stall: *Prevention of Cruelty to Animals Regulations* 2000 (SA), regulation 10 and Schedule 2.

66 The RSPCA has since indicated to Animal Liberation (NSW) that it does not consider the evidence justifies commencing a prosecution.

67 *Model Code of Practice for the Welfare of Animals – Pigs* 2nd edition (2003) CSIRO Publishing

subsequently the Minister, in response to a complaint from Animals Australia) asserted that because the relevant code referred to "suggested minimum space allowances..." for sows in stalls, use of stalls smaller than the dimensions in the code would not constitute breach of the relevant regulations.[68] According to that logic, sows could be kept in stalls smaller than their body! From the legal point of view, because the pig code was adopted as part of the law of South Australia (under the regulations), a court will seek to give meaning to a provision which is otherwise uncertain. Because the same approach must be taken to the interpretation of the code as is taken to the Act,[69] a construction that would promote the purpose or object of the Act will be preferred.[70] Given this, it is apparent that keeping a sow in a stall less than the minimum dimensions as specified in effect by the regulations will breach those regulations.[71] In any case, given that it would be easy for a prosecutor to establish that keeping a sow in a stall *per se* is cruel,[72] if indeed the wording of the pig code relating to sow stall dimensions is void for uncertainty, the defendant would be unable to rely on the defence available under the Act of compliance with the code.[73]

It is apparent from this that the operators of Wasleys piggery should have been prosecuted for breaching the Act.

Greens upper house MP Mark Parnell responded to the revelations of cruelty (and probable law-breaking – going unpunished) at Wasleys by bringing a motion to establish a select committee to inquire into various issues relating to the Act, including the appropriateness of the RSPCA being responsible for the enforcement of part of the criminal law of the State (ie the Act).[74] The motion was defeated on 6 December 2006.

Ludvigsen Family Farms

In January 2007 Animals Australia was contacted by Jason Shaw, an employee at a piggery in Owen, South Australia, owned and operated by Ludvigsen Family Farms Pty Ltd ("Ludvigsen"). Mr Shaw said that he had witnessed various incidents of cruelty (mainly concerning failure to properly look after pigs),[75] and

68 See footnote 11.

69 see *Whitaker v Comcare* (1998) 86 FCR 532.

70 see sections 14A(2)(a) and 22 of the *Acts Interpretation Act* 1915 (SA).

71 Martin Bennett, a prominent WA barrister, prepared a legal analysis which came to this conclusion. That advice was provided to the Minister.

72 and would in any case breach section 13(2)(b)(i) of the Act, which says that a person ill treats an animal if that person...being the owner of the animal...fails to provide it with appropriate...exercise (read together with section 13(1): a person who ill treats an animal is guilty of an offence).

73 section 43 of the Act says "nothing in this act renders unlawful anything done in accordance with a prescribed Code of Practice relating to animals".

74 Legislative Council Hansard 27 August 2006

75 section 13(2)(b)(i)

had sent a complaint to the RSPCA via its website. He had telephoned the RSPCA to see what was being done and was told that the complaint was being looked into. Mr Shaw also indicated that there were several ongoing cruelty issues at the Ludvigsen piggery. The RSPCA has subsequently stated that it did not pursue this complaint because it appeared to be vague and because it was obviously made by a disgruntled employee.[76] It is astonishing that the RSPCA regarded these as sufficient reasons for not pursuing a complaint of animal cruelty, particularly when complaints from whistleblowers employed by the intensive animal farming industry must, one suspects, be quite rare. Furthermore, another excuse given by the RSPCA for its lack of action (interest?) was that it did not have proper resources available.

The author went to South Australia and spent some time with Mr Shaw and other workers at the Ludvigsen piggery, all of whom provided detailed evidence of failures to properly provide for animal welfare. In February 2007 he got a phone call from Colin Bugg, one of those workers, to say that for about the past week he had been struggling to look after a sick sow which was not taking food and was very ill. Despite repeated complaints to piggery management and requests that the sow be euthanased, Mr Bugg had been told to keep going with attempts to feed her. Mr Bugg complained to the RSPCA about that pig a few days later. An RSPCA inspector rang him some hours after his call and took some details. Interestingly, the inspector did not ask whether there was any way of identifying the pig concerned (there was – it had a numbered ear tag). Mr Bugg's clear understanding was that the RSPCA would treat his complaint as confidential and his expectation was that the next step would be for the RSPCA to carry out an unannounced inspection of the site (which of course would have the effect of maintaining Colin's anonymity). However, that same inspector then called the director of Ludvigsen (Greg Ludvigsen) and told him that a complaint had been made about a pig and giving him sufficient information to know which pig was the subject of concern. According to Mr Bugg, Mr Ludvigsen immediately moved the pig from the stall she was in to another area. Mr Ludvigsen subsequently claimed to the RSPCA that the subject pig was inspected by a vet the following day, who gave it a clean bill of health – indeed the RSPCA reported on its website that the pig had made a full recovery. All of this should be considered in the context of a situation where the RSPCA had possibly given Mr Ludvigsen a chance to substitute the subject pig with another one.[77] Of course, the RSPCA, in giving a warning to Mr Ludvigsen almost certainly identified Mr Bugg as the complainant. There are only a few piggery workers at that piggery, there was only one very sick

76 RSPCA Internal Memo 7 March 2007, referred to by Mark Parnell MP in his speech to the South Australian Legislative Council on 14 March 2007.

77 as pointed out by Mark Parnell MP in his speech to the South Australian Legislative Council on 14 March 2007; Legislative Council Hansard page 1630; see http://www.parliament.sa.gov.au/Historic/HistoricHansardAugust1993to September2007.htm.

pig and only one person had been complaining to management about it. It was perhaps unsurprising that a couple of days later Mr Bugg was sacked. In seeking to justify its actions, the RSPCA claimed that Mr Bugg had expressly given the relevant inspector permission to contact his employer.[78] Mr Bugg expressly denies this and has told Mark Parnell MP and me that he is prepared to state on oath that he never gave permission to the RSPCA to contact Mr Ludvigsen.[79] The RSPCA inspected the piggery 9 days after the initial complaint and gave it a ringing endorsement.[80] Mr Bugg's evidence was completely disregarded and Mr Ludvigsen's position was taken by the RSPCA to be true.[81]

Animals Australia responded by complaining to the RSPCA, the Minister, the police and by alerting the media. Mark Parnell MP took up Mr Bugg's dismissal and the question of the clumsy and inappropriate behaviour of the RSPCA in the South Australian parliament,[82] calling for an independent investigation into the RSPCA's conduct. Mark Parnell made the very good point that, in intensive animal farming establishments, the workers are often the only persons who know the conditions of the animals and are in a position to report cruel practices. It is therefore essential that such persons, if they do complain to an enforcement authority, should be protected.

One of the consequences of all of this was the Minister instructed the Chief Executive of the Department of Environment and Heritage to carry out an investigation. The main conclusion of this inquiry,[83] was that the RSPCA had "acted appropriately" in these cases. Bizarrely, and despite this, the report made several recommendations indicating that protocols followed by the RSPCA in such situations were not appropriate. Those recommendations included that complainants must be advised of "confidentiality protocols", the processes used by the RSPCA for raising the matter with the person that is the subject of the complaint and a "prompt" to make sure that questions must be asked to enable the identification and location of any animals referred to in the complaint.

78 Footnote 19.

79 Mark Parnell MP's speech to the South Australian Legislative Council on 14 March 2007; personal communication.

80 The statement on the RSPCA website (http://blog1.rspcasa.asn.au/) reads like an advertisement for Ludvigsen, including the remarkable claim that "the farmer told us has [sic] in fact spent over $700,000 on improvements to the farm so that he can meet the expectations of the new Pig Code of Practice...". This is amazing, given the final version of the Code was not in fact approved until April 2007 (so he could not have known what he needed to do to meet its "expectations") and more to the point, there are in effect no requirements in the new Code which would have required him to spend money on upgrades.

81 The author obtained funds for Colin to receive legal advice, as a result of which he made a complaint to the Equal Opportunity Commissioner pursuant to section 9 of the *WhistleblowersAct* 1993 (SA); so far as the author am aware, the Commissioner has decided to take Colin's case up and take action against Ludvigsen for an "act of victimisation" under the *Equal Opportunity Act* 1984 (SA).

82 South Australia Legislative Council Hansard 14 March 2007.

83 Letter dated 9 November 2007 from Minister Gago to Animals Australia.

But there was more to come. At the beginning of April 2007 the author received a call from another Ludvigsen worker. He reported that there were several pigs in one of Ludvigsen's facilities which were in bad condition, including one animal with a lesion on its leg which he thought was gangrenous. Once again, despite raising the matter several times with Greg Ludvigsen, nothing had been done. By now, having had extensive discussions with Lyn White the author had realised that the only way to ensure that the authorities (including the RSPCA) would take complaints seriously in these circumstances was to obtain incontrovertible evidence, preferably video footage. The author contacted Animal Liberation (SA) and as a result a person attended the Ludvigsen piggery with the worker (taking great care to wear appropriate protective clothing and take other steps to ensure that there could be no allegations of breach of "biosecurity"). Video footage of the subject pig was taken and a complaint lodged at the RSPCA in Adelaide later that day. This time the RSPCA responded by attending the piggery within hours of the complaint (ie without forewarning Greg Ludvigsen). However, in the meantime the piggery worker had been mulling things over and told Greg Ludvigsen about the complaint. Consequently, by the time the RSPCA arrived (ie only a few hours after Greg Ludvigsen was told), the subject pigs had disappeared. However, the RSPCA were able to exhume several freshly-killed pigs from the "dead pile", which they took back to Adelaide.

Minister Gago, after considering submissions received in response to the draft Bill, on 31 July 2007 introduced into Parliament the Prevention of Cruelty to Animals (Animal Welfare) Amendment Bill 2006. But it was clear from what was said in the Second Reading Speech that the intensive animal farming industry had managed to influence the Minister and draw the teeth of the proposed "random inspection" provision. In her speech, the Minister referred to a "Memorandum of Understanding" between the agencies involved with the animal industries which specified that "intensive industries establishments will not be the subject of a routine inspection more than once each year and, if a quality assurance program is in place, desk top audits of the program will be undertaken more frequently than site visits".

At this point, despite repeated requests from Animals Australia and Mark Parnell MP, the report into the RSPCA's handling of the Ludvigsen affair had still not been released.[84] Both Animals Australia and Mark Parnell had informed the Minister about the third complaint.

In August 2007 the RSPCA told the complainant that it was going to prosecute Ludvigsen in relation to the third complaint. In September 2007 the case was heard before the Magistrates Court in Elizabeth. Greg Ludvigsen pleaded guilty to

84 And it was not released until November 2007.

three charges. The charges related to the pig seen by the complainant, as well as two other (dead) animals, one of which was found to have a foot missing. The RSPCA prosecutor made several odd statements, including that it was "unfortunate" that the worker had contacted the author and that the piggery operator was "fearful" of biosecurity breaches. The RSPCA presented evidence from an expert pathologist that all of the subject animals should have been euthanased several weeks before the complaint was made. The RSPCA did not seek a penalty, but only sought its costs. Ludvigsen was fined $1,500 and ordered to pay the RSPCA's costs of $1,300.[85]

On 13 November 2007 the Prevention of Cruelty to Animals (Animal Welfare) Amendment Bill was debated in the Legislative Council of the South Australian parliament. Mark Parnell gave a speech in which he made several important points relevant to the proposed amendments to the Act which had arisen from the Ludvigsen affair, including:

- it was inappropriate for the RSPCA, an unaccountable body, to be the mainstay of investigating multi-million dollar agribusiness animal operations;[86]

- in any case, the evidence-gathering procedures of the RSPCA were completely inadequate;

- where a "whistleblower" complains about animal cruelty, and there is no system of unannounced routine or random inspections, the "whistleblower" will always be at risk;

- the objection of industry that "biosecurity" breaches were an obstacle to unannounced inspections was a complete furphy (inspectors can in any case take any precautions required);

- the "memorandum of understanding" which would, if implemented, have the effect of excluding intensive animal industries from routine inspections, could be regarded as illegally fettering the powers of inspectors under the Act.

The consideration of the Bill moved to the committee stage in February 2008. There was considerable debate about the issue of routine inspections and in particular whether notice should be given. The Liberal opposition wanted 72 hours notice to be given.[87] Family First wanted 24 hours. The Greens wanted

85 Personal communication from Animal Liberation (SA) made 7 September 2007.

86 He also mentioned that the most recent AGM of the RSPCA (of which he is a member) had voted in favour of unannounced inspections – but that the RSPCA Council did not support this. In my view another reason why the RSPCA should not be involved in law enforcement at all.

87 The opposition spokesperson stated that one of the reasons for this was there is "only one specialist pig vet in

none. The government wanted "reasonable notice". Mark Parnell quoted the Ludvigsen case as an example of how little time an operator of an animal factory farm needed to hide the evidence. The outcome was that the Act as amended will say that an inspector must give an operator "reasonable notice". Mark Parnell for the Greens also succeeded in inserting a provision into the amended Act which would have the effect of requiring an inspector to report back to a complainant the action taken in response to a complaint. He was instrumental in persuading the government to insert a provision giving protection to persons who made complaints of cruelty under the Act (ie "whistleblower protection").

Australia". This, presumably, will come as something of a shock to the Australian Association of Pig Veterinarians, whose membership appears to have shrunk to one (see the Australian Veterinary Association website at http://www.iimage.cim.au/ava.com/au/main.php?c=0&mt=SIG&new_c_id=2).