STRATEGIC LITIGATION AND LAW REFORM*

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The principal challenge for lawyers who wish to advance the animal cause is two-fold. One, the formulation and conduct of strategic litigation. Two, the prosecution of law reform proposals on the basis that animal protection should be primarily a Commonwealth responsibility.

So what is strategic litigation? We know that by reason of the sanction by state animal protection statutes of producer friendly 'codes of practice' that their protective reach is denied to the overwhelming mass of animals, some 500 million animals annually. For example, the code of practice for domestic poultry permits the confinement of a battery hen to a floor area less than an A4 sheet of paper. Such enduring close confinement would ordinarily give rise to a cruelty offence under a statute. As such confinement complies with the relevant code of practice however, the Act does not apply.

With welfare thresholds for intensively produced animals so low, prosecution is difficult. Accordingly, the lawyer is compelled to turn to more creative legal strategies. For example, section 52, *Trade Practices Act* 1974[‡] prohibits misleading and deceptive conduct by a corporation in trade or commerce. Suppose, for example, that major players in an industry were to market their animal products on the basis that the animals were raised in ideal or enriched conditions, when in fact they were not. A case could be brought against such companies for engaging in misleading and deceptive conduct. What would be the point? Apart from serving the public interest generally, it would enable consumers to make an informed choice in their purchase of particular animal products. Afterall, it is a parody of the notion of consumer choice if it is not an *informed* choice. Flowing from that though is the likely prospect that producer practices would change in response to the exertion of market power by informed consumers.

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‡ The *Trade Practices Act* 1974 became the *Competition and Consumer Act* 2010 as of 1 January 2010. There is now reposed in Schedule 2 the new *Australian Consumer Law*. The new s.18 of the *ACL* , for example, contains the new equivalent of the former s. 52, TPA. Other relevant sections have been relocated and their numbering changed. See further chapter 1, 'The Animal Welfare Legal Regime- a critical overview, and chapter 2, ' Three Key Challenges in Strategic Public Interest Litigation', of the author's just published e-book (May 2011), ***'Animal Law : Principles and Frontiers'*** at www.bawp.org.au

There have been three traditional impediments to such public interest litigation. First, the cost and availability of appropriate legal representation. This has been addressed by the establishment of the Barristers Animal Welfare Panel with its adjunct panel of law firms, including national first tier law firms, offering services pro bono. Second, the risk of an adverse costs outcome in a difficult or lengthy case. Third, the requirement to give an undertaking as to damages as a condition of the grant of an interlocutory injunction. [2] In these latter respects, the just established Animal Justice Fund provides, at last, the missing link in the legal armoury.

The Animal Justice Fund will be administered by Animals Australia. Its launch was enabled by a Tasmanian benefactor, Jan Cameron, (founder of the Kathmandu chain) who has offered to provide up to $1 million per year over five years, that is, $5 million in total, to enable the conduct of public interest litigation and, second, the gathering of evidence by rewards of up to $30,000 for evidence which leads to successful prosecution for animal cruelty, or what is judged by the AJF to be a significant animal welfare outcome. The website may be found at www.animaljusticefund.org.

Such rewards are thought to be necessary because, in Victoria for example, the vital power to permit random inspection of premises (such as a battery hen shed housing thousands of birds) lies tightly controlled by the Minister for Agriculture. The power is exercised sparingly. There is the further practical challenge in gathering evidence where one would need a departing employee to make a complaint (infrequent) or the co-operation of the particular producer (unlikely).

There have been three recent major examples of public interest litigation going to the protection of animals under Australia jurisdiction. First, the decision by the Full Court of the Federal Court of Australia in 2006 in *Humane Society International Inc v Kyodo Senpaku Kaishaltd* [2006] FCAFC 116 to grant an interlocutory and, later, a perpetual injunction under s.475 of the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999, against a Japanese company whaling within the waters of Australia's Whale Sanctuary. The Australian Whale Sanctuary was declared in 2000 under that Act. The injunction was granted even though it may have been futile to do so as the Japanese whaler had no registered office or assets in Australia and its ships did not call into Australian ports. The majority of the Full Court (Black CJ and Finkelstein J) said that, despite this, an injunction served the public interest objects of the Act by having an educative

[2] In *Hoffmann-La Roche* v. *Secretary of State for Trade* [1975] AC 295, the House of Lords held, in summary, that the Crown was entitled in that case to an interim injunction without giving an undertaking as to damages where it was suing to enforce what was prima facie the law of the land (i.e. public interest), in contrast to where it may sue to enforce proprietary rights (i.e. private interest), unless the person against whom the injunction was sought could show a strong prima facie case why the Crown should be required to give the undertaking. For an analysis, and how an analogous argument may be adduced to waive the undertaking where an animal society sues to enforce the law of the land , for example, under a public interest provision like the former s. 52, *Trade Practices Act* 1974 (now s. 18 of the *Australian Consumer Law*), see chapter 2, 'Three Key Challenges in Strategic Public Interest Litigation', of the e-book referred to in fn.2

effect. In litigation without a public interest factor, futility would almost invariably be a ground for denial of injunctive relief.

Or again there was unquestionably a public interest object to be satisfied in the secondary boycott case brought by Australian Wool Innovation against Ingrid Newkirk, the animal rights group People for the Ethical Treatment of Animals, and others in the Federal Court in 2005. [3] There are a number of case references, as various applications were made to strike out different parts of the AWI statement of claim on the basis of its insufficiency as a pleading: see *Australian Wool Innovation Ltd v Newkirk* [2005] FCA 290 (22 March 2005); *Australian Wool Innovation Ltd v Newkirk (No 2)* [2005] FCA 1307 (16 September 2005); and *Australian Wool Innovation v Newkirk (No 3)* [2005] FCA 1308 (16 September 2005). The case was ultimately settled on a basis very favourable to PETA: a copy of the terms of settlement may be found at the BAWP website when it goes live later this month – www.bawp.org.au. It will be recalled that PETA threatened an international boycott of Australian wool products in the face of a failure to adopt or develop alternatives to the mulesing of sheep. Leaving aside questions of animal welfare, the public interest element lay in how the secondary boycott provisions of the *Trade Practices Act* could be used to stifle free speech or protest activity directed to reliance on the exertion of informed consumer choice or market power.

There is one further argument to keep in view in considering the application of the secondary boycott provisions such as s.45D(1), *Trade Practices Act* 1974. In a given case, a persuasive argument could be mounted that the prohibition in s.45D(1) creates a legal restriction on communication, and thus as a statutory provision should be read down or confined in its application by the implied freedom of political communication under the Constitution. A two-stage test was adopted by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-8; 145 ALR 96 at 12 for determining whether a law infringes the implied freedom of political communication under Australia's Constitution. In brief summary, the two-stage test[4] (later slightly modified) is:

[3] See further chapter 4, ' Secondary Boycotts', of the e-book referred to in fn.2

[4] (a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

(b) secondly, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed in .128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

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

(a) first, does the law effectively burden freedom of political communication?
(b) secondly, if the law effectively does so, is the law reasonably appropriate and adapted (or proportionate) to serve a legitimate end?

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

In my view, s.45D(1) stands to create a burden because it imposes potentially serious sanctions and an exposure to large damages claims and judgment, including legal costs. To restrict methods of communication and freedom of association where, in the public interest, it is sought to act in concert to target an arguably inimical practice or course of conduct, is to restrict the effectiveness of the freedom of political speech and protest. It also acts to restrict the extent to which new concerns may be brought to the attention of electors. Plainly, the campaigns of animal societies attract criticism of political representatives and public officials.

Secondary boycotts provisions also stand to operate in practice to burden or deny an animal society's opportunity to obtain access to the media so as to transmit a message on political or government matters to other electors: see for example the observations of McHugh J in *Levy v State of Victoria* (1996) 189 CLR 520 at 623; 146 ALR 248 at 274-5.

Further, by its terms, operation and effect, s.45D(1) directly and not remotely restricts or limits communications or freedom of association by way of an interest group acting in concert with fellow concerned citizens or organisations. It would also affect the manner or conditions of the occurrence of such communications. In 2007 the then federal Minister for Agriculture complained of misleading statements by PETA about the mulesing of sheep, and flagged introduction of a Bill to empower the ACCC to bring representative proceedings on behalf of farmers in reliance on the secondary boycott provisions. The Bill was introduced into the parliament, but it later lapsed with the calling of the federal election in 2007. As to the Minister's complaint, with all political discourse, the question of whether a statement is misleading or not will usually depend on one citizen's particular viewpoint as against another. And ultimately, when political representatives refuse to make laws to change particular practices, citizens who disagree are left, practically speaking, to "vote with their feet" and refuse to purchase the product affected by the practice. For example, why should the ordinary citizen be denied the opportunity to "vote with their feet" where urged by free range egg producers not to buy battery hen eggs on the grounds of the birds' suffering?

Moreover, that s.45D(1) may burden political or government communications is supported by the existence of exemptions in s.45DD for environmental protection or consumer protection.

As to the second-stage test in *Lange*, the burden s.45D(1) creates on communication is excessive and disproportionate by reason of the limited exemptions granted to environmental protection and consumer protection, so that s.45D(1) has an

unreasonably wide operation. Section 45DD(3) in providing for these two exemptions only cannot be thought to provide for a wide rubric of public interest matters.

Arguably relevant to both stages of the implied freedom test is that s.45D(1) makes contravention of its terms subject to a pecuniary penalty under s.76 of the *Trade Practices Act* 1974 of up to $750,000 for a body corporate. In addition, damages and injunctions are available under ss.80 and 82 and remedial orders under s.87. Deane J in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 177 observed how potential civil liability and damages and costs:

> "...is likely to represent a much more effective curtailment of the freedom of political communication and discussion than the possibility of conviction of most of the many criminal offences which are punishable by a pecuniary penalty."

Perhaps the most significant recent public interest case in Australia was that of the *Emmanuel Exports* live sheep export case heard before a West Australian Magistrate. This case involved the prosecution of a live sheep exporter for alleged breaches of s.19(1)(iii) of West Australia's *Animal Welfare Act* 2002, which prohibits animals being "transported in a way that causes or is likely to cause unnecessary harm." In a carefully reasoned judgment handed down in February 2008, the Magistrate found the charges proven. But she acquitted the accused on the ground that there was an operational inconsistency between the federal legal regime and the State Act for the purposes of s.109 of the Constitution, where Commonwealth laws are provided to prevail over State laws to the extent of any inconsistency. Unhappily, the Magistrate erred in law on this point: there was no s.109 point.[5] An appeal was lodged in March 2008 to the West Australian Supreme Court by the WA State Solicitor's office. The Barristers Animal Welfare Panel had two counsel give advice to the effect there was no s.109 point. A copy of the Opinion will be available shortly on the Panel's website.

However, the Minister responsible for administration of the WA animal protection statute intervened on political grounds and discontinued the appeal. At the time, the Carpenter government was clearing the decks for a State election. But for this political intervention, a successful appeal would have ensued and a precedent would have been established with far-reaching consequences for the live animal trade.

I am in little doubt that the Barristers Animal Welfare Panel and the Animal Justice Fund will in the future work together on major strategic litigation. One point that has discouraged public interest litigation by animal societies has been the question of standing to sue. Ordinarily, a special interest in the subject matter of the dispute is required to be established: see *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493; 28 ALR 247. I believe that a body like Animals Australia for example would likely satisfy this test.

[5] See further chapter 3, Live Animal Exports', of the e-book referred to in fn.2

However, if a proceeding were to be brought for misleading and deceptive conduct under the *Trade Practices Act*, then no such standing to sue issues should arise.[6] Section 80 provides that the Federal Court may grant injunctive relief where, on the application of the Commission, "or any other person" it is satisfied that a person was engaged, or was proposing to engage, in conduct in contravention of a Part V provision such as s.52. Section 163A of the Act also provides that "a person" may institute a proceeding in the Federal Court seeking a declaration in relation to the operation or effect of (among others) a provision of Part V. Thus, in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 169 ALR 616, the applicant was a stranger to the dispute, having suffered no loss or damage by reason of the respondent's conduct. It simply invoked the jurisdiction conferred on the Federal Court by ss. 80 and 163A in its capacity as a (corporate) person. The High Court determined the appeal on its standing to sue in favour of the applicant.

There have been other interesting developments here and in the UK relevant to animal law. A person may for example come into possession of information which exposes animal cruelty, but which that person knows to be confidential. Ordinarily, such a person would be under a duty at law not to publish it: *Prince Albert v Strange* (1849) 1 Mac&G 25; 41 ER 1171; *Duchess of Argyll v Duke of Argyll* [1967] Ch 302; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 260, 268; or for example in Australia, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1, 10. Typically, the person seeking to protect confidential information will apply for an interlocutory injunction on the grounds of breach of confidence and/or say breach of copyright.

In *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1980) 147 CLR 39; 32 ALR 485 the Commonwealth sought an interlocutory injunction to restrain the publisher of The Age and The Sydney Morning Herald newspapers from publishing extracts from a book and from documents on defence and foreign policy matters, both of which were produced by Commonwealth government departments. The Commonwealth submitted that it was the owner of the copyright in the documents; that the book contained confidential information; that publication would constitute an offence under the *Crimes Act* 1914; and would in some instances prejudice relations with other countries. Mason J granted the interlocutory injunction. However, his Honour did not grant the injunction on the basis of any actual or threatened breach of criminal law, as injunctions in that event are confined to cases where the offence is frequently repeated in disregard of, usually, an inadequate penalty, or to cases of emergency. The Court here followed *Gouriet v Union of Post Office Workers* [1978] AC 435. His Honour found that the degree of embarrassment in Australia's foreign relations was insufficient to justify

[6] See further chapters 2 and 3 of the e-book referred to in fn.2

interlocutory protection of the confidential information. However he found that the plaintiff had made out a prima facie case for copyright infringement.

For our purposes, His Honour interestingly observed (at pages 496-7 of the ALR):

> "It has been accepted that the so-called common law defence of public interest applies to disclosure of confidential information. Although copyright is regulated by statute, public interest may also be a defence to infringement of copyright... Assuming the defence is to be available in copyright cases, it is limited in scope. It makes legitimate the publication of confidential information or material in which copyright subsists so as to protect the community from destruction, damage or harm. It has been *acknowledged* that the defence applies to disclosures of things done in breach of national security, *in breach of the law (including fraud) and to disclosure of matters which involve danger to the public*."[7]

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

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

More recently, there is the decision of interest by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2002) 185 ALR 1. Lenah Game Meats sought an interlocutory injunction restraining the Australian Broadcasting Corporation from broadcasting a film of the processor's slaughter operations at a "brush tail possum processing facility". The film was made surreptitiously and unlawfully by reason of trespass, and was given to the ABC to broadcast. The unchallenged evidence was that broadcasting the film would cause financial harm to the processor.

In brief summary, the course of argument before the High Court invoked principles of unconscionablility, the implied freedom of political communication, rights of property, and an emergent tort of invasion of privacy. The privacy argument was quickly dismissed because it is not available to a corporation: see paragraph [132] of the joint judgment of Gummow and Hayne JJ, for example. The question of what may constitute filming of private activity, on the one hand, and what is necessarily public, on the other, was canvassed at some length. Gleeson CJ at paragraph [42] observed:

[7] emphasis added

> "There is no bright line which can be drawn between what is private and what is not... An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford... The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person with ordinary sensibilities is in many circumstances a useful test of what is private."

At paragraph [25] of his judgment, Gleeson CJ noted that it was not suggested that the operations that were filmed were secret, or that requirements for confidentiality were imposed upon people who might see the operations. And it was not contended that the ABC had contravened, or threatened to contravene any statute, unlike the people from whom the ABC received the video. At paragraph [39] of his judgment, Gleeson CJ observed that if the activities filmed were private, then the law of breach of confidence was adequate to cover the case. Notwithstanding that, at paragraph [43] Gleeson CJ concluded:

> 'The problem for the respondent is that the activities secretly observed and filmed were not relevantly private...Of course, the premises on which those activities took place were private in a proprietorial sense...Nor does an act become private simply because the owner of land would prefer that it were unobserved...It may mean that a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private."

Accordingly, the Court examined the principal contention of the respondent invoking unconscionability. In this respect, it was incumbent upon the respondent to explain why the ABC was bound in conscience not to publish.Given that Gleeson CJ found that there was no breach of the law of confidence, he observed at paragraph [55] that: "... the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large."

Of parallel interest are developments in the United Kingdom arising initially from proceedings taken by a biotechnology company to injunct the publication of material taken in breach of confidence and breach of copyright and given to an animal society which then published the material on its website. The decision of the Vice-Chancellor on the interlocutory application is reported as *Imutran Ltd v Uncaged Campaigns Ltd and Anor* [2001] EWHC Ch 31 (11 January 2001).[8] The

[8] See further chapter 5, 'Animals in Research', of the e-book referred to in fn.2

case arose in this way in September 2000. Imutran Ltd, a wholly owned subsidiary of a Swiss owned international pharmaceutical company, was engaged in research into xenotransplantation, that is to say, the replacement of human organs with those of animals, usually pigs. Most of such research was being carried out at a laboratory known as Huntingdon Life Sciences. As xenotransplantation necessarily involved experimental work on animals, it was regulated by the UK *Animals (Scientific Procedures) Act* 1986. Amongst the duties imposed on the Home Secretary by the Act was the duty, when considering an application for a project licence, to weigh the likely adverse effects on the animals concerned against the benefit likely to accrue as a result of the proposed project.

In the northern hemisphere spring of 2000, Uncaged Campaigns Ltd received a package and a CD-Rom containing copies of a large number of documents belonging to Imutran. A director of Uncaged Campaigns Ltd was Daniel Lyons, a then part-time student at Sheffield University for a PhD in the subject area of the ethical and political theory implications of xenotransplantation. Mr Lyons appreciated that the documents came from Imutran and mainly concerned its program of primate xenotransplantation conducted at Huntingdon Life Sciences. Amongst other things, he considered that the documents raised extremely serious questions of animal welfare and the adequacy of regulation of research by the Home Office. He also appreciated the documents were confidential.

Mr Lyons wrote and published on the website "Diaries of Despair: The Secret History of Pig to Primate Organ Transplants" comprising 157 pages of information from Imutran's documents obtained from the unknown source. On 19 September 2000 a journalist with the Daily Express faxed to Imutran three specific questions concerning its program of xenotransplantation to which Imutran replied. A few days later articles appeared in the Daily Express commenting adversely on Imutran's program. They were based on the Diaries of Despair.

An interim injunction was obtained on 26 September restraining UCL and Mr Lyons from infringing Imutran's copyright in its documents and from using or disclosing the information contained in nominated confidential documents. A proviso to the injunction exempted from the prohibition further use or disclosure of information appearing in the Daily Express articles. These injunctions were obtained on 10 October. The interlocutory injunction application came on before the Vice-Chancellor on 18 October 2000. The matter was adjourned for reasons I do not need to deal with today.

In the upshot, the Home Secretary asked the Chief Inspector of the UK RSPCA to examine compliance by Imutran with licence conditions imposed under the *Animals (Scientific Procedures) Act* 1986. The Vice-Chancellor's eventual decision was handed down on 11 January 2001. Imutran in argument had relied upon first, breach of confidence, and second, infringement of copyright. Relevant to both those issues was the proper approach for the Court to adopt in considering an application for interim injunctions in which the right to freedom of expression guaranteed by Article 10, *European Convention on Human Rights*, was material. This depended in turn on the proper construction and application of s.12 of the UK *Human Rights Act* 1998.

Time does not permit me to explore the human rights argument. Suffice to say, in summary, the Vice-Chancellor found that the documents were in their nature confidential, that the defendants knew this was so, and that the defendants knew that Imutran had not known or consented to removal of the documents. The Vice-Chancellor then turned to whether the defendants should be free to publish and campaign with Imutran's confidential and secret documents. Surprisingly, the Vice-Chancellor said:

> "Many of those documents are of a specialist and technical nature suitable for consideration by specialists in the field *but not by the public generally*. Given the proviso to the injunctions sought there would be no restriction on the ability of the defendants to communicate the information to those specialists connected with the regulatory bodies denoted by Parliament as having responsibility in the field."[9]

The Vice-Chancellor went on to find that there had been also a breach of copyright.

What is surprising about the Vice-Chancellor's decision is the adoption of the view that matters of the public interest as to the treatment and welfare of higher primates should be satisfied by reference of the material to appropriate regulatory bodies, but not by publication to the public generally. Further, it appeared that the Home Office had classified severely intrusive procedures as instead "moderate" only, and indeed may have "cosied up" to Imutran in securing the grant of the licence. The UK RSPCA published a report about Imutran's project which was highly critical. Both this report and the Diaries of Despair are available on the web.

Despite its success before the Vice-Chancellor on the injunction application, ultimately Imutran settled the proceeding with Uncaged Campaigns Ltd and Mr Lyons. According to Wikipedia, the papers reveal researchers at Imutran exaggerated the success of work aimed at adapting pig organs for human transplant. It is plain too that the procedures for the hundreds of higher primates used (monkeys and baboons captured from the wild) between 1994 and 2000 were, to say the least, doubtful, and produced an appalling result for their welfare. The diaries remain published and appear at www.xenodiaries.org. The website of Uncaged Ltd is at www.uncaged.co.uk.

Little over a year later the English Court of Appeal in *A v B plc (Flitcroft v MGN Limited)* [2002] EWCA Civ 337 (11 March 2002); [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545; delivered judgment on two appeals, with an entirely different flavour to that of the reasons of the Vice-Chancellor in the *Imutran* case. 'A' was a well known footballer, B was a national newspaper, and C was one of two women with whom A, a married man, "had affairs". Applications for interim injunctions were made by A on the ground of breach of confidence in the context

[9] emphasis added

of particular Articles of the *European Convention of Human Rights*. In summary, the question arose whether a person is entitled to have his privacy protected by the Court or whether the restriction of freedom of expression which such protection involves cannot be justified. [10] But it is not the privacy question which commands interest, but rather the dicta as to public interest publication.[11] They must be read however in the context of UK privacy principles and the impact of the Convention Articles.

Article 8 operated so as to extend the areas in which an action for breach of confidence can provide protection of privacy. Article 10 operated in the opposite direction because it protects the freedom of expression and to achieve that it was necessary to restrict the area in which remedies were available for breaches of confidence. The English Court of Appeal noted:

> "Any interference with the *press* has to be justified, as it inevitably has some effect on the ability of the press to perform its role in society. This is the position *irrespective of whether a particular publication is desirable in the public interest*. The existence of a free press is in itself desirable so any interference with it has to be justified."

This principle arises because the view is taken that it is more important in a democratic society that a press be free from both government and judicial control. Importantly, the Court noted further:"...the existence of a public interest publication strengthens the case for not granting an injunction. Again, in the majority of situations whether the public interest is involved or not would be obvious. In the grey area cases public interest, if it exists, is unlikely to be decisive."

These dicta offer some encouragement for animal lawyers and animal societies, although in Australia the availability of a 'public interest' defence awaits determination by an ultimate appellate court such as the Full Federal Court or the High Court of Australia. Certainly, it is not available presently in Victoria and South Australia by reason of decisions of their respective appeal courts.[12]

When it comes to Australia's implied freedom of political communication, I expect those of you who have studied constitutional law will be familiar with the High Court 'free speech' decision of *Levy v State of Victoria*. [13] Well known campaigner against duck shooting, Laurie Levy, challenged regulations promulgated

[10] The CA's decision and reasoning on the *privacy* question should be taken to be no longer good law. Whilst not expressly overruled by the House of Lords in *Campbell v MGN Limited* [2004] UKHL 22, it is plain that the House of Lords decision now enunciates the law in the UK. The appellant was the well-known fashion model, Naomi Campbell.

[11] For analysis of the 'public interest' defence and its availability in Australia, see chapter 2, 'Three Key Challenges in Strategic Public Interest Litigation', of the e-book referred to in fn.2

[12] See further fn. 7

[13] For a detailed analysis of the case, see chapter 5, 'Constitutional Law Issues in Animal Law', of the e-book referred to in fn.2

under the Victorian *Wildlife Act* by the then Kennett government prohibiting entry into a permitted hunting area during prohibited times without a licence to do so. The prohibited times were the opening weekend when media interest was at its height. Only duck shooters were licensed. Laury Levy relied on a constitutionally implied freedom of political communication. At the commencement of this case the principal progenitors of the implied freedom on the High Court, Mason CJ and Deane , were still members of the Court. However, by the time it came on for hearing, they had retired from the bench. From the standpoint of enunciation of legal tests, the *Levy* decision is satisfactory. But the factual analysis is not. With barely any reasons, it was in effect asserted as a constitutional fact that the threat to public safety was apparent and met proportionately by the Regulations. In the United States Supreme Court by contrast, it would need to have been shown that there was a clear and present danger of such a threat. Levy's counsel argued that a police presence would remove the prospect of such a threat. Such an argument was consistent with high United States authority.

The short point is that there is any variety of interesting case law developing by reason of the attempt by lawyers to further the objects of the animal cause and the patient work of animal societies, including bringing to public notice activities screened from public view, and defending the rights of protestors. Another view can be taken that these cases also represent, in the main, steps taken to invoke the legal armoury to protect the rights or welfare of animals. Suffice to say, lawyers have shown no lack of ingenuity in acting on behalf of their clients in these types of cases.

It is not surprising that cases of the foregoing kind come about where the legal regime for the protection of animals has become so corrupted by producer self -interest. The codes of practice I referred to earlier are formulated within the Australian Primary Industry Ministerial Council system, comprising federal and state Minsters for Agriculture. In turn, their State departments mostly administer the animal protection statutes, despite the most self- evident conflict of interest. The modest role they play in enforcing the statute is thus no surprise. Enforcement of such a wide -ranging public interest statute is instead left substantially to the RSPCA, a charity with limited resources. In an age in which individuals may be backed by a producer body or a fighting fund, how can a charity be expected to risk an adverse costs outcome in a difficult or protracted prosecution. Or offer an undertaking as to damages as a condition of obtaining an interlocutory injunction. Only the State has the resources necessary to enforce such a wide-ranging public interest statute.

This then brings me to the question of law reform, which is at the heart of the animal cause. I am in no doubt that animal welfare should be a Commonwealth responsibility. Presently bandaids are applied by State legislation where radical surgery is required. There is more than adequate constitutional power for the enactment of a national animal welfare act and the establishment of a national statutory authority to administer and enforce the act. I need only cite as examples the trade and commerce power, and the corporations power. A few years ago

Andrew Bartlett of the Democrats introduced into the Senate a national animal welfare bill. It failed. But I am also aware, firsthand, that amongst Commonwealth parliamentarians on both sides there is support for the cause of animal welfare. This coterie of support needs to be built upon so that animal welfare may be viewed as a Commonwealth political issue. This is an exercise in patient lobbying, which the Panel undertakes.

The Barristers Animal Welfare Panel at this moment comprises members of the NSW and Victorian Bars.[14] It was established initially at the Victorian Bar in November 2006 and quickly acquired 90 members, including 25 silks from the commercial and criminal bars. When the Panel is shortly established as a company limited by guarantee, members of the remaining State bars will be invited to join. By August it will be truly national. The Panel's objects and activity reflect principally the two-fold challenge I expressed at the outset of this talk. It also represents protestors.

Importantly too, the Panel has a national Secretariat of some 25 young lawyers, law students, or others with non-legal skills, whose task it is to undertake policy research, assist in the drafting of submissions, attend to administrative work such as the organisation of animal welfare legal seminars, and participate where appropriate in our case program. The national Panel's website will shortly go live at www.bawp.org.au

Lawyers have particular skills and training. As tomorrow's lawyers you will have an informed access to our legal system. You will be exposed continually to the challenge of marshalling and articulating an argument from a forest of facts and paper. These skills, this training, and this informed access are truly an illustration of the maxim that 'knowledge is power'.

The journey ahead offers exciting possibilities. And, as with any great humanitarian cause, a moral firmament exists to inspire. A justice issue exists in which lawyers can confer much needed leverage on the animal cause and in respect of whole classes of animals that are defenceless, without bargaining power, and with little representation, political or legal. That said, their legal representation is beginning to gain momentum. And with successful legal forays, support should build for animal welfare to be viewed as a Commonwealth political issue and responsibility. I hope that at some stage you may join the challenge.

[14] Since this speech was delivered, the Panel now comprises barristers from all the State Bars of Australia.