Legal Challenges in Animal Welfare

1. No-one here this evening is asked to subscribe to the animal welfare cause, though some of us do. Rather, the appeal is made on the basis, first, that a public interest statute enacted to remedy a perceived mischief stands largely unenforced. A law unenforced stands to be a law unobserved; and in that case the moral or social norms the statute reflects also fail to be imparted: see section 1(b) and (c) for example as to the Act's purposes. Old attitudes stand unchallenged.

   Second, the appeal is made on the basis that occasionally difficult public interest cases arise in which the expertise and experience of barristers stand to make the difference. Instances of these have been given in the notice for this meeting and will be briefly adverted to later. An example is the recent interlocutory whaling injunction granted against a Japanese whaling company by the Full Federal Court.

2. Turning first to the public interest statute, Victoria's *Prevention of Cruelty to Animals Act* 1986, it is necessary that we appreciate the animal protection legal regime and, just as relevantly, how its present unsatisfactory state came to be. I propose to tell it "as it is", but in doing so time permits only a brief overview.

3. The starting point in Victoria is section 6(1) of the Act providing that the Act does not apply (amongst other things) to:

   > "(b) except to the extent that it is necessary to rely upon a Code of Practice as a defence to an offence under this Act the keeping,

> treatment, handling, transportation, sale, killing, hunting, shooting, catching, trapping, netting, marking, care, use, husbandry or management of any animal or class of animals (other than a farm animal or class of farm animal) which is carried out in accordance with a Code of Practice;"

Accordingly, compliance in these wide-ranging matters with a code of practice (sanctioned by the Governor in Council on the recommendation of the Minister for Primary Industries pursuant to section 7 of the Act) creates a defence to a prosecution under the Act.

4. Nor by section 6 does the Act apply to:

> "(c) any act or practice with respect to the farming, transport, sale or killing of any farm animal which is carried out in accordance with a Code of Practice;"

So, in the case of farm animals, acts carried out in accordance with a Code of Practice are *exempt* from the Act's application.

What is a "farm" animal then under the Victorian statute?

Section 3(1) defines a "farm animal" to mean:

> (a) "if kept for or used in connection with primary production – cattle, sheep, pigs, poultry, goats and deer;" and
>
> (b) "horses other than horses kept for or used in connexion with sporting events, equestrian competitions, pony clubs, riding schools, circuses or rodeos;"

5. This means then that intensively confined animals like cattle in feed lots, sheep kept for fine wool, and pigs and poultry in intensive or battery production, are all part of primary production, and thus as "farm animals" are liable to exemption from the Act's protection. Animal welfare societies maintain that intensive production is a system the cruelty of which can only be eliminated by its abolition.

This also means that with intensive production alone millions upon millions of animals each year stand to be effectively exempted from the protective reach of the statute. Yet this is one area where the legal spotlight is needed and where, despite the codes, I believe it can be successfully focused in a case of non-compliance with a Code.

6. So who generates these codes of practice creating defences to and exemptions from the statute's cruelty offences? Codes are produced by the self-styled "Animal Welfare Committee" within the (Australian) Primary Industries Ministerial Council system. Like its other State counterparts, the Victorian Department of Primary Industries is a member of the Animal Welfare Committee. The Department administers and is empowered to enforce the *Prevention of Cruelty to Animals Act* 1986.

The preface to the model code of practice for the "Welfare of Animals, Domestic Poultry" 4th Edition SCARM Report 83 notes:

> "This Australian Model Code of Practice for the Welfare of Animals has been prepared by the Animal Welfare Committee (AWC) within the

> Primary Industries Ministerial Council (PIMC) system. Membership of the AWC comprises representatives from each of the State Departments with responsibility for agriculture, CSIRO, the Department of Agriculture, Fisheries and Forestry – Australia and other committees within the PIMC system. Extensive *consultation* has taken place with industry and *welfare groups* in the development of the Code …
>
> The Code is intended as a set of *guidelines* which provides detailed *minimum* standards for assisting people and understanding *the standard of care required to meet their obligations under the laws that operate in Australia's states and territories*. National QA programs for meat, chickens and layer hen industries are well advanced, and will also play an important role in supplementing the Code and assuring the health and well-being of poultry …
>
> The following Code is based on current knowledge and technology. It will be further reviewed in 2010, although an earlier review will be implemented if technology offering significant welfare benefits are available." [emphasis added]

7. No animal welfare representation of any kind exists on this "Animal Welfare Committee". Further, the Code is only a "set of guidelines" and is legally unenforceable. It provides only for "minimum standards", not proper standards or those of the relevant animal protection statute: see also 'Introduction' second paragraph. Yet the Code is expressed to be intended to assist people in understanding "the standard of care required to meet their obligations under the laws of Australia's States and Territories.

8. As to the "extensive consultation" with welfare groups in the development of the Code, I note again that animal welfare groups see intensive production as a system the cruelty of which can only be eliminated by its abolition. Suffice to say, despite the suffering (for example) of millions upon millions of battery hens annually, and the public acknowledgement of their plight in public opinion poll

surveys, the Animal Welfare Committee will not review the Code until 2010, unless "technologies offering significant welfare benefits" become available in the interim: see also for example the meaningless statement in clause 2.2.4. Thus is sidestepped any attempt to address the unsavoury features of the battery hen system, let alone the more difficult task of taking steps to phase out battery hen cages.

9. In the Code's Forward (entitled "Primary Industries Ministerial Council") the objective of the Council is expressed in these terms:

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

Nothing wrong with that, but not a mention of "welfare". Yet it is within this Council's system that the "Animal Welfare Committee" exists the task of which is to prepare the Codes, and in order, it will be recalled, to assist people in understanding "the standard of care required to meet their obligations under the laws of Australia's States and Territories". It is perhaps not altogether surprising that in the Domestic Poultry Code's 'Introduction', the Animal Welfare Committee should observe:

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

Matters central to the welfare of domestic poultry are treated as still "the subject of debate and review". Yet Council of Europe Conventions and European Union

legislation provide ultimately for banning the further establishment of battery hen systems, and in the interim, the phasing out of battery hen systems[1]. Afterall, most people can appreciate the inhumanity of once confining three birds to a cage the floor surface area of which was about the size of an old vinyl record album cover, or now confining one bird to an area less than the size of an A4 sheet of paper. And, as we know, they stay so confined without any release, or relief, for the remainder of their lives. Who could reasonably disagree that a battery hen's existence is, to borrow a phrase of Charlotte Bronte, as "a polar winter never gladdened by a sun".

10. The "special requirements" for various species designated in Appendix 1 to the Code, for example, as to stocking densities and minimum floor and space allowances, point up the contrast with Europe. Clause 2.3.2.1[2] allows for 20 years from prior to 1 January 2001 (see clause 2.3.2.4) for earlier caged system standards (which do not conform with the new allowances in Appendix 1 to the Code) to apply for 20 years from prior to 1 January 2001. Decommissioning or modification is only required thereafter to conform with the Code's new, but nonetheless, inhumane allowances. No sense of urgency would seem to have attended the setting of such a 20 year period. Yet in fact, in terms of area for the bird, very little difference exists between the two sets of allowances, and each reflects the space provision I instanced earlier of one bird to less than an A4 size sheet of paper. So, even in the case of just a little improvement in area, up to 20

[1] See further worldanimal.net.forward/henlegislation.html.

[2] "2.3.2.1 Cages meeting all 1995 standards above (i.e. 2.3.1.1-2.3.1.6) have a life of 20 years from date of manufacture, or until 1 January 2008, whichever is the later, when they must be decommissioned or modified to meet standards applying at the time."

years is permitted for decommissioning or modification of earlier non-conforming cages.

11. Such national model codes are usually adopted in turn by the States and thus incorporated, as in the case of Victoria's statute, into the State's animal 'protection' regime. Thus, in Victoria's case, we see that the Minister and the Department of Primary Industries are responsible for the administration and enforcement of the statute. The Department also acts as a member of the Primary Industries Ministerial Council system's "Animal Welfare Committee" to prepare these national model codes, the effect of which is to mostly remove the protective reach of Victoria's statute. And, as noted earlier, under section 7 of the Act the Codes so prepared are then made by the Governor-in-Council on the recommendation of the Minister.

12. A list of the pervasive nature of the Codes appears in the Domestic Poultry Code Preface. In this respect, it will be seen how the Commonwealth defacto plays already the primary role in animal welfare in Australia.

Indeed, as an aside, there is no doubt that more than adequate constitutional power exists for the Commonwealth to assume the primary role.

13. Then there is the quantity and scale of suffering presently, seemingly, beyond the protective reach of the statute. Although the quantity of suffering and its sources is unable to be exhaustively outlined, as the statistics are not readily available,

some signposts should adequately make the point. In some cases welfare problems may relate to all or just a percentage of various classes of animals. However, in the case of just a small percentage, the numbers can be enormous as in the case, for example, of live sheep exports. I have gathered these in an appendix to the text of my talk.

But, by way of example, over 90% of egg producing hens are kept in battery systems. I have no reliable recent figures, but as of only a few years ago there was an estimate of about 13.29 million hens (ABS in 2003 SA).

Second, broilers are also intensively confined. Some 419 million are slaughtered annually (Australian Agriculture and Food Sector 'stocktake', Department of Agriculture, Fisheries and Forestry, 2005): this is not a vegetarian argument but rather one that, whilst animals live, they should be treated humanely.

Third, in the case of pigs, over 90% of some 350,000 sows are kept in intensive breeding units.

14. I now turn to the challenges of detection and enforcement. Like other inspectors designated by section 18 of the Act, the RSPCA has restricted powers of entry conferred by the Act to enter premises to detect an offence.

The powers of inspectors are set out in section 21 of the Act. In particular section 21(1)(c) provides for a power to –

> "(i) enter any premises other than a person's dwelling with such assistance as is necessary if the inspector *suspects on reasonable grounds* that in or on those premises there is an animal that –
>
> (B) is abandoned, distressed or disabled …" [emphasis added]

The key word here is "distressed". But vitally there are also any number of animal welfare scenarios where the animal in question may not be "abandoned, distressed or disabled". Such language is directed to an end-point. What about where a course of conduct, if persisted with, is likely to cause pain and suffering? Section 9(1)(c) prescribes a cruelty offence couched in these terms, but the ordinary powers of inspection conferred by the Act for detection of an offence are not. Yet the statute's title suggests prevention of cruelty. Only very limited provisions can be called upon in this regard, principally under s 21(1)(b) to give food and water, or under s 21(1)(bb) to arrange veterinary treatment where the owner or person in charge has not done so or cannot be contacted.

15. Instead, under section 21A of the Act an inspector must apply to a magistrate for the issue of a search warrant in relation to a person's premises on the basis that the inspector *believes on reasonable grounds* that there is in or on the premises:

> (a) "an animal, in respect of which a contravention of section 9 [the cruelty offences] or the regulations is occurring or has occurred." or
> (b) "an abandoned, diseased, distressed or disabled animal," [emphasis added]

16. However power exists under section 22A for the Minister to authorise in writing specialist inspectors (appointed by him under section 18A) to enter premises (other than a person's dwelling) in or about which an animal or animals are housed or grouped for any purpose and to inspect them, and any plant, equipment or structure on the premises, as well as observe any management practice conducted on the premises. RSPCA inspectors are not specialist inspectors. Plainly the power under section 22A does not depend upon the criteria under section 21(1)(c) of suspecting on reasonable grounds that an animal is abandoned, distressed or disabled.

This Ministerial power thus tightly controls the source and any notion of random inspections of animal establishments. Perhaps in a given case the Minister may stand to be persuaded that due cause exists to exercise the power, but here one enters the uncertain realm of discretion subject to the weighing of political considerations.

(Apparently this Ministerial authority can be, and is on occasion delegated to an Executive Officer of the Department.)

17. In the case then of distressed or disabled hens in a battery hen facility, or where it is believed a section 9 cruelty offence is occurring or has occurred, how does an RSPCA inspector get to enter the premises to inspect the condition of the birds, having regard to the "reasonable grounds" requirement for a search warrant ? In the case of the RSPCA it would need an employee of the producer (perhaps

departing their employment) to make a complaint. This would be infrequent. The RSPCA can seek to secure the co-operation of the producer to permit a voluntary inspection. This would be unlikely.

Or there is perhaps the thorny issue of what course the RSPCA charts if it receives information and a complaint by a person or persons who enter upon the premises for the specific purpose of obtaining evidence, or by a person who went undercover to do so. This of course has received a deal of media publicity.

Assuming that evidence so obtained is compelling, and it is desired to obtain a search warrant, I suppose interesting questions will arise as to whether the "reasonable grounds" requirement can be satisfied by arguably "illegally obtained" evidence. Is it sufficient that such evidence compellingly points to "reasonable grounds"? I have not had cause to consider the matter, and perhaps members of the criminal bar have done so and take a view. But if a search warrant issues and evidence is obtained thereby by the RSPCA or a police officer and a prosecution ensues, is the evidentiary fruit of the tree at the hearing tainted by the illegality of the evidence relied upon initially to obtain the search warrant ? In other words, is there a relation back, and on which side of the balancing exercise is the admission or rejection of evidence sought to be adduced at the hearing likely to fall ?

18. As to prosecution, by section 24 of the Victorian statute charges may be laid by:

(a) a member of the police force;

(b) a person the Minister for Primary Industries authorizes who is –

(i) a public servant in the department;

(ii) a municipal council officer;

(iii) a full-time officer of the RSPCA.

In practice, only the RSPCA presently stands to play a meaningful prosecution role, judged qualitatively. So a resource deficient RSPCA is left as a private organization or charity with the challenge of enforcement of a wide-ranging public interest statute.

19. What's this mean in practice? It must mean that most breaches of the law are not able to be investigated or detected, let alone prosecuted. This is not to criticise the RSPCA.

20. The central problem however is that the codes of practice, sanctioned by sections 6 and 7 of the Act, subvert the Act's reach on cruelty. Speaking as an animal welfarist, the terms of codes of practice make it clear that producer interests and not animal welfare usually prevail in the event of conflict.

21. The result is that Australian animal protection laws largely fail to protect animals because the animal protection statutes have exemptions or easy defences to the application of the cruelty provisions to the overwhelming mass of animals. The Victorian statute acts by way of its easy defences or exemptions to permit suffering rather than to end, prevent or even discourage its infliction. This then is

the starting point for questions of detection and enforcement. Yet by conferring restricted powers of inspection, the State statute impairs the prospect of its own meaningful enforcement, save for the tightly controlled power in a Minister for Primary Industries or his delegate to permit a random inspection. Then, against the backdrop of these circumscribed parameters, law enforcement is principally left, qualitatively speaking, to a charity with limited resources. As a result, the State statute, so far as its reach extends, all but fails to be enforced. This is not to suggest however that it can't be, but it will require the skills of the Bar and instructing solicitors (acting pro bono or for a reduced fee) to do so. Certainly, the Codes are not bullet-proof.

22. I now turn to the question of some of the challenges that Victoria's *Prevention of Cruelty to Animals Act* 1986 can pose to a successful prosecution. Regrettably, time does not permit me to canvass these properly. But I can offer some examples. Offences under section 9(1)(f) or (i) require proof that the accused was the owner of or had the possession or custody of the animals. The accused would likely stay silent on this question. Or, if the accused admits he or she is the owner of the animals, it will not infrequently be said that, at the time of the alleged offence, the owner had entered into an agreement with another person by which the other person agreed to care for the animals. By section 9(3) this constitutes a defence to a cruelty charge. In the sheep cruelty prosecution I conducted, the owner said that she had made an oral agreement over the kitchen table with her son for the care of the animals. Obviously no informant is present at the time such an agreement is purportedly made, so how is the existence of such an

agreement challenged? In that prosecution, for example, the accused in her evidence said that she had asked her son to assist her with the care of the animals as distinct from asking him to assume their care. This removed the defence offered by section 9(3).

23. Or assume that a cruelty charge alleges that a flock of sheep was not provided with sufficient food or drink for say a month before the relevant inspection by an inspector. How does the prosecution meet the contention that the sheep during the month in question were moved and dispersed between paddocks and other sheep brought in to relevant paddocks. Is the inspector, as it were, to daub with dye say 150 sheep and then wait a month? The answer, strategically speaking, is that usually a vet will conduct a postmortem on at least one sheep and closely examine say another 10 or 11 dead sheep. Accordingly, rather than seek to project from their condition the state of the flock of say 150 sheep generally, it is best to simply prosecute in respect of the sheep which were closely examined and thus avoid identification problems.

24. If ownership is contested, how does one prove ownership ? It is not sufficient that they happen to agist on the land owned by the accused. It is unlikely one will get the opportunity (despite a subpoena) to trace an account with relevant invoices to one of the many possible stock and station agents through whom the sheep in question may have been purchased. And how would one then identify from the invoices the sheep in question, and relate them back to the flock in the paddock, or the carcasses examined. The ways of proving ownership will depend on the

case in question. It is a threshold matter and cannot be overlooked if one wishes to avoid the risk of a successful no case submission.

25. Or again, if an inspector, say with the aid of a veterinary practitioner, proposes as part of a post mortem to take a sample of a dead sheep to send away for analysis, the inspector must under section 21(2D) of the Act:

> a) "advise the owner or person in possession or custody, if possible prior to taking the sample, that it is obtained for the purpose of examination or analysis;" and
>
> b) "if it is obtained for the purpose of analysis, subdivide the sample into three parts and give 1 part to the owner, 1 part to the analyst and keep 1 part untouched for future comparison;"

26. If the owner or person in possession or custody does not admit such ownership or possession or custody at the time, one can still be met with the argument that they were not provided with the sample so that the conduct of their defence is prejudiced because any sample has now perished. At the time of obtaining the sample, the informant or the inspector may not have even decided to prosecute, hoping instead to secure the suspected owner's co-operation as to appropriate treatment or care of the animal. Further, the owner may stay silent on the question of ownership. It may be contended, when ownership is later admitted at the hearing, that the evidence relied upon by way of later analysis, was illegally obtained because the procedure prescribed by the Act to furnish the owner with a sample was not followed. It is a short step then to submit that the results of a sample's analysis should be excluded from the evidence.

27. Another difficulty is that an offence like that prescribed in section 9(1)(c) of the Act, which provides that a person who:

> "(c) does or omits to do an act with the result that unreasonable pain or suffering is caused, or is likely to be caused, to an animal"

is so generally expressed, and replete with different and/or alternative elements, that it invites extensive legal argument as to whether its elements have been satisfied on the evidence. Even with the particulars, such a charge can invite the submission that they suffer from duplicity and are therefore invalid. There is no doubt in my mind that only counsel should formulate these charges, given the difficulty also of having to later fend off say an application for certiorari on the basis that the charges below on which convictions were secured were duplicitous.

28. Finally, in a difficult case the testimony of an expert witness such as the veterinary inspector who examines the condition of the animals in question, stands to be crucial. In my view, in such a case to simply rely upon the informant, invites problems of proof in contested areas.

29. It should also be noted that presently a Memorandum of Understanding exists between the RSPCA and the Victorian Department of Primary Industries pursuant to which commercial livestock prosecutions are to be the principal but not exclusive responsibility of the DPI. The RSPCA has not then vacated the field of commercial livestock prosecutions under the Memorandum of Understanding. In a large case involving commercial livestock it may be that the complaint is made to the RSPCA, whose inspector attends the premises concerned and assumes thereafter the carriage of any prosecution. The principal responsibilities for the

RSPCA in prosecutions, according to this Memorandum of Understanding, have been apparently designated to be companion animals, small farms according to the numbers of animals, and offences in urban areas. The Memorandum of Understanding is for two years and expires next year.

30. I suspect that the basis for the RSPCA agreeing to assign principal responsibility for major commercial livestock prosecutions to the DPI arises from the difficulty and expense of investigation and any prosecution. Substantial resources are necessary for investigation and detection of offences. They also require, frequently, legal steps to be taken (such as applying for a search warrant) or prior legal advice to be obtained. The problems of prosecution are not to be underestimated, including the cost. This is where barristers as members of the panel, including the expertise and resources of instructing solicitors, stand to make a real difference.

31. For the record, the approximate statistics for prosecutions are something like DPI: 30 to 40 annually, RSPCA: some 90 or so annually and municipal councils: say 4 a year for each council. In addition, the police apparently conduct many prosecutions including in respect of livestock, although I do not know the details. However, apart from livestock prosecutions, the nature of prosecutions turn on, for example, dogs creating a nuisance, an animal which has been injured or killed as a result of a domestic argument, or a dog alleged to be a dangerous dog, and so on. The police though, understandably, do not by expertise or disposition view this as an area of priority. It may be ultimately that greater police involvement

will be necessary to discharge the burden of detection and prosecution of offences.

32. As with any non-government organization or committed individuals, one's expertise as a lawyer is called upon in defence of protestors prosecuted for breach of some regulation or statutory provision. A major illustration was the High Court "free speech" case of *Levy v State of Victoria* (1997) 189 CLR 579; 146 ALR 248, a decision of the Full Court comprising seven justices. Time does not permit me to canvass this interesting case.

33. I turn then to examples of cases involving matters of public interest affecting animal welfare. I will deal with only two. First, Animals Australia as the umbrella group for most of the animal societies in Australia, applied for a writ of mandamus in the Western Australian Supreme Court to in effect compel the responsible West Australian Department to investigate a complaint by Animals Australia for alleged cruelty infractions by a live sheep exporter of the West Australian *Animal Welfare Act*. The prosecution is now proceeding in the Magistrates' Court.

I have taken information for the following summary from the Animals Australia website.

On 11 November 2003 a live sheep export transport ship with more than 100,000 sheep aboard departed Fremantle bound for the Middle East. When it docked in

Kuwait City 16 days later, evidence was gathered on the spot, as to inter alia the condition of the sheep disembarking, by an Animals Australia representative (and an ex-police officer) and a British national working for the UK based Compassion in World Farming. (The principal evidence, so far as I am aware, comprised video footage.)

34. Section 19(1)(iii) of the Western Australian *Animal Welfare Act* prohibited animals being "transported in a way that causes or is likely to cause unnecessary harm". In reliance on the evidence obtained, Animals Australia then lodged a complaint with the West Australian police. The complaint was lodged on 17 December 2003.

35. In March 2004 Animals Australia was advised by WA police that a policy decision had been made that the RSPCA was the more appropriate body to investigate the complaint.

36. Animals Australia later formally lodged the complaint with the Office of the Director General of the Department of Local Government and Regional Development in Western Australia. The Director General apparently is empowered to bring proceedings and carries ultimate responsibility for ensuring the *Animal Welfare Act* is enforced.

37. During the period June to November 2004 the complaint was sent by the Director General to the West Australian State Solicitor for advice as to jurisdictional

issues. Animals Australia believes that the State Solicitor's advice was that no jurisdictional impediment existed to the matter being fully investigated.

38. Then, the Director General advised Animals Australia that she had decided to obtain advice from the office of the Federal Attorney General as to jurisdictional issues.

39. On 24 January 2005 an application was made by Animals Australia for a writ of mandamus in the West Australian Supreme Court.

On 28 January 2005 the West Australian Supreme Court granted an order nisi.

40. In April 2005 the West Australian State Solicitor advised Animals Australia that the West Australian Government was investigating the complaint.

41. In October 2005 Animals Australia met with the investigation team and provided its evidence.

In November 2005, some two years after the alleged offence, cruelty charges were laid by the Western Australian police against the live export company 'Emanuels' for breach of section 19(1)(iii) of the West Australian *Animal Welfare Act.*

42. The other case I will briefly refer to this evening is what is known as the Japanese whaling case, the citation for which is the *Humane Society International Inc v.*

Kyodo Senpaku Kaisha Ltd [2006] FCAFC 116 (Black CJ, Finkelstein and Moore JJ). I take the following from an article written by junior counsel, Chris McGrath, a member of the Queensland Bar, appearing for *Humane Society International Inc* in that case, available at (2006) 23 (issue no. 5) EPLJ 333.

43. In 1936 Australia proclaimed the Australian and Antarctic Territory. The AAT covers a large sector (42%) of the Antarctic mainland. Sovereignty over Antarctica is a sensitive international topic and only the United Kingdom, France, Norway and New Zealand officially recognise Australian sovereignty over the AAT. Japan does not recognise Australian sovereignty. Japan also renounced all claims to Antarctica at the end of World War II. Sovereignty is important because it gives the Australian Government a right to regulate the activities of all people, including Australian nationals and foreigners, within the area over which Australia is sovereign or has sovereign rights.

44. The moratorium on all commercial whaling was declared by the International Whaling Commission in 1982 and took effect in 1985. Despite this, the Government of Japan continued to permit "scientific research" involving the killing of whales and ultimate sale of whale meat in Japan under Article VIII of the *International Whaling Convention* 1946.

45. In 2000 Australia declared an Australian Whale Sanctuary within 200 nautical miles of the coastline of the Australian mainland and Australia's external territories, including the AAT. The Australian Whale Sanctuary was declared

under Australia's main federal environmental legislation, the *Environment Protection and Biodiversity Act* 1999 (Cth). A large part, though not all, of Japanese whaling occurs within the Australian Whale Sanctuary.

46. Humane Society International estimated that the number of whales killed within the Australian Whale Sanctuary by way of Minke whales for the period 2000-2006 totalled 1,253.

47. Humane Society International commenced proceedings in the Federal Court in late 2004 for a declaration that the whaling in the Australian Whale Sanctuary was illegal and an injunction to restrain it under the *Environment Protection and Biodiversity Act* 1999. The respondent was the Japanese company that conducts the whaling. As the company had no registered office in Australia, the Humane Society International needed the leave of the Federal Court to proceed. Allsop J refused to grant leave after the Commonwealth Attorney-General submitted to the Court that allowing the case to proceed would cause a diplomatic incident (see [2005] FCA 664). Humane Society International appealed this decision and the Full Court of the Federal Court allowed the appeal.

48. The Full Court was unanimous in holding that diplomatic and political issues were not relevant to the grant of leave to serve proceedings outside the jurisdiction in this case.

49. There are a number of reasons that the appeal decision in the case is important. These are canvassed by Chris McGrath in his article. However, Chris McGrath observed that broadly speaking the principle that emerges from the joint judgment of Black CJ and Finkelstein J is that the Federal Court may grant an injunction under section 475 of the *Environment Protection and Biodiversity Act* 1999 (Cth) even if it may prove impossible to enforce where it serves the public interest objects of the Act by having an educative effect.

50. Moore J, in dissent, saw the grant of an injunction as futile in the circumstances of this case and would, therefore, have refused the appeal. He also saw the making of a declaration by the Court about the illegality of whaling to be inappropriate in the circumstances. Chris McGrath observed that the principles that have emerged in this case are, therefore, important for future public interest litigation under the *Environment Protection and Biodiversity Act* 1999 (Cth) and, potentially, under other environmental legislation in Australia.

51. The last I know is that the case was listed for a directions hearing on 31 October 2006 before Allsop J in Sydney, by which date the respondent company was to file an appearance in the Federal Court.

52. As to another public interest case, the 'test case' in the Federal Court as to whether, as the applicant contends, an animal rights group by engaging in environmental protests, acted in breach of section 45DB (the 'secondary boycott' provisions) of the *Trade Practices Act* 1974, I understand that Matthew Barrett,

junior counsel briefed for the defendant in that case, is here this evening and I will later invite him to briefly explain the compass of this case.

53. It is proposed from within the animal welfare panel of barristers to establish a 'Practice Group' to act as a point of liaison with PILCH or law firms, and with barristers on the panel. It is also thought it should discharge a general administrative and strategic role, including liaison with external groups such as the RSPCA, Animals Australia, the police or even the DPI. The strategic role would perhaps include establishing the strategic direction of the panel, such as the type of cases in which panel barristers are briefed. If anyone is interested in serving on this group, could they please let me or Meredith Schilling know.

54. I would be happy to take any questions.

Graeme McEwen

Owen Dixon Chambers West
15 November 2006

APPENDIX

First, battery hens. Over 90% of egg producing hens are kept in battery systems. I have no reliable recent figures, but as of only a few years ago there was an estimate of about 13,290,000 hens (ABS in 2003 SA document).

Second, broilers, which are intensively confined. Some 419 million are slaughtered annually (Australian Agriculture and Food Sector 'Stocktake', Department of Agriculture, Fisheries and Forestry, 2005).

Third, pigs. Over 90% of some 350,000 sows are kept in intensive breeding units. Some 5.7 million pigs are slaughtered annually.

Fourth, cattle. Australia has some 24 million cattle. Approximately 640,000 are exported **live** each year. Up to 860,000 cattle may be in feedlots at any one time (having regard to their capacity). Indeed, some 40% of all cattle killed spend some time in feedlots to be 'finished'. If destined for the Japan market, they may stay in a feedlot for up to a year.

As to **dairy cattle**, Australia has some 2 million, approximately 60% of which are in Victoria. Dairy herds tend to be much bigger than formerly with many producers running up to 1,000 cattle. Some 600,000 poddy calves are sent for slaughter each year. The problems of transporting such young animals are immense.

Fifth, sheep. The Australian flock is some 100 million. At least 6% die in the paddocks annually. Some 20,000 lambs are mulesed each year. Some 4 million sheep are exported live to the Middle East annually.

Sixth, transport. The foregoing figures indicate that millions upon millions of cattle, pigs, sheep and poultry are transported for slaughter or sale each year. In a large State such as Queensland, they can travel very long distances. Some even are trucked across the Nullarbor.

Seventh, animals used in research. There are no national statistics, but it is fair to estimate that at least 2 million animals are subject annually to scientific research/experiments. Some 488,000 animals were used in Victoria, for example, in 2003.

Eighth, companion animals. There are no national statistics. Over 30,000 cats are killed by animal shelters each year in Victoria alone. RSPCA shelters nationally put down over 58,000 dogs in the 2003/4 year. These statistics, of course, are just a subset of the numbers of companion animals put down nationally by all shelters.

Ninth, kangaroos. Still unresolved is the question of whether their treatment should reflect their status as a pest or a national symbol. The commercial quota for 2005 is 3,909,550 kangaroos. A 1985 report of the RSPCA estimated 15% of kangaroos shot by commercial shooters would not be killed instantly and may thereby suffer before death

which, if correct, would translate into several hundred thousand animals (including joeys).

Tenth, "pest" animals. These animals run into the many millions in total and include feral horses, donkeys (especially in the Kimberleys), feral pigs, feral cattle and camels in the Northern Territory, goats in South Australia, Western Australia and western New South Wales and, of course, foxes and rabbits. Archaic methods of purported population control include poisoning and non-specific trapping, with consequent painful suffering before death. While feral horses, donkeys or pigs, and even the much maligned rabbit (introduced by forebears wishing to pass their time hunting) and other animals may genuinely present a problem to our environment and to primary production, they nonetheless should be protected from barbaric and outmoded population reduction measures. These methods are not only inhumane, but ineffective.

The foregoing then points up the scale of the challenge, and the quantity of suffering.