SUBMISSION

The need for a national animal welfare act

1. This Bill recognizes the urgent need for the Commonwealth to assume the primary role in animal protection. Simply put, it is plain that in animal protection terms, the States offer band-aids where radical surgery is required.

2. First, Australian animal protection laws largely fail to protect animals. In fact, they institutionalize animal suffering. Why? Because such laws exempt from their application the overwhelming mass of animals. As a lawyer, one looks in any animal welfare reform legislation for exemptions from the statute. They are always there. By section 6(1) of Victoria's *Prevention of Cruelty to Animal Act* 1986, 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 animals) which is carried out in accordance with a Code of Practice; or"

Instead, compliance in these wide-ranging matters with a code of practice creates a defence to a prosecution under the Act. (In other States and Territories, a not dissimilar regime or approach is provided for.)

3. Nor does that 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; or"

So, in the case of farm animals, there is even less protection: acts carried out in accordance with a Code of Practice are *altogether* 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 connexion 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;"

This means that intensively confined animals like cattle in feedlots, sheep kept for fine wool, and pigs and poultry subject to intensive or battery production, are all part of primary production, and thus as "farm animals" are liable to exemption from the Act's protection. As it is, intensive production is a system the cruelty of which cannot be eliminated except by abolition. This means millions upon millions of animals each year are effectively exempted from protection. And this is the case before consideration is given to their transport or sale, each of which carries its own unsavoury features. Not surprisingly, farm animal codes dealing with intensive production stand to make prosecution a difficult undertaking. Yet this is where the legal spotlight is needed.

In short, animal protection laws have one law for say a domestic animal and another law for an animal with a profit factor, or called to be used in a scientific procedure.

4. But if compliance with codes of practice - unsatisfactory as they are - may be relied upon as a defence to prosecution or to exempt altogether a person from the Act's application, why, conversely, are they not able to be made legally enforceable? It may be that that for this purpose some re-drafting would be necessary to create greater certainty. But that should be viewed as a small matter weighed against the Act's pervasive failure to extend protection.

And in respect of farm animals, who's to check whether the relevant act or omission conformed with a farm animal code? Like other inspectors designated by s.18 of the Act, the RSPCA has restricted powers of entry conferred by the Act to enter premises to detect an offence. The police, in practice, do not play a role in inspection or enforcement of animal welfare laws of their own initiative. Other appointees are rarely heard of.

5. And what of 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 Agriculture 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 plays a meaningful prosecution role. At the very least the Department should. But no meaningful resources are set aside to do so. So, once again, a resource deficient RSPCA is left as a private organization with the challenge of enforcement of an Act of Parliament.

6. 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 criticize the RSPCA. Plainly, a Minister and Department responsible for the Act's administration should assume their responsibility, and seek or be equipped with the necessary resources to discharge it.

Plainly too, a department of agriculture should not be conferred with administration of an animal protection statute. The scope for conflict of interest is evident.

7. And an Act styled the '<u>Prevention of Cruelty</u>' to Animals Act connotes by the word "cruelty" only one element at one end of the spectrum of proper animal welfare and protection. Self-evidently, there are many other ways that the welfare of a person or an animal may be attacked short of the extreme of cruelty. The law's protective mantle should certainly begin with cruelty, but not end there.

But the Codes, sanctioned by the Act, subvert its reach on cruelty. For the industry groups to which they apply, the Codes are mere window-dressing. They are pointed to by an industry group (especially when under pressure) to suggest publicly all is well. However, their terms make it clear that producer interests and not animal welfare usually prevail in the event of conflict. Indeed, Codes constitute an admission that it is thought that acts or practices which otherwise may breach the Act's cruelty provisions should be exempted to enable humane standards not to prevail where competing economic or other considerations exist.

8. The dichotomy between largely domestic animals and other animals then is entrenched by animal protection statutes. To keep a sow in a farrowing crate or single stall without exercise or real movement for 6 weeks or longer, for example, is not an offence. To keep a dog in this way would render its owner liable to prosecution for cruelty. Or again, whereas a dog on tether in Queensland since 1925 was entitled to 2 hours exercise each day, a sow is not even able to turn around, and a caged hen is not permitted to stretch or flap her wings. If farm and domestic animals are each sentient beings, on what basis is the benefit of the law's sanction denied to one but granted to the other?

9. The challenge is not just the fact of suffering and the attendant misery and fear. Nor is it just the acute levels of pain and stress to which we subject the majority of animals over protracted periods. The challenge lies also in the dimension of

the problem, the sheer quantity of suffering. Millions upon millions of animals each year in Australia alone. And how many more around the world? Properly, we would not as a society tolerate the suffering of even a few thousand people which could be avoided or lessened. Our social security system is predicated on the notion that minimum standards of decency should apply, and apply across-the-board. Suffering is suffering, and does not cease to be a challenge at the borders of human experience.

10. So, in summary, State statutes mostly institutionalize animal suffering. In reliance on a regime of codes of practice weighted in favour of producer self-interest, little or no protection is granted by the State statute to most animals. The State 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. Then, against the backdrop of these circumscribed parameters, law enforcement is principally left to a charity with limited resources. As a result, the State statute, so far as it pitifully extends, all but fails to be enforced.

As for the department of State charged with the statute's administration, it stands largely apart, playing no real role in the state's enforcement. Minimum resources are allocated for enforcement. In Victoria, a small, able and well-motivated Bureau of Animal Welfare exists within the mammoth of the Department of

Primary Industries. Yet the mammoth views itself as the friend of industry. It is culturally ill-equipped to acknowledge the voice of its Bureau, let alone undertake the task of the statute's proper administration and enforcement. If the true scale of animal suffering were to be acknowledged, its role would connote an abandonment of public responsibility.

11. What welfare object then is served by a State statute denied proper enforcement? What supervening moral norm is acknowledged by so limited a result in protective reach? Certainly, we cannot expect reform and any extended reach of this State statute to be generated from within a Victorian Department of Primary Industries. Then there is the array of politically powerful and well-financed producer bodies that stand inexorably opposed to reform. The existence of a regime of legally unenforceable codes of practice (except when recognized for a defence or exemption altogether) is testimony to their political clout, as are the self-serving terms of the various codes. Ultimately, it can only be hoped that this long-standing history of "might over right" may spur the concerned national legislator to act.

12. In saying this, it may be allowed that compromises are an inevitable part of the political process in enacting reformist or remedial laws. But with animal protection laws, it is plain that any initial animating moral imperative has not been so much compromised as largely effaced. Self-interest and produce convenience have largely prevailed over principle. The regime of statutory exemptions or easy

"escape clauses" sourced in codes of practice is central to this legislative failure. By reason of that, in the end, the statute stands as a caricature of the excesses permitted in the treatment of animals. By law and custom, animals are mostly relegated to the status of things, because first, the State statute permits self-interest to prevail over welfare and, second, as a result they are not protected, whether at law or by a half-decent attempt at adequate law enforcement. Who could reasonably disagree that the existence of a battery hen is, to borrow a phrase of Charlotte Bronte, as "a Polar winter never gladdened by a sun". Yet still the States fail to act, with the result that the battery hen, legally speaking, remains little more than a "thing".

13. Presently, a drive appears to exist for the creation of national animal welfare standards. In addition, codes of practice are formulated at the national level as models for subsequent adoption by the States and, as it turns out, incorporation in their statutory animal protection regimes. But while uniformity may be desirable, no part of this process is directed, so far as can be discerned, to a root and branch examination of the adequacy of animal protection laws and animal welfare standards. But it is in such an examination that we find the mainspring of this Bill. Yet tackling the codes of practice for the "welfare of animals" is fundamental to any real reform.

14. So who generates codes? The codes are produced by the "Animal Welfare Committee" within the Primary Industries Ministerial Council system. 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 in 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 wellbeing 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 technologies offering significant welfare benefits are available." [emphasis added]

15. So, no animal welfare representation of any kind, let alone of any meaningful extent, exists on the "Animal Welfare Committee". The code is only a "set of guidelines", with no legal standing. It provides not for proper standards, but only for "minimum standards" [emphasis added]: see also 'Introduction', second paragraph.

And despite the acute suffering of millions upon millions of battery hens annually, and the public acknowledgement of their plight, the "Animal Welfare Committee" is not due to 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. This proviso suggests technology offers the only prospect of "significant" welfare enhancement and thus side-steps the more difficult task of phasing out battery hen cages. In this respect the "Animal Welfare Committee" lags behind Council of Europe Conventions and European Union legislation which provide ultimately for banning the further establishment of battery hen systems, and in the interim, the phasing out of battery hen systems[1]. Plainly, the notion of "technologies" has not acted to impede beginning the task of welfare enhancement.

16. Yet, when one turns to the code's Forward "Primary Industries Ministerial Council", we see, in part, why Australia drags its feet. 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".

Not a mention of welfare. Yet it is within this Council system, with its quite different objective, that an "Animal Welfare Committee" exists, and does so bereft of animal welfare representation (despite its name).

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

17. Further, membership of the Council "consists of the Australian Federal State/Territory and New Zealand Minister responsible for primary industries matters". As in the case of *Prevention of Cruelty to Animals Act* 1986 (Vic), administration of animal welfare is assigned to those bearing the most evident conflict of interest. And, in the case of Victoria's statute, it points up how progress on welfare enhancement and law reform remains, at best, glacial.

18. One need look no further than the code's 'Introduction', which tritely observes:

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

Matters central to the welfare of domestic poultry are summarily dismissed as still the "subject of debate and review". Yet this cannot have been the thinking in the approach adopted by the Council of Europe. And despite this, and despite the overwhelming welfare case against the continuance of battery hen systems (and as must be taken to be acknowledged by the measures of the European Union), 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, only point up how Australia drags its feet. Inhumane as these allowances may be, and despite there being no review planned until (self-servingly) 2010, clause 2.3.2.1 provides:

> "2.3.2.1 Cages meeting all 1995 standards above (i.e. 2.3.1.1 to 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."

So, those who drafted and adopted the code have allowed for 20 years from prior to 1 January 2001 (see clause 2.3.2.4) for such earlier caged system standards to apply. Decommissioning or modification is only required thereafter to conform with the code's new, but nonetheless, inhumane allowances. What future can be held for the battery hen? And compare this against the European Union measures.

19. We drag our feet because those in charge of animal welfare in Australia have the least reason to improve it. In any event, the public interest requires animal welfare reform be placed in more dispassionate hands free of the all too evident conflict of interest of primary industries' representatives.

20. And it is such national model codes which are usually adopted in turn by the States, and thus incorporated into the State animal 'protection' regime. A list of the pervasive nature of such codes appears in the Domestic Poultry code Preface. In this respect, it can be seen how the Commonwealth de facto plays already the primary role in animal welfare in Australia. This is so in the case too of animals used in scientific experiments where the same kind of impediment exists to welfare reforms, or specifically too in areas such as the regulatory framework under the *Meat Industries Act* for the slaughter of animals, or again by way of

example in the live export of animals. In each area there is a failure to provide for welfare standards, sufficiently or at all.

21. Then there is the quantity and scale of suffering. Although the quantity of suffering and its sources is unable to be exhaustively outlined, as statistics are not readily available, some signposts should adequately make the point. Suffice to say, welfare problems may relate to all or just a percentage of the following classes of animals and that, even in the case of just a small percentage, the numbers can be enormous (e.g. live sheep exports).

First, battery hens. Over 90% of egg producing hens are kept in battery systems. Some three or more hens are permitted to be kept in an area the floor surface area of which is about that of a (vinyl) record album cover. 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.

22. Sadly, but perhaps not surprisingly, the animal welfare debate is riddled with the self-justification of interest groups who do not wish their convenience or economic interest disturbed. Yet our laws are supposed to reflect moral norms. The Age newspaper in an editorial (written now some 14 years ago) reflected upon the plight of our indigenous people. What it espoused in respect of our indigenous people then applies with equal force to animals today, that is: that they have been under assault, spat upon and crushed by a culture which traditionally has viewed itself as superior and without moral obligation.

The way around this, and the self-interest of interest groups, is to accept that the cost of proper animal welfare should be substantially shouldered by the whole community, and not just fall upon particular groups of producers.

23. From a legislative viewpoint, how is this to be best achieved? If, in animal protection terms, the States offer only the continuing prospect of band-aids where

radical surgery is required, then the Commonwealth should assume the primary role in animal protection. Afterall, many animal industries today are organized or trade nationally and internationally. Second, the Commonwealth, despite the GST, still has all the financial clout as a polity of the federation. Third, it defies common sense to pretend that political debate can be compartmentalized into "State political discussion" and "federal political discussion", and that political debate, ideas and information are not in constant flow across State and federal boundaries (see for example the joint judgment of Mason CJ; Toohey and Gaudron JJ in Theophanous v Herald & Weekly Times Ltd[2]). In animal welfare terms, instance the federal government's political problem of the live sheep transport ship 'Cormo Express' which haplessly sailed in Middle East high temperatures unable to dock. Or the National Consultative Committee on Animal Welfare reporting to the federal Minister of Agriculture. Fourth, the political parties operate nationally, and it is from them that the scale of such a challenge can only begin to be adequately addressed. Fifth, the Commonwealth de facto already plays the primary role in animal welfare in Australia.

The constitutional basis for a national act

24. But what constitutional powers exist for the Commonwealth to assume such a role? In summary, they principally comprise:

(a) s.51(xx), the corporations power: being the federal parliament's power under the Constitution to make laws with respect to ... (xx) "Foreign

[2](1994) 182 CLR 104, 122; 124 ALR 1, 12.

corporations, and trading and financial corporations formed within the limits of the Commonwealth".

In Commonwealth v Tasmania (Tasmania Dam)[3] Mason, Murphy and Deane JJ said that s. 51 (xx) literally authorized the regulation of any activities of a corporation.

Not surprisingly, most animal producer businesses trade as companies, and it would suffice to regulate only their trading activities where animals are raised for the purpose of the company's trading activities: see the Tasmania Dam case (supra).

Sufficient case authority exists to suggest that by reason of the prefatory phrase "with respect to" and the incidental power, a director of a company "knowingly concerned" in the commission of an offence by a trading corporation, is within the s.51 (xx) head of power. So too a person "involved in" the contravention by a trading or financial corporation. In short, in certain circumstances, and because of the relation between that person and a corporation, the individual can be regulated in reliance on the corporations power. After all, a company acts by its human agents, and regulation of these persons makes "effective" or "facilitates" Parliament's control of the corporation as the object of the s.51 (xx) grant of power: see further *Lane* on *The Australian Constitution.*

(b) s.51(i), the trade and commerce power: being the federal parliament's power to make laws with respect to ..." (i) Trade and commerce with

[3] (1983) 158 CLR 1, 147-8, 179, 268-9.

other countries, and among the States" viz. overseas and interstate trade and commerce.

Further, by s.98, the power in 51(i) extends inter alia to shipping.

Self-evidently, animal producers engage in trade and commerce, whether by producing live sheep for export by ship, or selling animals or animal products produced in one State to wholesalers, retailers, or consumers in another. Interstate transport of animals is another obvious example. For movement is the essence of trade and commerce among the States.

In the High Court case of O'Sullivan v Noarlunga Meat Ltd (No 1)[4] parliament was able to prescribe hygiene conditions for premises where animals were slaughtered for export because the conditions would "affect beneficially" overseas trade. So, in reliance on a power as to overseas or interstate trade and commerce, the Commonwealth can reach back beyond the farmgate within a State to regulate conditions which would generate an effect on overseas or interstate trade or commerce. The implications are obvious as to the reach of this power to regulate animal trade and commerce activities within a State.

(c) s.51(ii), the taxation power

An obvious instance here would be to offer accelerated depreciation as a tax deduction to say battery hen producers on the cost of conversion of their shed to barn or free range egg production.

[4](1954) 92 CLR 565, 598.

(d) s.51(v), the posts and telegraph power: being parliament's power to make laws with respect to "(v) Postal, telegraphic, telephonic, and other like services". For example, the use of the mail service for illicit literature or drugs may be prohibited under s.51(v). So too could the mail service or telephone be prohibited from use to effect unlawful animal or animal product transactions.

(e) s.51 (xxix), the external affairs power.

In the Tasmania Dam case, relevant sections of the World Heritage Properties Conservation Act 1983 (Cth) and the National Parks and Wildlife Conservation Act 1975 (Cth) were upheld under the external affairs power. These Acts were built on the Convention for the Protection of the World Cultural and National Heritage 1972, ratified by Australia in 1974. According to *Lane* on *The Australian Constitution,* by reason of the Tasmania Dam case the simple test for validity is: "is there a Commonwealth Government international commitment on any kind of matter, followed by the Commonwealth action under s.51 (xxix). That is all."

Suffice to say, international treaties exist bearing upon animal welfare at the margin like that on endangered species. But this may eventually change under the auspices of the IOE(the animal equivalent of the World Health Organization) to which 160 countries are signatories.

(h) s.122, the Territories power.

This applies in particular to the ACT and the Northern Territory. Acting under s.122 the Commonwealth, as the ultimate authority for the Territories and, despite the grant of self-government, could enact a model code of animal welfare. This model code could in turn by its example lead to change elsewhere.

An inconsistent Territory law would be invalid. It will be remembered how the federal parliament overturned the Northern Territory's law on euthanasia.

25. In addition, s.109 of the Constitution provides that when a State law is inconsistent with a Commonwealth law, the Commonwealth law shall prevail and the State law "shall to the extent of the inconsistency, be invalid". In particular, if the Commonwealth law establishes a Commonwealth regime – disclosing a Commonwealth intention to cover the field – then under s.109 it is inconsistent with it for a State law to govern the same conduct or matter. Accordingly a federal animal welfare regime would exclude State laws governing the same conduct or matter.

26. Finally, the High Court post the Engineers case of 1920 has generally interpreted Commonwealth powers like the foregoing in an expansionary way.

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