The live export trade from Australia: prosecution under the Animal Welfare Act 2002 (WA)

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For many years, Australia has exported live sheep to the Middle East. Geography alone dictates that the journey is a long one, and the ending is often brutal. The loading and transport would be distressing for most animals, but sheep in Australia are kept mostly in extensive systems of agriculture, so that they are relatively unused to human contact or intensive conditions.[1]

Unsurprisingly, animal welfare groups have long had the trade under review. Some, and arguably the worst, aspects are beyond the jurisdiction of the Australian courts. Recently, however, a prosecution was launched in Western Australia under the Animal Welfare Act 2002 (WA) (the "AWA") alleging cruelty in the export of live sheep.

The AWA replaced an earlier Prevention of Cruelty to Animals Act 1920 (WA). There was much debate about, and criticism of, the new Act. In particular it contains a defence, common throughout most of Australia, of compliance with a "code of practice". This greatly undermines the Act's ability to deal with animals used in intensive food production. It means that those industries, which largely draw up the codes of practice, broadly regulate themselves.

The AWA, though, did contain at least one improvement. Section 19 proscribes cruelty to animals. Importantly, section 19(3) includes, in the definition of cruelty, the transport of an animal "in a way that causes, or is likely to cause, it unnecessary harm". This is important in two ways. Firstly, in relation to live export, it can establish jurisdiction in Australia, even though much of the voyage may take place outside Australia's territorial waters. Secondly, the High Court of Australia has given an expansive interpretation to similar phrases. The term "likely" does not mean "probably" or "more likely than not". It means "a real and not a remote possibility".

In November 2003, investigators from the group Animals Australia made observations about the loading and conditions of sheep on the *Al Kuwait.* As a result, they prepared a comprehensive report and returned to Perth to make a formal complaint.

It took almost two years for the prosecution to be brought. The fundamental problem was that the ability to prosecute for an offence under the AWA is confined[2] to a police officer, an inspector or the chief executive officer of the Department of Local Government (the "DLG"). In practice – and leaving aside scientific inspectors, who are concerned with animals used in research – most inspectors are local government employees or staff of the RSPCA. Animals Australia and its employees are not authorised to prosecute under the Act. Like everyone else, they are confined to making a complaint to someone who is.

In the present case, Animals Australia had deliberately approached the Western Australian police rather than the RSPCA.[3] The police, however, declined to prosecute. They suggested that the RSPCA was more experienced, and better equipped, to bring prosecutions for animal cruelty. Against opposition from Animals Australia, they sent the Animals Australia report to the RSPCA.

It is unclear what action, if any, the RSPCA ever took. The RSPCA was in a difficult position. It is not especially well resourced and depends largely on

[1] One of the grounds of the prosecution discussed below is that some sheep were loaded without being accustomed to eating the pellets which are the only food source on the voyage. These sheep – known as "shy feeders" – suffer, and often die from, malnutrition.

[2] See section 82 of the AWA, read with section 5.

[3] It should be noted that RSPCA Australia has no formal connection with RSPCA UK.

public donations. As well, it receives some government support by way of grants. The live export industry in Western Australia, though, works hard to persuade the State Government that the live export trade is vital to Western Australia's large rural economy. The RSPCA's governing body is its Council, whose members seemingly differed in their views about the live export trade. The RSPCA has many good people and staff, and works well in prosecuting cases of deliberate cruelty to domestic and companion animals. It is unclear, though, that it has the capacity to take on the well-resourced live export industry.

In the meantime, and in the light of the reaction from the police, Animals Australia took its complaint to the DLG. This is the department which, in Western Australia, is charged with the administration of the AWA.

From April 2004, for the best part of a year, it did not seem that anything much was happening. The voyage had long since been completed. The primary investigation, too, conducted by an experienced former police officer from Animals Australia, had been largely concluded in November 2003. Most of the evidence had been gathered, although there remained some formalities that required attention before a prosecution was ready for court.

In April 2005, faced with the apparent inactivity of the DLG, Animals Australia began an action for mandamus against the chief executive officer of the DLG. The writ sought essentially to compel her properly to exercise her discretion whether to prosecute under the AWA, based on the materials in the report prepared by Animals Australia. The application relied in part on cases such as *R* v *Metropolitan Police Commissioner; ex parte Blackburn.*[4]

The application was lodged on 24 April 2005. Applications for mandamus in Western Australia[5] still have the two-stage process of an application for an order nisi and a later hearing to determine whether the order should be made absolute. The order nisi can be heard *ex parte*, but in the present case the application was served on the DLG. It chose, however, not to respond and the order nisi was made, unopposed, in the Supreme Court by Acting Master Chapman on 26 April 2005.

Commendably, the DLG did not seek to resist the order. Instead, it agreed to investigate and to consider a prosecution. It engaged the legal advice of the State Solicitor's Office and appointed an experienced and enthusiastic police officer to conduct any further enquiries that seemed necessary.

One issue that had seemingly troubled the RSPCA, and which is still relied upon by the exporters, is that of jurisdiction. When the prosecution notice was first before the Perth Magistrates Court on 12 January 2006, the livestock company's solicitor was reported as saying that the AWA simply did not apply. The sheep, he suggested, were being exported and so were subject to Commonwealth laws concerning shipping and quarantine. Since, in Australia, section 109 of the Commonwealth Constitution means that Commonwealth law prevails over inconsistent State law, the prosecution was in his view misconceived, and was bound to fail.

The issue of jurisdiction is not without interest, and presumably it will be fully agitated in the trial. It would be inappropriate, therefore, to comment further. It might be noted, however, that presumably the State Solicitor's Office has taken a view different from that held by the company's solicitors, otherwise the prosecution would not have been brought.

The case is now before the Perth Magistrates Court. It may take some time to come to trial.

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[4] [1968] 1 All ER 763.

[5] See the Rules of the Supreme Court 1971, O 56.

Dubious legality of vivisection as practised in the UK

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Torture and other forms of cruelty to animals are criminal offences that render the perpetrator liable to prosecution under the Protection of Animals Act 1911 (the "PAA").[6] This, I would submit, is indicative of the abhorrence with which the British people view, and for nearly a century have viewed, the abuse of animals. The PAA in essence both reflects, and gives statutory force to, an underlying presumption against the abuse of animals in the UK.

Animals used in scientific research, however, are excluded from the ambit of protection afforded by the PAA.[7] The protection of those animals has since 1986 instead come within the ambit of the Animals (Scientific Procedures) Act 1986 (the "ASPA"), the preamble to which states that it is "[a]n Act to make new provision for the protection of animals used for experimental or other scientific purposes".

The stated aim of the ASPA thus is the "protection of animals". This, too, would thus appear both to reflect, and give statutory force to, the presumption against animal abuse, and the abhorrence with which it is viewed by society in general. That notwithstanding, each year in the UK nearly 3 million animals are used directly in the vivisection industry.

"Vivisection" literally means "cutting while still alive", and is defined as "the act or practice, or an instance, of making surgical operations on living animals for the purposes of physiological research or demonstration" (*The Chambers Dictionary*). In practice, the term has come to mean any harmful experiments or tests performed on animals, and routinely involves confining animals in cages and subjecting them to an array of procedures such as poisoning, burning, blinding, mutilation, irradiation, force-feeding of chemicals and household products and so forth and, ultimately, killing them.

Whereas the ill-treatment thus meted out to animals in research would render the perpetrators liable to prosecution under the PAA, the ASPA instead legalises vivisection provided certain conditions are met. Given that the stated aim of the ASPA is the protection of animals, how is it that cruelty to animals on such a massive scale is accorded any degree of legality, let alone that the perpetrators are accorded immunity from criminal prosecution? The purpose of this article is to examine that issue and question whether indeed the proper application of the ASPA legalises what would otherwise be criminal cruelty.

Licensing regime

The protection of those animals coming within the aegis of the ASPA is afforded by way of a licensing regime. In essence, the ASPA prohibits the application of a regulated procedure to an animal except in accordance with that regime (section 3).

A "regulated procedure" is defined as, *inter alia*, "any experimental or other scientific procedure applied to a protected animal which may have the effect of causing that animal pain, suffering, distress or lasting harm" (section 2). A "protected animal" essentially is any "living vertebrate other than man" (section 1).

The regime provides for two types of licence – a personal licence, and a project licence. A personal licence is granted on the basis of the competencies and skills of the proposed holder, and it continues in force, subject to a review every five years at most, until revoked (section 4). It is the project licence, however, that is of greater relevance here.

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[6] Section 1(1)(a), PAA, for example, makes it an offence to cruelly beat, kick, ill-treat, over-ride, over-drive, over-load, torture, infuriate or terrify any animal.

[7] See section 1(3) PAA. The Animal Welfare Bill, currently before Parliament, will lead to the repeal of the PAA. However, as with the PAA, animals used in research are excluded from its ambit.