



## JOINT SUBMISSION ON THE ALRC'S REVIEW ON 'SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA'

19 December 2013

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## ABOUT VOICELESS

As an innovator, capacity builder and ideas-generator, Voiceless plays a leading role in the development of a cutting edge social justice movement, animal protection.

With a highly professional and well-educated team, Voiceless brings together like-minded passionate Australians from the legal, academic, non-profit and education sectors to form strong and effective networks.

Voiceless believes in the provision of quality information, analysis and resources to inspire debate and discussion and to empower individuals and organisations to generate positive social change.

Voiceless is a non-profit Australian organisation established in May 2004 by father and daughter team Brian and Ondine Sherman.

To build and fortify the animal protection movement, Voiceless:

- gives grants to key projects which create the groundswell for social change;
- cultivates the animal law community through the provision of leadership, educational opportunities and resources; and
- raises awareness of animal protection issues within the education system in order to strengthen democratic skills, promote critical thinking and encourage advocacy amongst students.

### PATRONS

**J.M. COETZEE**, Nobel Prize for Literature Winner 2003, author of 'Lives of Animals' and 'Elizabeth Costello'

**BRIAN SHERMAN AM**, businessman and philanthropist

**DR JANE GOODALL**, world-renowned primatologist and animal advocate

**THE HON MICHAEL KIRBY AC CMG**, former judge of the High Court of Australia

### AMBASSADORS

**HUGO WEAVING**, Actor: Oranges and Sunshine, Last Ride, Little Fish, Lord of the Rings Trilogy, Matrix Trilogy, The Adventures of Priscilla Queen of the Desert

**EMILY BARCLAY**, Actor: Prime Mover, Piece of my Heart, Suburban Mayhem, In My Father's Den

**ABBIE CORNISH**, Actor: w.e., Suckerpunch, Limitless, Bright Star, Stop Loss, Elizabeth: The Golden Age, A Good Year, Somersault, Candy

For further information visit <http://www.voiceless.org.au>

## **ABOUT THE BARRISTERS ANIMAL WELFARE PANEL**

The Barristers Animal Welfare Panel (**BAWP**) is a national unitary body comprising over 120 barristers, including some 25 senior counsel and Queen's Counsel. It has a secretariat of solicitors and an adjunct panel that includes top-tier national and international law firms.

BAWP's objects include the following:

- to promote, and foster advocacy for, the welfare of animals generally, whether in Australia, New Zealand or elsewhere;
- to enable litigants in matters of public interest or prosecutions affecting animal welfare to be represented and advised on a pro bono or reduced fee basis, instructed where necessary under the auspices of PILCH or directly by law firms;
- to challenge publicly or otherwise deficiencies in the animal legal regime in Australia, New Zealand or elsewhere, and for this purpose, to formulate and prosecute proposals for law reform;
- to advise or appear in the defence of protestors acting to promote animal welfare;
- to promote the adoption by law schools of 'Animal Law' as a subject and continuing legal education programs for members of the legal profession and others;
- to encourage the participation by other legal professionals, law students or persons with non-legal skills in our programs and cases, especially by membership of BAWP's Secretariat;
- to establish and maintain an informal adjunct panel of law firms to act as instructing solicitors and otherwise assist in promoting the objects of BAWP; and
- to liaise and collaborate with other organisations or individuals with like or compatible objects or with which (irrespective of their objects) such liaison or collaboration may stand to benefit animal welfare, including international organisations.

**PATRON**

**THE HON MICHAEL KIRBY AC CMG**, former judge of the High Court of Australia

## 1. Introduction

- 1.1. The submission is in response to the Australian Law Reform Commission's (ALRC) request for submissions on the topic of 'Serious Invasions of Privacy in the Digital Era'. This is a joint submission prepared by Voiceless, the animal protection institute (Voiceless) and the Barristers Animal Welfare Panel (BAWP). We commend the ALRC for its proposal and for inviting submissions from the public on this important issue.

### Executive summary

- 1.2. Our organisations are focused on advocating for stronger legal protections for animals.
- 1.3. There is a widespread phenomenon throughout Australia whereby animal advocates and animal protection organisations employ surveillance activities, most notably covert surveillance and drone technology, to monitor facilities that house animals on a short- or long-term basis for the purpose of either producing animal products (such as meat or eggs) or carrying out research on animals.
- 1.4. Surveillance by animal advocates and organisations is ordinarily carried out at a facility, in circumstances where a complaint has been made to the relevant advocate or organisation about serious animal cruelty or neglect occurring at that facility. The purpose of the surveillance is ordinarily to capture audio-visual footage of any such cruelty or neglect and to utilise the retrieved footage in:
- (a) informing the public of the cruelty or neglect, directly<sup>1</sup> or through the media;<sup>2</sup>
  - (b) reporting the relevant cruelty or neglect to animal welfare<sup>3</sup> or other<sup>4</sup> regulators, so as to compel those regulators to investigate and take enforcement action;<sup>5</sup> or

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<sup>1</sup> e.g. by uploading the footage to a website such as <<http://www.aussiepigs.com.au>>, accessed on 10 December 2013.

<sup>2</sup> See paragraphs 2.23.3, 2.23.4, 4.14, 5.26 and 5.27 below for examples of media exposés featuring surveillance of the nature presently under discussion.

<sup>3</sup> e.g., in New South Wales, the Royal Society for the Protection of Animals NSW (RSPCA NSW) and the Animal Welfare League NSW (AWL NSW).

<sup>4</sup> e.g. the Australian Competition and Consumer Commission, which frequently receives complaints in relation to densely populated housing systems.

<sup>5</sup> Many or all of the investigations and legal proceedings referred to in paragraphs 2.23.1 to 2.23.5 below arose upon surveillance of the nature presently under discussion being provided to the relevant regulator.

- (c) providing evidence of the cruelty or neglect that can be used in court proceedings against the employees or owners of the facility.
- 1.5. Under the current legal framework, surveillance of the nature presently under discussion is sometimes, but not always, criminal or tortious. Our organisations do not condone illegal activity of any nature. However, there are considerable public interest considerations in favour of such surveillance not attracting civil or criminal liability, including the following:
- (a) The surveillance under discussion provides the public with a significant degree of visibility of commercial animal facilities. Such facilities are often located on private property, “behind closed doors”, and in the absence of surveillance, the public may, in a practical sense, have no other way to witness what transpires within the facilities.
  - (b) Surveillance footage, often graphic and confronting, promotes public awareness of, and encourages public debate about, issues of a political nature, including animal welfare, consumer protection, food safety and criminal justice.
  - (c) Surveillance facilitates the effective monitoring and enforcement of animal welfare regulations. Public outcry following the dissemination through the media or internet of surveillance footage provides animal welfare and other regulators with a potent incentive to investigate the relevant facility, and to enforce animal protection regulations in relation to the incident captured in the footage.
  - (d) Surveillance footage itself may constitute direct evidence of animal cruelty or neglect, which, in the hands of an animal welfare or other regulator, can be adduced as evidence in court proceedings relating to the relevant cruelty or neglect.
  - (e) Serious animal cruelty and neglect, in contravention of animal welfare regulations, are widespread in the Australian agricultural industry. Surveillance, for the reasons referred to in the foregoing paragraphs, assists with reducing the rate of contravention and improving animal welfare standards.
- 1.6. Additionally, there are already significant barriers to effective enforcement of animal welfare regulations, such as:
- (a) inadequate numbers of animal welfare inspectors;<sup>6</sup>

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<sup>6</sup> It is noted, for example, that in New South Wales, there are approximately 34 active inspectors appointed under the *Prevention of Cruelty to Animals Act 1979* (NSW), responsible for investigating and prosecuting offences under that Act for the State’s entire geographical area.

- (b) budgetary constraints of animal welfare organisations;<sup>7</sup>
  - (c) key government agencies having animal welfare as one of a number of policy concerns (some which may conflict with animal welfare);<sup>8</sup> and
  - (d) logistical difficulties with carrying out inspections or prosecutions in remote locations or in relation to large facilities.<sup>9</sup>
- 1.7. BAWP and Voiceless do not advocate for or against the creation of a statutory action for invasion of privacy. Rather, we are concerned that if such an action is not appropriately qualified in terms of scope, this would be expected to cause additional civil or criminal liability to be imposed in relation to surveillance of the nature under discussion, and would accordingly undermine the public policy considerations referred to in paragraph 1.5 above, and have a significantly detrimental effect on the enforcement (already troubled, for the reasons referred to in paragraph 1.6 above) of animal welfare regulations.
- 1.8. Accordingly, it is submitted that if a statutory action for invasion of privacy is to be created, it should not apply:
- (a) where the privacy allegedly invaded is that of a corporation;
  - (b) where the alleged invasion of privacy:
    - (i) involved the perception of matters that were not private in nature;
    - (ii) was carried out for the purpose of, or resulted in, the procuring of evidence of an iniquity;

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<sup>7</sup> e.g. in New South Wales, the RSPCA NSW and AWL NSW, as animal welfare regulators under the *Prevention of Cruelty to Animals Act 1979* (NSW), are charitable organisations largely dependent on donations and bequests from members of the public.

<sup>8</sup> e.g. in New South Wales, the Department of Primary Industries is responsible for enforcing approximately 49 Acts and subordinate legislation of the New South Wales Parliament, the vast majority of which does not directly relate to animal welfare (source: <<http://www.dpi.nsw.gov.au/aboutus/about/legislation-acts?mode=results>>, accessed on 10 December 2013.

<sup>9</sup> Examples include the raid in August 2012 on Wally's Piggery in Yass, New South Wales, a comparatively remote location from the perspective of animal welfare regulators based in New South Wales. That raid uncovered a facility with several hundred pigs in poor veterinary condition. Although the animal welfare regulators arguably had the power under section 24J(1) of the *Prevention of Cruelty to Animals Act 1979* (NSW) to seize the pigs, there was a considerable logistical difficulty as to where to house the pigs once seized. Accordingly, the inspectors' power to seize large numbers of those pigs was not exercised.

- (iii) was connected with the public discussion of political matters;  
or
- (iv) was permitted under a law of the State or Territory in which the alleged invasion of privacy occurred.

1.9. Section 2 below provides further description of the surveillance under discussion. Section 3 provides detail of lobbying in Australia and overseas for the imposition of civil or criminal liability in relation to the surveillance under discussion. Section 4 discusses some aspects of the current regulation of animal cruelty and neglect. Section 5 discusses each of the matters referred to in paragraph 1.8 above.

## 2. Surveillance of commercial animal facilities for animal protection purposes

### *Drone technology*

#### **What are “drones”?**

2.1. “Drones”, or “remotely piloted aircraft”, are aircraft which operate either autonomously by computer technology or manually by a pilot in a different location. Drones can be fitted with onboard surveillance equipment to survey the land area below them. The various uses of drones include, but are not limited to, commercial aerial surveillance, domestic and international policing, scientific research, armed attacks, search and rescue, and environmental conservation.

#### **How have drones been used for animal protection purposes?**

2.2. In recent times, drones have been employed by animal protection groups, in Australia and internationally,<sup>10</sup> for the purposes referred to at paragraph 1.4 above. Video footage of drones being used for animal protection purposes can be viewed at <<http://www.abc.net.au/landline/content/2013/s3838274.htm>>.<sup>11</sup>

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<sup>10</sup> For international examples of the use of drone technology by animal protection groups, see: Paul Marks, "Anti-hunting group hires 'ethical' surveillance drone" New Scientist (21 March 2013) <http://www.newscientist.com/blogs/onepercent/2013/03/drone-campaign-group.html>, accessed on 20 November 2013; Steve Tawa, "Animal Activists Using Drones for Aerial Surveillance" CBS Philly (1 October 2013) <<http://philadelphia.cbslocal.com/2013/10/01/animal-activists-using-drones-for-aerial-surveillance/>>, accessed on 20 November 2013; The Black Fish, "Drones ready to hunt illegal driftnets" The Black Fish (22 May 2013) <<http://www.theblackfish.org/news/driftnet-preparations.html>>, accessed on 20 November 2013.

<sup>11</sup> S Murphy, "Sky Wars", ABC Landline, 2 September 2013, accessed 19 December 2013.

- 2.3. For example, in August 2013, Animal Liberation NSW used drone technology to film egg farms at Dora Creek on the Central Coast of New South Wales and Maitland, north of Newcastle. The eggs produced by the farms were labelled “free range”. The purpose of Animal Liberation NSW’s surveillance was to test the veracity of the “free range” claim. According to ABC News:<sup>12</sup>

“Animal Liberation says it is providing the pictures to the Australian Competition and Consumer Commission to investigate whether the farms are really free range.”

- 2.4. According to Mark Pearson, executive director of Animal Liberation NSW:<sup>13</sup>

“[The use of Drones] gives the opportunity to document from above 10 metres and below 30 metres, and it is lawful ... So the key to the remote-controlled device is that it's actually vision that's obtained without trespass, it's obtained lawfully in our airspace so what it documents is something that can be used by all the authorities, police and the courts.”

- 2.5. It has been proposed that drones could potentially be used to monitor animal welfare in a range of commercial animal facilities, including live export facilities and cattle feedlots.<sup>14</sup>

### **The legality of drones under the current law**

- 2.6. Under the current Australian law, it is likely that the use of drones does not, in itself, attract any civil or criminal liability.
- 2.7. In the case of *Lord Bernstein of Leigh v Skyviews & General Limited*,<sup>15</sup> which has been cited with approval by Australian courts,<sup>16</sup> Griffiths J of the Queen’s Bench Division discussed the common law and statutory framework governing aerial trespass to land. His Honour indicated that the principle described by the maxim *cujus est solum ejus est usque ad coelum et ad*

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<sup>12</sup> S Murphy, “Animal Liberation activists launch spy drone to test free-range claims”, ABC Landline, 30 August 2013, <<http://www.abc.net.au/news/2013-08-30/drone-used-to-record-intensive-farm-production/4921814>>, accessed 19 December 2013.

<sup>13</sup> *Ibid.*

<sup>14</sup> See for example Jed Goodfellow, *Expect more spy drones if ‘ag gag’ laws introduced* (1 October 2013) The Conversation <<http://theconversation.com/expect-more-spy-drones-if-ag-gag-laws-introduced-18194>>, accessed on 19 November 2013; and Sean Murphy, “Animal Liberation activists launch spy drone to test free-range claims”, ABC Landline (30 Aug 2013), <<http://www.abc.net.au/news/2013-08-30/drone-used-to-record-intensive-farm-production/4921814>>, accessed on 19 November 2013.

<sup>15</sup> [1977] 2 All ER 902.

<sup>16</sup> See, e.g., *Di Napoli v New Beach Apartments Pty Ltd* [2004] NSWSC 52 at [17] (per Young CJ in Eq).



*inferos* (he who owns the soil owns everything above it and below it) did not operate so as to confer proprietary rights on a landowner to airspace at an unlimited height.<sup>17</sup> In the course of the judgment, his Honour commented:

“I would add that if [the *usque ad coelum* maxim is] applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the maxim... The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such a height as is necessary for the ordinary use and enjoyment of his land and the structures on it, and declaring that above that height he has no greater rights in the air space than any other member of the public.”<sup>18</sup>

- 2.8. His Honour found that aircraft had passed over Lord Bernstein’s land at a height of 1000 feet and had taken photographs of the land below. Given the height of the passing over, his Honour held that no trespass had been committed. In relation to the taking of the photographs, his Honour said:

“There is, however, no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff’s air space one that is a trespass.”<sup>19</sup>

- 2.9. It is submitted that this analysis would apply equally in relation to the taking of video footage.
- 2.10. A further defence was raised in *Bernstein v Skyviews* under section 40(1) of the *Civil Aviation Act 1949* (Imp). Similar legislation has been enacted in all Australian States other than Queensland.<sup>20</sup> Using the New South Wales legislation<sup>21</sup> as an example:

“No action lies in respect of trespass or nuisance by reason only of the flight (or the ordinary incidents of the flight) of an aircraft over any property at a height above the ground that is reasonable (having regard to wind, weather and all the circumstances of the case) so long as the Air Navigation Regulations are complied with.”

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<sup>17</sup> At 906–907.

<sup>18</sup> At 907.

<sup>19</sup> At 908.

<sup>20</sup> *Civil Liability Act 2002* (NSW), sections 72 & 73; *Civil Liability Act 1936* (SA), section 62; *Damage by Aircraft Act 1963* (Tas), sections 3 & 4; *Wrongs Act 1958* (Vic), sections 30 & 31; *Damage by Aircraft Act 1964* (WA), sections 4 & 5.

<sup>21</sup> *Civil Liability Act 2002* (NSW), section 72.

2.11. The *Air Navigation Regulations 1947* (Cth) are unlikely to be contravened in relation to the use of drones, so no action for trespass lies by reason only of their flight (or ordinary incidents thereof) at a reasonable height. The aircraft in the *Bernstein v Skyviews* case was held to have passed over at a reasonable height, and so no trespass action was found to lie. What will be a reasonable height in any given case will, of course, depend on the circumstances of the case.

2.12. As to the scope of the defence under section 40(1), however, Griffiths J clarified:

“The section will not preclude [an owner] from bringing an action if he can point to some activity carried on by or from the aircraft that can properly be considered a trespass or nuisance, or some other tort... Nor would I wish this judgment to be understood as deciding that in no circumstances could a successful action be brought against an aerial photographer to restrain his activities. The present action is not founded in nuisance for no court would regard the taking of a single photograph as an actionable nuisance. But if the circumstances were such that a plaintiff was subjected to the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity, I am far from saying that the court would not regard such a monstrous invasion of his privacy as an actionable nuisance for which they would grant relief.”

2.13. In determining whether an action for private nuisance is available in relation to the use of drone technology, one would consider the usual indicia, such as duration and intensity of interference, locality of land, social utility and malice.<sup>22</sup>

2.14. In accordance with the analysis above, the use of a drone which has no direct impact on the operation of a commercial animal facility, and maintains a reasonable distance above the land, would be unlikely to amount to a trespass or nuisance.<sup>23</sup>

2.15. The High Court of Australia in the case of *Lenah Game Meats Pty Limited v Australian Broadcasting Corporation*<sup>24</sup> considered the question of whether a tort of invasion of privacy exists, or is developing, under the Australian common law. The question was not conclusively determined in that case.

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<sup>22</sup> See, e.g., *Munro v Southern Dairies Ltd* [1955] VLR 332.

<sup>23</sup> J Goodfellow, *Expect more spy drones if 'ag gag' laws introduced* (1 October 2013) The Conversation <<http://theconversation.com/expect-more-spy-drones-if-ag-gag-laws-introduced-18194>>, accessed on 19 November 2013.

<sup>24</sup> (2001) 208 CLR 199.

- 2.16. The *Lenah* case involved anonymous animal advocates having hidden a video camera within a possum abattoir, and having later retrieved footage of possums being stunned and their throats slit. The footage had been provided to Animal Liberation Limited, which in turn had provided it to the Australian Broadcasting Corporation for television broadcasting. Lenah Game Meats Pty Ltd, the owner of the abattoir, had sought an injunction restraining the broadcasting of the footage. The asserted bases for the availability of injunction included that the taking of the video footage amounted to the commission of a tort of invasion of privacy.
- 2.17. A majority<sup>25</sup> of the judges in *Lenah* commented that although the decision of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*<sup>26</sup> had been generally understood as establishing that a cause of action for breach of privacy does not exist in Australia, nothing in that decision actually precluded a tort of invasion of privacy being found to exist on a later occasion.<sup>27</sup>
- 2.18. However, quite aside from the question as to whether the tort of invasion of privacy actually exists under the Australian common law, the Court was not receptive to the abattoir owner's argument that an invasion of privacy had been committed *on the facts of the case*. Gleeson CJ commented:<sup>28</sup>

“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 proprietary sense. And, by virtue of its proprietary right to exclusive possession of the premises, the respondent had the capacity (subject to the possibility of trespass or other surveillance) to grant or refuse permission to anyone who wanted to observe, and record, its operations. The same can be said of any landowner, but it does not make everything that the owner does on the land a private act. Nor does an act become private simply because the owner of land would prefer that it were unobserved. The reasons for such preference might be personal, or financial. They might be good or bad. An owner of land does not have to justify refusal of entry to a member of the public, or of the press. The right to choose who may enter, and who will be excluded, is an aspect of ownership. 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.”

- 2.19. A further issue arose as to whether a tort of invasion of privacy, if found (by a court in some later case) to exist under the Australian common law, would be

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<sup>25</sup> Gaudron J; Gummow and Hayne JJ; Callinan J. Kirby J did not address this issue directly but indicated that such a cause of action may be a possibility: at 279 [191].

<sup>26</sup> (1937) 58 CLR 479.

<sup>27</sup> See, e.g., (2001) 208 CLR 199 at 248 & 249 [107].

<sup>28</sup> At 227 [43]. See also his Honour's comments at 221 [25].

capable of operating so as to protect the privacy of a *corporation*. Gleeson CJ commented:

“The foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation.”<sup>29</sup>

- 2.20. Gummow and Hayne JJ indicated that “whatever development may take place in that field will be to the benefit of natural, not artificial, persons”.<sup>30</sup> Gaudron J agreed with this.<sup>31</sup> Kirby J also indicated that “doubt exists as to whether a corporation is apt to enjoy any common law right to privacy”.<sup>32</sup>
- 2.21. By application of the principles set out above, if there exists a tort of invasion of privacy under the Australian common law, such a tort would be unlikely to be committed in relation to the use of drones in a commercial animal production facility, because such facilities are ordinarily owned by corporations (as was indeed the case in *Lenah*).

### ***Covert surveillance***

#### **How has covert surveillance been used for animal protection purposes?**

- 2.22. Covert surveillance ordinarily involves the installation of a video recording device in a commercial animal facility, in a place where the device is difficult to notice. The footage is ordinarily recorded by the device and then retrieved at a later time. Since at least the 1970s,<sup>33</sup> animal advocates and animal protection organisations in Australia have engaged in covert surveillance of commercial animal facilities for the purposes referred to in paragraph 1.4 above.
- 2.23. In Australia, covert surveillance activities have resulted in Federal, State and Territory authorities investigating allegations of animal cruelty and either prosecuting against or forcing the closure of non-compliant industry participants. Examples include:
- 2.23.1. In 2011, Victorian industry regulator, Primesafe, laid charges and forced the closure of the L.E. Giles abattoir at Trafalgar after it

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<sup>29</sup> At 226.

<sup>30</sup> At 258.

<sup>31</sup> At 231.

<sup>32</sup> At 279.

<sup>33</sup> C McCausland, S O’Sullivan and S Brenton, “Trespass, Animals and Democratic Engagement”, Springer (26 March 2013).

viewed video footage obtained from an animal advocate showing the mistreatment of pigs going to slaughter.<sup>34</sup>

- 2.23.2. In August 2012, authorities raided Wally's Piggery in Yass, New South Wales after footage was released by Animal Liberation NSW. Since the raid, Wally's Piggery has been closed, with court proceedings having been commenced for alleged acts of animal cruelty.<sup>35</sup>
- 2.23.3. In June 2013, Pepe's Ducks, one of Australia's largest producers of duck meat, was convicted of misleading and deceptive conduct by the Australian Federal Court. The ACCC pursued an action against Pepe's Ducks under the Australian Consumer Law shortly after the screening of covert footage on the Australian Broadcasting Corporation's 7.30.<sup>36</sup>
- 2.23.4. In early 2013, Animal Liberation NSW provided the ABC with covert footage of workers bashing and kicking turkeys at a facility operated by a major poultry producer. In March 2013, the *Lateline* program (ABC) aired the covert footage. This has resulted in criminal proceedings being brought in the Local Court of New South Wales (on foot as at the time of writing) against a person who is alleged to have been one of those recorded in the footage as carrying out the bashing and kicking.
- 2.23.5. In February 2012, footage from the Hawkesbury Valley Meat Processors in Wilberforce, New South Wales was obtained, allegedly from a worker in the abattoir who installed the camera with the assistance of Animal Liberation NSW. The footage<sup>37</sup> depicted matters including sheep being hung up and skinned whilst apparently still conscious and pigs being beaten over the head repeatedly with a metal bar.

2.24. While not necessarily covert, the surveillance activities of animal protection groups like Animals Australia has been effective in shedding light on and

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<sup>34</sup> See for example ABC News, "Abattoir owner angry after charges dropped" ABC News (16 April 2013) <<http://www.abc.net.au/news/2013-04-16/abattoir-owner-angry-after-charges-dropped/4631864>>, accessed on 20 November 2013.

<sup>35</sup> See for example ABC News, "NSW piggery owner face cruelty charges" *ABC Online* (8 October 2013) <<http://www.abc.net.au/news/2013-10-08/piggery-owner-accused-of-abuse-to-face-court/5004274?section=act>>, accessed on 20 November 2013.

<sup>36</sup> See for example Bronwyn Herbert, "Disturbing footage prompts calls for duck farming changes" Transcript, *ABC News* (19 June 2012) <<http://www.abc.net.au/news/2012-06-19/disturbing-footage-prompts-calls-for-duck-farming/4080436>>, accessed on 20 November 2013.

<sup>37</sup> Some of which can be seen from <<http://www.smh.com.au/environment/animals/covert-evidence-of-cruelty-halts-abattoir-20120209-1rx7w.html>>, accessed on 29 November 2013.

raising public awareness about serious animal cruelty and neglect in the live export industry.<sup>38</sup>

- 2.25. The footage derived from surveillance activities can be, and often is, adduced as evidence in court proceedings against individuals or organisations accused of having engaged in animal cruelty or neglect. For example, the footage referred to in paragraph 2.23.4 has been adduced as evidence in the proceedings referred to in that paragraph.
- 2.26. Animal advocates and animal protection organisations often provide footage of animal cruelty or neglect to the media rather than the animal welfare regulators. It is the experience of our organisations that such advocates and organisations are often disenchanted with the regulators, due to a perception by the advocates and organisations that a complaint to the regulators, by itself, would not be likely to cause any enforcement action to be taken.

### **The legality of undercover surveillance activities**

- 2.27. Undercover surveillance often, but not always, involves a trespass to land. For example, an employee installing a surveillance device in his or her employer's facility would not be likely to commit a trespass, despite the employer not consenting to the installation.
- 2.28. The covert nature of the surveillance is unlikely to cause any interference with the use or enjoyment of the land or with the business operations, so a private nuisance is unlikely to be committed.
- 2.29. As discussed above in these submissions, there is comment from justices of the High Court of Australia to the effect that if a tort of invasion of privacy exists under the Australian common law, it would not be capable of protecting the privacy of a corporation, and would ordinarily not extend to situations such as surveillance of a commercial animal production facility.
- 2.30. In terms of criminal liability, statutory offences may be committed in relation to a trespass to land.<sup>39</sup> Additionally, the installation of a surveillance device may, in itself, amount to an offence.<sup>40</sup> Accordingly, animal activists who are involved in the surveillance of commercial animal production facilities are already at risk of incurring criminal, and possibly civil, liability for this activity. Given that there are significant public interest considerations in the public being provided with visibility into commercial animal facilities (as discussed at paragraph 1.5 above), it is submitted that imposing additional civil or

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<sup>38</sup> See for example Sarah Ferguson, "A Bloody Business", ABC Four Corners (30 May 2011) <[http://www.abc.net.au/4corners/special\\_ed/20110530/cattle/](http://www.abc.net.au/4corners/special_ed/20110530/cattle/)>, accessed on 20 November 2013.

<sup>39</sup> e.g. under the *Inclosed Lands Protection Act 1901* (NSW), section 4.

<sup>40</sup> e.g. under the *Surveillance Devices Act 2007* (NSW), section 8.

criminal liability on those who are involved in such surveillance would be a retrograde step.

### 3. Lobbying in Australia and overseas by industry groups

- 3.1. Certain industry groups have lobbied governments and parliaments in Australia and overseas for the imposition of civil or criminal liability in relation to surveillance activities by animal advocates and animal protection organisations.<sup>41</sup>
- 3.2. There have been calls from a number of State and Federal politicians to introduce U.S. style 'ag-gag' legislation in Australia.<sup>42</sup> Ag-gag laws have been implemented in a number of states across the U.S., prohibiting the making of undercover videos, recordings and photographs of commercial animal facilities. The precise details of the legislation vary from state to state, but the legislation has a common intent and effect, namely preventing or discouraging the surveillance under discussion.
- 3.3. In 2006, the U.S. also enacted the *Animal Enterprises Terrorism Act*, which prohibits anyone from intentionally damaging or causing the loss of any real or personal property used by an animal enterprise. Importantly, the Act labelled such individuals as "terrorists", a term which Australian politicians are now using to refer to animal advocates.<sup>43</sup>
- 3.4. Ag-gag and eco-terror laws have been vehemently opposed by animal protectionists and civil libertarians, the latter objecting on the basis of freedom of speech and political communication. According to Paul Shapiro, senior director of farm animal protection for The Humane Society of the United States:

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<sup>41</sup> See for example C Bettles, 'Senator backs 'ag gags,' Stock Journal (4 July 2013) <<http://www.stockjournal.com.au/news/agriculture/livestock/other/senator-backs-ag-gags/2660177.aspx?storypage=0>>, accessed on 13 December 2013.

<sup>42</sup> C Bettles, "Support for 'ag gag' move", The Land (28 May 2013) <<http://www.theland.com.au/news/agriculture/livestock/cattle-beef/support-for-ag-gag-move/2658824.aspx>>, accessed on 20 November 2013.

<sup>43</sup> In her public addresses, NSW Minister for Primary Industries, the Hon. Katrina Hodgkinson has used words like "fanaticism", "radical" veganism and "terrorism" to describe certain activities of animal advocates – language that has featured prominently in U.S. discourse as part of the conservative push to criminalise the covert surveillance of agricultural facilities. See for example, Voiceless, "Animal law in the spotlight: Hodgkinson's cheap shot" (26 July 2013) <<https://www.voiceless.org.au/content/animal-law-spotlight-hodgkinson%E2%80%99s-cheap-shot>>, accessed on 21 November 2013.

“These draconian bills to silence whistle-blowers show just how far the animal agribusiness industry is willing to go, and just how much the industry has to hide.”<sup>44</sup>

- 3.5. Civil libertarians and animal protection groups have been successful in causing a number of ag-gag bills across the U.S. not to be passed, with 11 state bills being defeated in last 12 months.<sup>45</sup>

## 4. Current enforcement of animal welfare regulations

### Enforcement by charitable organisations

- 4.1. State and Territory police forces, certain State and Territory departments of primary industries and certain charitable organisations have a statutory mandate to monitor compliance with, and take enforcement action in relation to contraventions of, animal welfare regulations. In New South Wales, for example, authority to prosecute in relation to offences under the *Prevention of Cruelty to Animals Act 1979* (NSW) and associated regulations is conferred exclusively on the following:<sup>46</sup>
- (a) the Royal Society for the Prevention of Cruelty to Animals NSW (**RSPCA NSW**) and the Animal Welfare League NSW (**AWL NSW**), being the two “approved charitable organisations” for the purposes of the Act;
  - (b) individuals who have been appointed as inspectors under the Act;<sup>47</sup>
  - (c) police officers;
  - (d) the Minister for Primary Industries (NSW) or Director-General of the Department of Industry and Investment (NSW); or

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<sup>44</sup> The Humane Society of the United States, “‘Ag Gag’ Bills Die in Iowa, Minnesota, Florida” (30 June 2011), <[http://www.humanesociety.org/news/news/2011/06/iowa\\_ag\\_gag\\_063011.html](http://www.humanesociety.org/news/news/2011/06/iowa_ag_gag_063011.html)>, accessed on 20 November 2013.

<sup>45</sup> D Flynn, ‘2013 Legislative Season Ends with ‘Ag-Gag’ Bills Defeated in 11 States,’ Food Safety News (July 30, 2013), <<http://www.foodsafetynews.com/2013/07/2013-legislative-season-ends-with-ag-gag-bills-defeated-in-11-states/#.UqpSxr8aiFK>>, accessed on 13 December 2013.

<sup>46</sup> *Prevention of Cruelty to Animals Act 1979* (NSW), section 34AA.

<sup>47</sup> Where each such appointee is either (1) an inspector under the *Animal Research Act 1985* (NSW), (2) an officer of one of the organisations referred to in paragraphs 4.1(a) or (b) above, or (3) a public servant appointed as an “officer” under the *Prevention of Cruelty to Animals Act 1979* (NSW).



- (e) persons who have the written consent of the Minister or Director-General to carry out a prosecution.
- 4.2. It is the experience of our organisations that a large proportion of the animal cruelty inspections and prosecutions that take place in New South Wales and other Australian jurisdictions are carried out by charitable organisations.
- 4.3. While the work of charitable organisations with statutory authority to inspect and prosecute is commendable, resource constraints and limited funding directly impacts on the organisations' effectiveness in enforcing the animal cruelty regulations. For example, RSPCA NSW only has 32 inspectors under the *Prevention of Cruelty to Animals Act 1979* (NSW) for all of New South Wales.<sup>48</sup> AWL NSW has only two such inspectors, as at the date of writing. Government funding for such organisations is often minimal. Additionally, in New South Wales, penalties imposed on defendants following a conviction for animal cruelty offences, unlike for other offences such as those concerning food safety, are payable to consolidated revenue, not to the prosecuting authority. Accordingly, animal welfare charitable organisations are financially at a disadvantage vis-à-vis government prosecutors (funded by taxpayers) or prosecutors that have the benefit of moieties (such as municipal councils in New South Wales for food safety prosecutions), and so are more limited in terms of the level of enforcement they can provide.
- 4.4. Of the prosecutions that were brought by the RSPCA in 2011–2012, less than 3% involved agricultural animals.<sup>49</sup> This statistic is concerning given that the ABS statistics for 2010–2011 show that there was well over half a billion agricultural animals in Australia during this period.<sup>50</sup>
- 4.5. A similar situation can be seen in the troubled Australian live export industry. The Australian Government's Department of Agriculture Forestries and Fisheries (**DAFF**) (through the Australian Quarantine and Inspection Services (**AQIS**)) is responsible for monitoring and enforcing the live export regulatory regime. However, DAFF is largely dependent on private charitable organisations to detect regulatory non-compliances.
- 4.6. Since the Gillard Government implemented the Exporter Supply Chain Assurance Scheme (**ESCAS**) in 2012, there have been 21 reported breaches of ESCAS. Of those, 16 were reported by private charitable organisations like Animals Australia and the RSPCA. Relevantly, not one was reported or

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<sup>48</sup> RSPCA NSW, Inspectorate <<http://www.rspcansw.org.au/our-work/inspectorate>>, accessed on 20 November 2013.

<sup>49</sup> RSPCA Australia National Statistics 2011-2012, <<http://www.rspca.org.au/sites/default/files/website/The-facts/Statistics/RSPCA%20Australia%20National%20Statistics%202011-2012.pdf>>, accessed on 20 November 2013.

<sup>50</sup> Australian Bureau of Statistics, Year Book Australia (2012), Agriculture, <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Agricultural%20production~260>>, accessed on 20 November 2013.

detected by DAFF, and not one has resulted in a fine or other criminal sanction being imposed on an exporter or the suspension or revocation of an exporter's licence.<sup>51</sup>

- 4.7. Having regard to the significant role of charitable organisations in enforcing animal welfare regulations and the significant budgetary constraints on those organisations, surveillance by animal protection groups and animal advocates serves an important public interest, namely the exposing of animal cruelty and neglect that would otherwise not come to the attention of the regulators. Accordingly, this public interest would be undermined if the statutory action under consideration were to cause additional criminal or civil liability to attach to such surveillance.

### **Consumer protection and awareness**

- 4.8. Consumers are becoming more conscious of the physical and psychological suffering endured by animals in the production of meat, dairy and egg products in Australia. An increasing number of consumers are willing to pay for more humanely produced alternatives at the check-out, or are no longer consuming animal-derived food products at all. This is represented by a dramatic growth in consumer demand for and consumption of free-range eggs.<sup>52</sup> Retailers such as Coles and Woolworths have responded to such demand, with Coles phasing out the use of sow stalls and battery eggs in their Coles Brand pork and egg products,<sup>53</sup> and Woolworths committing to a complete phase-out of the sale of battery eggs and the use of battery eggs in its products by 2018.<sup>54</sup>
- 4.9. It may be inferred from the significant "pattern of remedial legislation"<sup>55</sup> concerning consumer protection, in State, Territory and Federal jurisdictions, that consumers have a right to know how their food is produced, and must not be misled about production-related matters. However, as previously discussed, there is low public visibility into commercial animal facilities. The footage obtained by animal advocates is often the only insight that consumers have into food production methods.

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<sup>51</sup> Department of Agriculture, Live Animal Export Regulatory Compliance - Complaints and Investigations, <<http://www.daff.gov.au/biosecurity/export/live-animals/livestock/compliance-and-investigations>>, accessed on 20 November 2013.

<sup>52</sup> See for example Choice, "Free Range Eggs" <<http://www.choice.com.au/reviews-and-tests/food-and-health/food-and-drink/organic-and-free-range/free-range-eggs-2012.aspx>>, accessed on 20 November 2013.

<sup>53</sup> Coles, "Better Animal Welfare at Coles!" (9 January 2013), <<http://blog.coles.com.au/tag/sow-stall-free/>>, as accessed on 20 November 2013.

<sup>54</sup> Woolworths Limited, "Animal Welfare" <[http://www.woolworthslimited.com.au/page/A\\_Trusted\\_Company/Responsible\\_Sourcing/Animal\\_Welfare/](http://www.woolworthslimited.com.au/page/A_Trusted_Company/Responsible_Sourcing/Animal_Welfare/)>, accessed on 20 November 2013.

<sup>55</sup> *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205 at 215–216 [5].

- 4.10. As part of this problem, consumer and animal protection organisations have expressed concerns over industry claims, through product marketing and packaging material, that animals are kept in “free range” housing systems, or are “free to roam”, “cage free”, “open-range”, “grain fed”, “bred free range”, “organic” or “biodynamic”.
- 4.11. The Federal Court of Australia has determined many such claims to be misleading and deceptive, in successful ACCC proceedings against producers. These cases include:
- 4.11.1. *ACCC v Pepe’s Ducks Pty Ltd*,<sup>56</sup> where a penalty of \$375,000 was imposed on Pepe’s Ducks Pty Ltd for misleading or deceptive conduct as to claims that certain ducks were “open range” or “grown nature’s way”;
- 4.11.2. *ACCC v Luv-a-Duck Pty Ltd*,<sup>57</sup> where a penalty of \$400,000 was imposed on Luv-a-Duck Pty Ltd for misleading consumers by claiming certain ducks had substantial access to outdoor areas and were “grown and grain fed in the spacious Victorian Wimmera Wheatlands”;
- 4.11.3. *ACCC v Turi Foods Pty Ltd*,<sup>58</sup> where three of Australia’s largest meat producers were found liable for deliberately misleading consumers, suggesting their animals were free range when in fact they were barn raised; and
- 4.11.4. *ACCC v C.I. & Co. Pty Ltd*,<sup>59</sup> where a penalty of \$50,000 was imposed on a chicken egg producer and retailer, for misleading and deceptive conduct through labelling eggs “free range”.
- 4.12. On 10 December 2013, the ACCC commenced proceedings against two large egg producers in relation to “free range” claims.<sup>60</sup>
- 4.13. According to ACCC Commissioner Sarah Court:

“The ACCC’s Compliance and Enforcement Policy lists credence claims as a new priority area, particularly those in the food industry with the potential to have a significant impact on consumers.

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<sup>56</sup> *Australian Competition and Consumer Commission v Pepe’s Ducks Ltd* [2013] FCA 570.

<sup>57</sup> *Australian Competition and Consumer Commission v Luv-A-Duck Pty Ltd* [2013] FCA 1136.

<sup>58</sup> *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* [2013] FCA 665.

<sup>59</sup> *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511.

<sup>60</sup> <<http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-free-range-egg-producers>>, accessed on 16 December 2013.

Consumers must be able to trust that what is on the label is true and accurate. Businesses need to make sure they are not misleading consumers into paying a premium for products that don't match the claims made on the label."<sup>61</sup>

- 4.14. Animal protection organisations have been instrumental in driving this important ACCC directive. For example, the ACCC commenced proceedings against Pepe's Ducks shortly after the screening of undercover footage provided by Animal Liberation NSW on the ABC's 7.30 news program.<sup>62</sup>
- 4.15. Further, consumer demand for animal-friendly products is often motivated by animal welfare concerns, which are brought to the attention of consumers by animal advocates and animal protection organisations, often through surveillance. As North J said in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*,<sup>63</sup> in relation to an instance of false labelling of eggs as "free range":

"The conduct amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.

...

It is unlikely that other operators in the industry could be in any doubt about the Court's view of the gravity of the deception visited upon unsuspecting and often well motivated consumers."

## 5. Scope of application of statutory invasion of privacy action

### Onus of proof

- 5.1. It is submitted that a statutory invasion of privacy action, if created, should be limited in scope. The statutory provisions which create the action should specify that the action does not apply in respect of the matters referred to in paragraph 1.8 above. This is preferable to those matters constituting a defence, the onus of proving which would lie with the defendant.

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<sup>61</sup> ACCC, "ACCC institutes proceedings against Luv-a-Duck for false, misleading and deceptive conduct", < <http://www.accc.gov.au/media-release/accc-institutes-proceedings-against-luv-a-duck-for-false-misleading-and-deceptive>>, accessed on 20 November 2013.

<sup>62</sup> See for example Bronwyn Herbert, "Disturbing footage prompts calls for duck farming changes" Transcript, *ABC News* (19 June 2012) < <http://www.abc.net.au/news/2012-06-19/disturbing-footage-prompts-calls-for-duck-farming/4080436>>, accessed on 20 November 2013.

<sup>63</sup> [2010] FCA 1511 at [31].

- 5.2. Issues concerning onus of proof are especially pertinent in the context of surveillance of commercial animal facilities, where animal advocates and animal protection organisations, as defendants, often do not have the finances or other resources to be able to mount a proper defence.
- 5.3. Assume, for example, that such a defendant was being proceeded against in relation to the alleged surveillance of a commercial animal facility. It may be a relatively simple matter for the defendant to tender in evidence the footage that was procured, which clearly displays serious animal cruelty or neglect. However, it may be considerably more difficult for the defendant to prove, on the balance of probabilities, that such cruelty or neglect amounted to a criminal offence (assuming criminal offences to be a relevant type of iniquity: see paragraph 5.12 and following, below). In addition to identifying a particular statutory provision asserted to have been contravened and explaining the precise nature of the contravention, the defendant may also need to identify applicable codes of practice and explain how those were contravened, because animal cruelty regulations in certain jurisdictions<sup>64</sup> do not apply where codes of practice have been complied with.<sup>65</sup> Expert veterinary or other scientific evidence may need to be procured and adduced. Accordingly, if the matters referred to at paragraph 1.8 above were to constitute defences rather than qualifications to the scope of the statutory action, financial or other resourcing constraints may prevent the defendant, in a practical sense, from being able to discharge its onus of making out the defence, despite the defence being available in a legal sense.
- 5.4. Conversely, an owner of a commercial animal facility who has the financial resources and inclination to bring proceedings against an animal advocate or animal protection organisation in relation to alleged surveillance activities is the person who is best placed, in our submission, to prove that the procured surveillance discloses no iniquity, and that the other matters referred to in paragraph 1.8 above do not apply.

#### **Natural persons only**

- 5.5. At paragraphs 2.19 and 2.20 above, reference was made to indications by five justices of the High Court of Australia that if there exists a tort of invasion of privacy under the Australian common law, it would not be capable of operating so as to protect the privacy of a corporation. One of those justices referred to “human dignity” as the basis of protecting privacy rights, which may be “incongruous when applied to a corporation”.<sup>66</sup> It is submitted that their Honours’ analyses in this regard apply equally in relation to a statutory action for invasion of privacy as for a common law one.

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<sup>64</sup> e.g. under the *Prevention of Cruelty to Animals Act 1986* (Vic).

<sup>65</sup> *Id* at sections 6(1)(b) & (c).

<sup>66</sup> *Lenah Game Meats Pty Limited v Australian Broadcasting Corporation* (2001) 208 CLR 199 at 226.

### **Matters not private in nature**

5.6. It is submitted that the judgment of Gleeson CJ in *Lenah* supports a qualification to the scope of the statutory action presently under consideration in relation to matters not private in nature, and provides useful guidance as to how determine whether any given acts or information are relevantly private. In *Lenah*, His Honour was of course discussing privacy in the context of a common law invasion of privacy action and an equitable breach of confidence action, but that discussion is equally applicable in the context of the statutory action under consideration.

5.7. At paragraph 2.18 above, we referred to his Honour's comments to the effect that "an activity is not private simply because it is not done in public".<sup>67</sup> In relation to breach of confidence, his Honour further observed, of the facts of that case :<sup>68</sup>

"It is clear that there was no relationship of trust and confidence between the respondent and the people who made, or received, the film. It is also clear that if, by information, is meant the facts as to the slaughtering methods used by the respondent, such information was not confidential in its nature."

5.8. However, his Honour acknowledged that a breach of confidence could be committed in circumstances where there was no relationship of trust and confidence. He cited with approval the following dicta of Laws J (High Court of England and Wales) in *Hellewell v Chief Constable of Derbyshire*:<sup>69</sup>

"If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available."

5.9. (Iniquity, as a defence based on the public interest (loosely speaking), is discussed below at paragraph 5.12 and following.)

5.10. In *Lenah*, Gleeson CJ posited a "useful practical test" for determining what is and is not private, as follows:<sup>70</sup>

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<sup>67</sup> At 226 [42].

<sup>68</sup> At 224 [34].

<sup>69</sup> [1995] 1 WLR 804 at 807.

<sup>70</sup> At 226 [42].

“Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.”

- 5.11. Ultimately, his Honour considered the abattoir operations in *Lenah* not to be relevantly private.<sup>71</sup> Indeed, the acts captured in surveillance by animal advocates and animal protection organisations would ordinarily not be private, applying his Honour’s test.

### **Iniquity**

- 5.12. Voiceless and BAWP submit that the statutory action presently under consideration should not apply in relation to an alleged invasion of privacy which is carried out for the purpose of, or which results in, the procuring of evidence of an iniquity.
- 5.13. An iniquity defence, albeit of a slightly different form, currently exists in the adjacent area of equitable breach of confidence actions. The elements of that action, citing from the decision of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*,<sup>72</sup> are as follows:

“It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information... It may also be necessary... that [the] unauthorised use would be to the detriment of the plaintiff.”

- 5.14. In terms of the iniquity defence, his Honour noted:

“[I]nformation will lack the necessary attribute of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of

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<sup>71</sup> At 226–227 [43].

<sup>72</sup> (1987) 14 FCR 434 at 443.

public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.”

5.15. In *AG Australia Holdings Ltd v Burton*,<sup>73</sup> Campbell J reviewed the authorities as to what needs to be proved in order for an iniquity defence to succeed. His Honour referred to the decision of Gibbs CJ in *A v Hayden*<sup>74</sup> as authority for the proposition that a defendant needs to show, to a prima facie standard, that an iniquity has occurred.

5.16. His Honour’s review of authorities also referred to dicta of Lord Denning MR in *Initial Services v Putterill*, as follows:

“[No confidence prevents the disclosure of] the proposed or contemplated commission of a crime or a civil wrong. But I should have thought that was too limited. The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. The reason is because ‘no private obligations can dispense with that universal one which lies on every member of the society to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare’...

The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus it would be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the registrar. There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field, even to the press.”

5.17. It is submitted that his Lordship’s dicta in the first paragraph above, in relation to public interest considerations, are equally applicable to the statutory action presently under consideration. The dicta support the proposition that the courts should not provide a remedy in relation to a disclosure of an iniquity – being a “proposed or contemplated commission of a crime or a civil wrong” or “crimes, frauds and misdeeds, both those actually committed as well as those in contemplation” – where the disclosure is in the public interest. In the animal protection context, it would be difficult to think of a situation where disclosure of serious animal cruelty or neglect would not be in the public interest. Depending on to whom the surveillance is disclosed, the public interest would be that of having a citizenry that is informed of political issues, or of causing the authorities to be aware of an incident that could potentially amount to a criminal offence.

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<sup>73</sup> (2002) 58 NSWLR 464 at 520.

<sup>74</sup> (1984) 156 CLR 532 at 546.



- 5.18. In the second paragraph in the extract above, his Lordship appears to suggest that the identity of the recipient to whom the confidential information may be disclosed depends on the “character” of the “misdeed”, and that certain (but not all) misdeeds are of such a character as to excuse disclosure of the information to the press.
- 5.19. It is submitted, with respect, that this approach gives rise to uncertainty, because reasonable minds may differ as to whether any given misdeed is of a sufficiently serious character as to excuse disclosure to the press or some other class of recipient. This difficulty could be readily overcome, for the statutory action presently under consideration, by not imposing any requirement as to the identity of the recipient.
- 5.20. In the animal protection context, surveillance footage depicting serious animal cruelty or neglect is ordinarily provided to:
- (a) other animal advocates or animal protection organisations;
  - (b) the public, through websites or social media;
  - (c) media organisations; or
  - (d) animal welfare or other regulators.
- 5.21. It is difficult to identify a recipient or class of recipients where disclosure of surveillance of serious animal cruelty or neglect would not be in the public interest.

### **Discussion of political matters**

- 5.22. In *Lenah*, Gleeson CJ approved of Laws J’s dicta in *Hellewell* (extracted at paragraph 4.9 above), to the effect that disclosure of photography with a telephoto lens of another engaged in a private act would amount to a breach of confidence, although a defence based on the public interest may be available. However, the chief justice qualified his approval as follows:
- “[T]o adapt [Laws J’s proposition] to the Australian context, it is necessary to add a qualification concerning the constitutional freedom of political communication earlier mentioned.”<sup>75</sup>
- 5.23. The chief justice had, earlier in his decision, referred to “the Constitution’s protection of freedom of political communication [precluding] the curtailment of such freedom by the exercise of legislative or executive power

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<sup>75</sup> At 224 [35].

[and restricting] law-making power and executive action”.<sup>76</sup> His Honour also cited “the tension that exists between interests in privacy and interests in free speech” as “a reason for caution in declaring a new tort [of invasion of privacy]”.<sup>77</sup>

- 5.24. In *Lenah*, Kirby J discussed in greater detail the issue of freedom of political communication and invasion of privacy actions at common law, as follows:

“The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.

Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.”

- 5.25. The surveillance of activities of animal protection groups has been incredibly successful in raising public awareness about animal welfare issues and in driving policy reform.
- 5.26. A notable example of this is the ABC’s *Four Corners* expose, “A Bloody Business”.<sup>78</sup> The program screened a documentary about Australian cattle exported live to Indonesian slaughterhouses. The public and political reaction resulted in the former Gillard Government suspending the trade with Indonesia, and then subsequently implementing a new regulatory regime to

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<sup>76</sup> At 219–220 [20].

<sup>77</sup> At 225–226 [41].

<sup>78</sup> See for example Sarah Ferguson, “A Bloody Business”, ABC Four Corners (30 May 2011) <[http://www.abc.net.au/4corners/special\\_ed/20110530/cattle/](http://www.abc.net.au/4corners/special_ed/20110530/cattle/)>, accessed on 20 November 2013.

govern live exports: the Export Supply Chain Assurance Scheme (ESCAS). Commentators have noted the following about the situation:

“It was a remarkable case for two reasons: first because it demonstrated clearly that exposing animal cruelty is in the public interest; the community is willing to acquire knowledge, even if the information is painful or upsetting. Second, the tactics used by Animals Australia in the live export case are legitimate and effective tools that can influence the policy agenda, and providing people with information that’s normally hidden can rapidly affect policy change.”<sup>79</sup>

- 5.27. Another example of how surveillance activities have driven public debate is in 2012, when Animal Liberation supplied the Australian Broadcasting Corporation with surveillance footage from a pig abattoir, which was then aired on *Lateline*. The investigation prompted a government review resulting in the introduction of mandatory animal welfare officers to be employed by abattoirs, as well as mandatory welfare training for those who conduct slaughter.<sup>80</sup>
- 5.28. Surveillance by animal advocates and animal protection organisations is an important method by which public debate about animal protection issues (being issues of a political character) is stimulated. It is submitted that this supports the statutory action under consideration being qualified in scope so as not to apply in relation to an alleged invasion of privacy connected with the public discussion of political matters.

**Permitted under a law of the State or Territory in which the alleged invasion of privacy occurred**

- 5.29. Presently, animal welfare statutes in each Australian State and Territory permit animal welfare inspectors to enter land in various circumstances. For example, section 24G of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides as follows:

- “(1) This section applies to the following land:
- (a) land used for the purpose of a sale-yard or an animal trade,
  - (b) land in or on which an animal is being used, or kept for use, in connection with any other trade, or any business or profession (including a place used by a

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<sup>79</sup> C McCausland, Siobhan O’Sullivan and Scott Brenton, “Trespass, Animals and Democratic Engagement”, Springer (26 March 2013).

<sup>80</sup> *Ibid.*

veterinary practitioner for the purpose of carrying on his or her profession).

- (2) For the purposes of ensuring that the provisions of this Act or the regulations are not being contravened, an inspector may, in relation to land to which this section applies, do any or all of the following:
  - (a) inspect and examine the land, any animal that is in or on the land and any accommodation or shelter that is provided in or on the land for any animal; ...”

5.30. There is no express provision in the New South Wales statute permitting photographic or video evidence to be taken during such an entry onto land. However, such evidence is very often taken and, where criminal proceedings are commenced against an owner or employee of the relevant facilities, tendered in evidence in court. Should such taking of evidence potentially amount to an invasion of privacy under the statutory action under contemplation, this could potentially cause it to be inadmissible in court proceedings.

5.31. A similar issue arose in the case of *Coco v R*,<sup>81</sup> where members of the Queensland Police Force and Australian Federal Police installed a listening device in factory premises. A majority of the High Court of Australia (Mason CJ, Brennan, Gaudron and McHugh JJ) considered that the installation was tortious and in breach of statute, so the conversations recorded were inadmissible.<sup>82</sup>

5.32. Section 138 of the *Evidence Act 1995* (Cth) makes provision in relation to admissibility of “improperly or illegally obtained evidence”, which may include evidence obtained pursuant to a tort or breach of statute.<sup>83</sup> The section provides:

- “(1) Evidence that was obtained:
- (a) improperly or in contravention of an Australian law, or
  - (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence

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<sup>81</sup> (1994) 179 CLR 427.

<sup>82</sup> At 435–436.

<sup>83</sup> *Parker v Comptroller-General of Customs* (2009) 252 ALR 619 at 638 [87] (per French CJ) and 644 [112] (per Gummow, Hayne and Kiefel JJ).

that has been obtained in the way in which the evidence was obtained.

...

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
- (a) the probative value of the evidence, and
  - (b) the importance of the evidence in the proceeding, and
  - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
  - (d) the gravity of the impropriety or contravention, and
  - (e) whether the impropriety or contravention was deliberate or reckless, and
  - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*, and
  - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
  - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.”

5.33. Similar provisions exist in other jurisdictions.<sup>84</sup>

5.34. In the context of animal protection, as stated in section 2 above, surveillance by animal advocates and animal protection organisations of commercial animal facilities may or may not be criminal or tortious, depending on the circumstances of the case. Surveillance (e.g. taking of photographs or video footage) by animal welfare inspectors lawfully present on land is unlikely to be tortious or criminal. If the statutory action presently under consideration is not appropriately qualified in terms of scope, such surveillance could be considered improperly or illegally obtained, which in turn could lead to a finding that the evidence is inadmissible.

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<sup>84</sup> See, e.g., section 138 of the *Evidence Act 1995* (NSW).

- 5.35. Even if particular provisions of State or Territory animal welfare statutes (e.g. section 24G of the *Prevention of Cruelty to Animals Act 1979* (NSW)) could be taken expressly or impliedly to permit the relevant surveillance (e.g. by animal welfare inspectors), the surveillance would still be likely to be “in contravention of an Australian law” for the purposes of section 138 or cognate provisions, being the invasion of privacy statute. If there was any inconsistency between the State statutes and the Federal invasion of privacy statute as to whether the surveillance was relevantly “lawful” or “properly obtained” for the purposes of section 138, section 109 of the *Constitution* would act so as to cause the Federal statute to prevail to the extent of the inconsistency, and so the surveillance would be considered to be “unlawful” or “improperly obtained”.
- 5.36. In order to avoid this undesirable situation, it is necessary, in our submission, to provide that the statutory action presently under consideration does not apply where permitted under a law of the State or Territory in which the alleged invasion of privacy occurred.
- 5.37. An additional reason for the necessity of this qualification, in the animal protection context, relates to State legislation requiring surveillance in commercial animal facilities. On 26 February 2013, the *Food Amendment (Recording of Abattoir Operations) Bill 2013* (NSW), being “an Act to amend the *Food Act 2003* to require recording of operations, including the movement, holding and slaughter of animals at an abattoir or knackery”,<sup>85</sup> was introduced in the Legislative Council of New South Wales.<sup>86</sup> If this Bill were to be enacted into law, it would permit the surveillance of certain types of commercial animal facilities and, under the present state of the law, would not be tortious or in breach of statute. There have been calls for similar legislation to be introduced in other jurisdictions.<sup>87</sup> However, if the surveillance, although authorised by the New South Wales Act, gave rise to a breach of the statutory action under consideration, those provisions of the New South Wales Act which authorise the surveillance would be likely to be invalid under section 109 of the Constitution.
- 5.38. It is submitted that there is no reason in principle why the State and Territory Parliaments should be restrained from enacting laws, responsive to the attitudes or opinions of their electorates, which authorise surveillance of commercial animal facilities (e.g. by CCTV) which might otherwise amount to an invasion of privacy under the proposed Federal statute.

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<sup>85</sup> <<http://parliament.nsw.gov.au/prod/parlment/nswbills.nsf/d2117e6bba4ab3ebca256e68000a0ae2/1d092df59f54d72dca257b1e0016a89a?OpenDocument>>, accessed 15 December 2013.

<sup>86</sup> As at the date of writing, the Bill is currently under consideration by the Legislative Council.

<sup>87</sup> <[http://www.animalsaustralia.org/take\\_action/CCTV-cameras-in-slaughterhouses](http://www.animalsaustralia.org/take_action/CCTV-cameras-in-slaughterhouses)>, accessed on 15 December 2013.

## 6. Conclusion

- 6.1. If a statutory invasion of privacy action is not appropriately qualified in scope, it may impose additional liability in relation to surveillance by animal advocates and animal protection organisations of commercial animal facilities. This, in turn, would undermine a whole host of public interest considerations, including (without limitation) the effective enforcement of animal welfare regulations, informing the public about matters of a political character and promoting consumer awareness and protection. The qualifications set out in paragraph 1.8 above would ensure that these public interest considerations are protected.