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A Note from The Editor

In the issue, **Alex Bruce** completes his two-part analysis of the Australian Government's preferred indirect regulatory approach to consumer values issues associated with food animal welfare,¹ questioning whether this is capable of being translated into a workable legal reality. And, surely this will need to be so if consumer demands are intended not just to generate informed and honest labelling information, but to effectively signal suppliers of consumers' preferences for welfare-friendly food animal products.

The first part of Alex Bruce's paper² suggested that it was at least theoretically possible to indirectly regulate consumer values issues associated with food animal products through consumer demand. The discussion in the first article explained how the dynamics of a competitive market, underpinned by competition and consumer policy supports the primacy of the consumer as the driver of this process.

The second part asks whether the legal structure of the Australian Consumer Law (ACL) enables it to be applied consistently across all Australian jurisdictions to achieve the Federal Government's end? How does the law work in enabling the ACL to prevent suppliers making misleading or deceptive animal welfare claims in the sale of their food animal products? And, does the case law support an interpretation of the ACL that would require suppliers to disclose the fact that animals may have been slaughtered according to religious practices? Bruce attempts to answer these questions by exploring how current case law might resolve hypothetical litigation instituted by the Australian Competition and Consumer Commission ('the ACCC') against a national retailer of food animal products alleged to have breached the s18 misleading or deceptive conduct prohibition by engaging in both 'positive' conduct in labelling food animal products and 'negative' conduct in failing to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered

(I have added a rudimentary and preliminary Note on the recent *ACCC v Pepe's Ducks* matter, and a copy of the complaint that initiated it.)

¹ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia.

² Alex Bruce, 'Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [1]' (2012) 7 *Australian Animal Protection Law Journal* 5.

Ruth Hatten examines the legal framework surrounding pig-dogging in New South Wales, concluding that the only leash imposed by law is "an extremely flimsy one", and suggesting that "a conflicted body with a pro-hunting agenda" should not have oversight of hunting.

This issue also introduces an Essay section that is intended to provide an outlet for ideas that go beyond specific animal protection law issues.. The title of the first Essay by **Stephen Keim** SC and **Jordan Sosnowski** is surely self-explanatory: Human Rights v Animal Rights: Mutually Exclusive or Complementary Causes?

And, Mirko Bagaric & Keith Akers' "Humanising Animals: Civilising People" is reviewed.

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Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [2]

By Ven. Alex Bruce

Introduction

This article is the second of two exploring whether, and to what extent an existing regulatory regime in the form of the Australian Consumer Law ('the ACL') and the economic forces of consumer demand that it protects, can be employed to advance food animal welfare initiatives and to address practices associated with the religious slaughter of animals.

The first article¹ suggested that it was at least theoretically possible to indirectly regulate consumer values issues associated with food animal products through consumer demand. In preferring this regulatory approach, the Commonwealth government's *Labelling Logic Report* assigns significant responsibility to the market in signalling consumer preferences for welfare friendly food animal products to suppliers. The discussion in the first article explained how the dynamics of a competitive market, underpinned by competition and consumer policy supports the primacy of the consumer as the driver of this process.

Evidence from the European Union, the United States, the United Kingdom and Australia also suggests that consumers would be willing to pay a price premium for welfare friendly food animal products. Informal, industry and formal surveys and studies suggest that consumer experiences of cognitive dissonance or purchasing inconsistency are mitigated by the availability of accurate information about food animal products, including antecedent animal welfare practices.

However, theoretical possibility must be translated into workable legal reality if the intended market-based regulatory approach to consumer values issues associated with food animal welfare is to be effective.

Associate Professor, Buddhist Monk, ANU College of Law.

¹ Alex Bruce, 'Labelling Illogic? Food Animal Welfare & the Australian Consumer Law [1]' (2012) 7 Australian Animal Protection Law Journal 5.

This is especially so if consumer demands are intended not just to generate informed and honest labelling information, but then to actually signal suppliers of consumers' preferences for welfare friendly food animal products.

Does the legal structure of the ACL enable it to be applied consistently across all Australian jurisdictions to achieve this end? How does the law work in enabling the ACL to prevent suppliers making misleading or deceptive animal welfare claims in the sale of their food animal products? Does the case law support an interpretation of the ACL that would require suppliers to disclose the fact that animals may have been slaughtered according to religious practices?

This second article answers these questions by exploring how current case law might resolve hypothetical litigation instituted by the Australian Competition and Consumer Commission ('the ACCC') against a national retailer of food animal products. This hypothetical litigation involves allegations that the retailer has breached the misleading or deceptive conduct prohibition in ACL s18 by engaging in both 'positive' conduct in labelling food animal products and 'negative' conduct in failing to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual.

Part I briefly introduces the ACL before Part II introduces the facts of hypothetical litigation instituted by the ACCC against a national retailer alleging that the retailer breached ACL s18 in making certain animal welfare claims associated with its food animal products.

The basic legal framework by which ACL s18 prohibits misleading or deceptive conduct is explained in Part III that analyses the case law relevant to evaluating the first set of allegations against the national retailer. That is, allegations of 'positive' conduct; where it is alleged that the national retailer has breached ACL s18 in making misleading or deceptive animal welfare claims associated with its food products.

Part III demonstrates how recent decisions of the Federal Court of Australia in *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd*² and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)*³ permit an interpretation of the ACL

² *Australian Competition and Consumer Commission v C.I. & Co Pty Ltd* [2010] FCA 1511 (23 December 2010).

³ *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19 (2 December 2011).

enabling it to prevent misleading or deceptive welfare claims associated with food animal products.

However, those decisions are not directly relevant to the task of evaluating the second set of allegations. That is, where it is alleged that a failure by the retailer to disclose to consumers that meat products offered for sale have originated from animals that have been slaughtered according to religious ritual constitutes misleading or deceptive conduct. Part IV therefore explores the difficult legal question of whether and to what extent the ACL can be interpreted to address claims of alleged misleading or deceptive conduct associated with a failure to inform.

Do consumers have a right to be informed whether the meat products they are buying have come from animals that have not been stunned prior to slaughter? Does the failure to inform consumers of this lack of stunning constitute misleading or deceptive conduct by omission in breach of ACL s18?

In exploring these questions, Part IV explains the methodology established by the decision of the High Court in *Campomar Sociedad Ltd v Nike International Ltd*⁴ ('Campomar'). As a decision of the High Court, Campomar is the principal authority followed by Australian Courts across all jurisdictions in evaluating conduct directed toward the public at large.

This methodology requires identifying the qualities of a hypothetical consumer against whom allegedly misleading or deceptive conduct is evaluated. Part IV also explores the case law that requires the existence of a reasonable expectation of disclosure, (in the present case, that meat has originated from animals slaughtered according to religious ritual) before a failure to disclose can be characterised as misleading or deceptive.⁵

By exploring the arguments for and against the issue, Part IV demonstrates how the current state of legal uncertainty associated with characterising silence as misleading or deceptive conduct ultimately dooms the ACCC's case and compromises the larger ability of the ACL to address allegations of misleading conduct by silence or omission.

⁴ *Campomar Sociedad Ltd v Nike International Ltd* (2000) 202 CLR 45.

⁵ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357, 370.

The article concludes in Part V that the ACL can be successfully interpreted and enforced against suppliers of food animal products who engage in misleading or deceptive conduct in relation to positive statements made on food labels. However, claims that a failure to provide consumers with information relating to the slaughter of food animals breaches the ACL are likely to fail.

The article also concludes that the Commonwealth government's intended policy in regulating consumer values matters, including animal welfare and religious slaughter issues set out in the Labelling Logic Report is limited. The limitations associated with the case law in interpreting the ACL highlight the importance of the sort of legislative initiatives intended by the European Union and United Kingdom and discussed in the first article.

Although not without controversy, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL with more specific forms of consumer protection initiatives such as food-specific labelling legislation or Codes of Conduct requiring halal and kosher meat products to be labelled as such.⁶

Part I - Australia's New Consumer Protection Regime

Until 2011, consumer protection and product liability in Australia was regulated by an often confusing patchwork of Commonwealth, State and Territory legislation, regulations and subordinate legislation. At the Commonwealth (Commonwealth) level and since 1974, the *Trade Practices Act 1974* (Cth) ('the TPA') provided Australia's principal source of consumer protection legislation. Complimenting and in many places duplicating the TPA were individual State and Territory Fair Trading legislation.

On 1 January 2011, this relatively fragmented landscape of consumer

⁶ For example, Section 40F of the Wine Australia Corporation Act 1980 (Cth) specifically prohibits misleading or deceptive claims in relation to wine offered for sale to consumers. Some conduct in relation to the sale of wine is also within the ambit of the Horticulture Code that became effective on 14 May 2007 and is regulated by the Competition and Consumer Act 2010 (Cth).

protection and product liability law in Australia fundamentally changed. The *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* ('the ACL Act') completed a process of reform that had been gaining momentum since the early 2000's and that culminated in the creation of a single, nation-wide consumer protection and product liability regime in the form of the Australian Consumer Law.

A National and Consistent Regulatory Regime

In the process, the Australian Consumer Law replaced 17 generic consumer protection laws that existed across States and Territories with a single national Consumer Law found in Schedule 2 to the CCA and implemented as a law of the Commonwealth in Part XI of the CCA and as an 'applied law' of the States and Territories in Part XI^{AA} of CCA and for the most part, embedded in Fair Trading legislation.

It is the largest reform of Australian consumer protection laws ever undertaken. I have explained in more detail elsewhere the policy and constitutional background to, and the mechanics of the national implementation of the ACL.⁷

Part II – Creating a Hypothetical Scenario

This article and the one before it is investigating whether and to what extent the ACL can advance the welfare of food animals. Consistent with its Labelling Logic Report, the Commonwealth government is proposing to facilitate consumers' preferences for welfare-friendly food animal products by prohibiting misleading or deceptive animal welfare representations made by suppliers of those products.

For the purposes of evaluating whether and to what extent the ACL can function in this way, a hypothetical scenario is posited. This approach follows the suggestion of Justice Kirby in 'conceptualising the case' for the purposes of evaluating the merits of an argument where the conceptual bases of arguments for and against a position are expressed at their highest level.⁸

⁷ Alex Bruce, *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) Chapters 1 & 2, 1 – 50.

⁸ Justice Michael Kirby, 'Ten Rules of Appellate Advocacy' (1995) 69 *Australian Law Journal* 964, 971.

Factual Context

Accordingly, we assume that a national grocery retailer, Hestia Pty Ltd ('Hestia')⁹ owns grocery retail stores in all States and Territories of Australia. It retails all manner of groceries including food animal products, to consumers. It obtains chicken, beef, pork, lamb and seafood products in bulk from national primary producers. Hestia's own in-house butchers re-package meat products in styrofoam trays covered in plastic wrap. Labels attached to the plastic covering disclose the relevant cut of meat, its weight, country of origin and ingredients. Consumers simply pick up their desired meat product from the meat section of any Hestia supermarket.

From April 2011, Hestia began selling home-brand generic eggs in all of its stores. The eggs are packaged in Hestia cartons. Labels on the egg cartons depict an image of smiling chickens roaming about green fields against a back drop of a large red barn.

On the label are two lines of words; the first line states: 'Hestia Healthy Choice Eggs' in bold and capitalised font. A smaller second line of words states 'Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice.'

Since September 2011, Hestia also began to sell a significant amount of halal and kosher chicken and beef meat in order to satisfy demand by an increasingly multicultural Australian society.

In some stores, located in predominantly Muslim suburbs such as Marrickville and Lakemba in Sydney, Hestia places halal meat products in a separate chiller display that specifically advertises halal meat products. However, in the majority of its stores, there is no distinction between halal and general meat products and consumers do not know whether they are buying halal or non-halal meat products.

After an investigation in January 2012 by a national current affairs program, it is revealed that approximately 80% of the 'Hestia Healthy Choice Eggs' have been sourced from battery hen farms. The program also includes interviews with consumers who are shocked to learn that the meat products they have been purchasing have originated from

⁹ In Greek mythology, Hestia is the goddess of the hearth, feasting and animal sacrifice; E.M. Berens, *Myths and Legends of Ancient Greece and Rome*, (CreateSpace Publishers, United States, 2011) 37.

animals slaughtered according to Muslim religious ritual that does not permit stunning prior to slaughter.

Predictably, in the weeks following the program, the ACCC receives many complaints about Hestia's practices from all Australian States and Territories. The ACCC notes that the complaints involve fundamental consumer concerns that fit within its Enduring Perspectives and 2012 Objectives, and are consistent with its Compliance and Enforcement Priorities.¹⁰

In these circumstances, and in June 2012, the ACCC institutes proceedings against Hestia in the Federal Court of Australia alleging that advertising associated with its eggs as well as the failure to inform consumers about the religious preparation of meat products constitutes misleading or deceptive conduct in breach of ACL s18.

Pleading the ACCC's Causes of Action

It is in these factual circumstances that the central question posed by these articles can be investigated. However, transposing this theoretical factual scenario into the procedural framework of pleading a cause of action under ACL s18 in the Federal Court of Australia requires a certain amount of precision. The new Federal Court Rules, issued in 2011, require pleadings to very clearly identify the issues to be resolved by the Court and the facts relied upon in order that the other party is aware of the case that must be met.¹¹

As a general rule, therefore, an applicant is required to plead a cause of action with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity, and to do so at an early stage in the litigation. In *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd*, Chief Justice Mason and Justice Gaudron confirmed:

the functions of pleadings is to state with sufficient clarity the case that must be met ... In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her, and incidentally, to

¹⁰ Rod Sims, *Enduring Perspectives and 2012 Objectives*, 20 February 2012;

<<http://www.accc.gov.au/content/index.phtml/itemId/1033915/fromItemId/8973>> (Accessed 15 May 2012).

¹¹ Rule 16.02 (1) Federal Court Rules 2011.

*define the issues for decision*¹²

Because ACL s18 is so very broad, a cause of action pleading misleading or deceptive conduct is vulnerable to imprecision and incoherence. Accordingly, it is necessary to plead exactly the nature of the behaviour said to represent the failure to observe that ‘norm of conduct’. In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*, the Court underscored the importance of a precise identification of the factual basis of an action based on misleading or deceptive conduct:

It necessarily follows that when the section is sought to be used in litigation as the foundation of a cause of action or claim for some specific form of relief, it is imperative that the factual basis upon which the Section is alleged to be brought into play must be stated with appropriate clarity in a statement of claim.

*Experience is showing that the Court must be astute in the prevention of this type of situation by requiring, in the early stages of litigation, that claims based on [s18] be pleaded with appropriate precision and in a manner that enables the factual issues for trial to emerge with clarity.*¹³

What is the basis of the ACCC's cause of action? The ACCC alleges that Australian consumers are increasingly aware of animal welfare issues, concern that is reflected in their purchasing patterns. It also notes the Commonwealth government's intention, expressed in its Labelling Logic Report, to regulate consumer values issues associated with food products through the misleading or deceptive conduct provisions of the ACL.

In these circumstances, the ACCC's statement of claim¹⁴ pleads that the respondent, Hestia, has, in trade or commerce':

- in connection with the supply and promotion of the supply of eggs produced in Australia for consumption and branded

¹² *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286.

¹³ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (1998) ATPR 41-633, 40,977.

¹⁴ Rule 8.05 Federal Court Rules 2011.

'Hestia Healthy Choice Eggs' engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s18 of the *Australian Consumer Law* consisting of Schedule 2 to the *Competition and Consumer Act 2010* (Cth); and

- in connection with the supply of meat products sourced in Australia and offered for supply, has engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s18 of the *Australian Consumer Law* consisting of Schedule 2 to the *Competition and Consumer Act 2010* (Cth);

In particularising its case, the ACCC alleges that the misleading conduct consisted:

- in the period from April 2011 until January 2012, producing or causing to be produced, egg cartons in its 'Hestia Healthy Choice Range' displaying images of chickens roaming on green pastures, accompanied by labels stating 'Be confident in choosing Hestia Eggs: Free Range is the Healthier Choice'. In doing so, Hestia represented that eggs from the 'Hestia Health Choice Range' were obtained from chickens raised in free-range green outdoor pastures in circumstances where the chickens had at all times, substantial space in an outdoor environment permitting them to roam freely; and;
- in the period from September 2011 until January 2012, causing to be sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals.

The ACCC's originating application¹⁵ seeks a number of orders including injunctive relief, corrective advertising and orders requiring that future sales of meat products will be labelled as 'Halal', 'Kosher' or 'Slaughtered According to Religious Ritual'.

Not surprisingly, Hestia intends to vigorously defend the ACCC's action.

¹⁵ Rule 8.03 Federal Court Rules 2011.

Part III – ‘Free Range Eggs’ – Positive Conduct

The ACCC’s first concern relates to the allegedly misleading or deceptive presentation of the ‘Hestia Healthy Choice Range’ eggs. The evidence establishes that some 80% of the eggs retailed by Hestia under this banner were actually obtained from battery hen farms where the hens were kept in cages.

In its statement of claim, the ACCC alleges that Hestia has engaged in misleading or deceptive conduct in breach of ACL s18. The general prohibition against misleading or deceptive conduct is one of the most frequently litigated prohibitions in the ACL. The former s52 of the *Trade Practices Act 1974* (Cth) is now s18 of the *Australian Consumer Law* and very simply provides: ‘person must not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive’.

This very wide-ranging prohibition has ‘been discussed and applied in innumerable authorities’¹⁶ and has given rise to an astonishing variety of case-law encompassing almost every aspect of commercial and non-commercial activity. In *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*, the High Court commented on the pervasive nature of litigation involving allegations of misleading and deceptive conduct:

*The cause of action for contravention of statutory prohibitions against conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive has become a staple of civil litigation in Australian Courts at all levels.*¹⁷

Far from being confined to straightforward transactions between corporate traders and consumers, the prohibition against misleading or deceptive conduct contained in s18 of the Australian Consumer Law extends to inter-corporate commercial activity, governmental activity and into circumstances that other areas of law, such as the law of negligence would have traditionally addressed. Allegations of misleading or deceptive conduct have therefore been pleaded in cases involving obvious examples of everyday commercial activity to extremely obscure conduct.

¹⁶ AMI Australia Holdings Pty Limited v Blade Medical Institute (Aust) P/L (No2) [2009] FCA 1437, [64] per Flick J.

¹⁷ Miller & Associates Insurance Broking P/L v BMW Australia Finance Limited (2010) 241 CLR 357, 364.

The bewilderingly wide range of circumstances in which misleading or deceptive conduct has been alleged is perhaps explained by the ease with which ACL s18 can be pleaded.¹⁸

There is no need to establish a contractual relationship between the parties. There is no need to establish that the defendant corporation owed the plaintiff a duty of care that has been breached. In fact, the plaintiff does not even have to establish that anyone has actually been misled or deceived. All that must be established is that there has been conduct in trade or commerce that is, or is likely to be misleading or deceptive.

ACL s18 - What Must be Established?

The text of s18 Australian Consumer Law is relatively straightforward. Three elements must be satisfied to establish a contravention:

1. A corporation or person engages in conduct;
2. In trade or commerce; that is
3. Misleading or deceptive or likely to mislead or deceive.

At this point, it should be noted that although s52 of the TPA is now s18 of the *Australian Consumer Law*, the case-law relating to the interpretation of s52 will continue to guide the Courts in evaluating conduct alleged to breach s18. The Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* Cth, specifically states:

Section 18 of the ACL replaces the repealed Section 52 of the TP Act. The substance of the drafting of the prohibition has not been changed, other than changing the reference to 'a corporation' to 'a person'. Accordingly, the well-developed jurisprudence relating to s52 of the TP Act is relevant to the

¹⁸ The High Court noted 'Its frequent invocation, in cases to which it is applicable, reflects its simplicity relative to the torts of negligence, deceit and passing off' *Ibid*.

*interpretation or understanding of the meaning and application of Section 18 of the ACL.*¹⁹

Most of the case law discussed in this article involves conduct evaluated under s52. However, for the sake of clarity, I will substitute '[s18]' for 's52' in relevant case-law extracts. There is no material difference in the sections and the substitution is intended for ease of conceptualising the argument as involving ACL s18 rather than TPA s52.

Although the elements of ACL s18 are clear, the interpretation and application of those elements has not been straightforward. The High Court in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* admitted:

*The words of [s18] have been said to be clear and unambiguous Nevertheless they are productive of considerable difficulty when it becomes necessary to apply them to the facts of particular cases. Like most general precepts framed in abstract terms, the section affords little practical guidance to those who seek to arrange their activities so that they will not offend against its provisions.*²⁰

These difficulties often arise in satisfying threshold requirements for successfully establishing a contravention of ACL s18. First, the conduct of the person or corporation must be assessable under the *Competition and Consumer Act 2010* (Cth). Second, the conduct must be 'in trade or commerce'; third, there must be an identifiable 'class of consumers' who are alleged to have been misled; and fourth, the conduct must have in fact caused the misled state of mind, and to succeed in recovering damages, the loss or damage must have been caused by the allegedly misleading or deceptive conduct.

In working through these requirements the Courts have developed a methodology in relation to s52 that enables conduct to be evaluated. There are certain elements built into that methodology that must be examined in interpreting ACL s18.

A Norm of Conduct Not an Imposition of Liability

¹⁹ Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), 37, [3.11].

²⁰ *Parkdale Custom Built Furniture P/L v Puxu Proprietary Limited* (1988 - 1982) 149 CLR 191, 197 per Gibbs CJ.

Section 18 of the Australian Consumer Law does not actually create a cause of action. It simply establishes a standard of conduct; a person must not in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

The Court in *Brown v Jam Factory Pty Ltd* noted:

Section [18] does not purport to create liability at all; rather it establishes a norm of conduct, failure to observe which has consequences provided for elsewhere in the same statute or under the general law.²¹

When the Court mentioned ‘consequences provided for elsewhere in the same statute’ it was referring to the remedies and orders available under the *Trade Practices Act 1974* (Cth) for a contravention of Part V of the TPA that included s52. Likewise, the ‘norm of conduct’ provided for by ACL s18 does not of itself establish the consequences for a breach. The remedial provisions for a contravention of ACL s18 are found in other parts of the ACL; principally in Chapter 5 and include injunctive relief²² and damages.²³

Conduct ‘In Trade or Commerce’

For the purposes of this article, and consistent with the authoritative interpretation of that term by the High Court in *Concrete Constructions (NSW) Pty Limited v Nelson*,²⁴ the sale for profit of food animal products by Hestia is conduct that is in trade or commerce for the purposes of the ACL. Consistent with the decision in *Concrete Constructions*, the retail sale of products is an activity that of itself bears a trading or commercial character.

Having established that the relevant conduct of Hestia was ‘in trade or commerce’ the next step is to inquire whether it was in fact misleading or deceptive or likely to mislead or deceive.

When is Conduct ‘Misleading or Deceptive’?

²¹ *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340, 348.

²² ACL s 232.

²³ ACL s 236.

²⁴ *Concrete Constructions (NSW) Pty Limited v Nelson* (1990) 169 CLR 594.

Conduct is misleading or deceptive when it ‘leads into error’. The High Court in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* explained:

The words of [s18] require the Court to consider the nature of the conduct of the corporation against which proceedings are brought and to decide whether that conduct was, within the meaning of that section, misleading or deceptive or likely to mislead or deceive One meaning which the words 'mislead' and 'deceive' share in common is 'to lead into error'.²⁵

The Full Federal Court in *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* formulated the requirement as follows:

In order to determine whether there has been any contravention of [s18] of the Act, it is necessary to determine whether or not the conduct complained of amounted to a representation which has or would be likely to lead to a misconception arising in the minds of that section of the public to whom the conduct (which may include refraining from doing an act) has been directed.²⁶

Whether evaluating the conduct of corporations or of persons, there are three threshold issues that need to be addressed before the prohibition in ACL s 18 can be established.

1. Whether conduct is ‘in trade or commerce’;
2. The Taco Bell²⁷ methodology for evaluating misleading or deceptive conduct; and
3. The Campomar²⁸ methodology employed for evaluating the relevant ‘class of consumers’ alleged to have been misled.

These foundational methods or principles influence whether ACL s18 even applies (because the conduct in question might not be ‘in trade or commerce’) and if it does, who might have been misled (identifying the ‘class’ of consumers through the Campomar methodology) and then

²⁵ *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* (1981 - 1982) 149 CLR 191, 198.

²⁶ *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* (2006) ATPR 42-106, 44,890.

²⁷ *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 24 ALR 177.

²⁸ *Campomar Sociedad v Nike International* (2000) 202 CLR 45.

whether that conduct is misleading or deceptive in breach of s18 of the Australian Consumer Law (the Taco Bell methodology).

The Taco Bell Methodology

Conduct is misleading or deceptive if it 'leads into error'. But what is the method by which conduct is considered to have led into error and therefore breached ACL s18? What processes does the Court undertake in making its assessment? In *Apotex Pty Ltd v Les Laboratoires Servier (No 2)*, the Court stated:

In Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 24 ALR 177 at 202 Deane and Fitzgerald JJ outlined a series of propositions to be considered in assessing whether conduct is misleading or deceptive under [s18] of the Act:

- *It is necessary to identify the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive falls to be tested;*
- *Once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations;*
- *Evidence that some individual has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Regardless, such evidence does not of itself conclusively establish the conduct to be misleading or deceptive, the test is objective and the Court must determine for itself;*
- *It is necessary to inquire why any proven misconception has arisen. It is only by this investigation that the evidence of those who are shown to have been led into error can be evaluated and it can be determined whether they are confused because of misleading or deceptive conduct on the part of the respondent.*

²⁹

²⁹ *Apotex Pty Ltd v Les Laboratoires Servier (No 2)* (2008) ATPR 42-235, 49,206.

Application of the Taco Bell Methodology

This process of evaluation, sometimes referred to as the ‘*Taco Bell Steps*’ has been adopted and elaborated upon, either explicitly or implicitly by almost all decisions in which the Court is required to evaluate whether conduct is misleading or deceptive or likely to mislead or deceive.

For example, in *Domain Names Australia Pty Ltd v .au Domain Administration Ltd*, the Full Court stated:

It has long been established that:

- *When the question is whether conduct has been likely to mislead or deceive, it is unnecessary to prove anyone was actually misled or deceived...*
- *Evidence of actual misleading or deception is admissible and may be persuasive but is not essential...*
- *The test is objective and the Court must determine the question for itself...*
- *Conduct is likely to mislead or deceive if that is a real or not remote possibility, regardless of whether it is less or more than 50%.³⁰*

See also *AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd*.³¹

In other cases, Courts have not explicitly set out the Taco Bell steps, but have implicitly adopted them. For example, in *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd*, the Full Court referred to Taco Bell in explaining its approach to the evaluation of the conduct under challenge in that case.

The Full Court stated:

For [s18] of the Act to be enlivened it is sufficient that the conduct complained of, in all the circumstances, answers the statutory description, that is to say, that it is misleading or deceptive or likely to mislead or deceive. It is unnecessary to

³⁰ *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215, [17] – [18]

³¹ *AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd*. (2009) 262 ALR 458, 472.

go further and establish that any actual or potential consumer has taken or is likely to take any positive step in consequence of the misleading or deception.

*That is not to say that evidence of actual misleading or deception and of steps taken in consequence thereof is not likely to be both relevant and important on the question whether the relevant conduct in fact answers the statutory description.*³²

A similar re-formulation of the Taco Bell steps was adopted by the Court in *Johnson & Johnson Pacific Pty Limited v Unilever Australia Limited (No 2)*.³³ The Court in *Unilever Australia Limited v Goodman Fielder Consumer Foods Pty Ltd*³⁴ also adopted the Taco Bell steps without referring to the case itself.

See also *Australian Competition and Consumer Commission v Australian Dreamtime Creations Pty Ltd*.³⁵

A Consistent Approach to Principles – The Basic Evaluative Framework

The consistent approval of the Taco Bell steps enables a summary of the basic principles employed by the Courts in evaluating whether conduct is misleading or deceptive or likely to mislead or deceive.³⁶

The principles set out below have been extracted from a number of recent decisions of the Federal Court including *ACCC v Clarion Marketing Pty Ltd*,³⁷ *Butcher v Lachlan Elder Realty Pty Limited*³⁸ and *ACCC v Australian Dreamtime Creations Pty Ltd*.³⁹

There are many other cases in which these principles have been stated (in various ways) and elaborated upon, and they form a basic conceptual

Alex Bruce 16/1/2013 12:00 PM

Comment [1]: The words “misleading or deception” are in the print and electronic versions of the judgement

32 *Astrazeneca Pty Ltd v Glaxosmithkline Australia Pty Ltd* (2006) ATPR 42-106, 44, 890.

33 *Johnson & Johnson Pacific Pty Limited v Unilever Australia Limited (No 2)* (2007) ATPR 42-136, 46,618 - 46,619 and 46,625.

34 *Unilever Australia Limited v Goodman Fielder Consumer Foods Pty Ltd* (2009) ATPR 42-305, [18] – [23].

35 *Australian Competition and Consumer Commission v Australian Dreamtime Creations P/L* (2009) 263 ALR 487, 493.

36 Alex Bruce, *Introduction to Misleading or Deceptive Conduct*, Chapter 3 in *Consumer Protection Law in Australia*, (LexisNexis Butterworths, Australia, 2011) 51, 73.

37 *ACCC v Clarion Marketing Pty Ltd* [2009] FCA 1441, 8 – 9.

38 *Butcher v Lachlan Elder Realty Pty Limited* (2004) 218 CLR 592, 621-626.

39 *ACCC v Australian Dreamtime Creations Pty Ltd* (2009) 263 ALR 487, 493 – 494.

framework against which allegations of misleading or deceptive conduct may be evaluated. The following ten principles form that basic evaluative framework:

- Whether a representation is likely to mislead or deceive is an objective question of fact, to be determined having regard to all the circumstances of the conduct and not just some isolated aspect of that conduct;
- Conduct is misleading or deceptive if leads into error. It is likely to be misleading or deceptive if there is a real chance that the conduct or representations will mislead or deceive;
- It is necessary to identify some conduct, whether in the form of a representation, an omission or some other form, that led the consumer(s) into error;
- It is necessary to identify the class of consumers toward whom the allegedly misleading conduct was directed;
- Having identified the relevant class of consumers, the test to be applied is objective, that is, whether an ordinary and reasonable person from the class is likely to have been misled or deceived;
- The process involved in identifying the ‘ordinary and reasonable’ person from the class differs depending on whether the allegedly misleading or deceptive conduct was directed toward specific and identified individuals or to a large class;
- Actual intention to mislead or deceive is not necessary to establish a breach of s18 of the ACL, but if intention is present, a Court may be more likely to find that the conduct complained of was misleading;
- Conduct may be misleading or deceptive if it induces error, but it is not sufficient merely to show that it may have led to confusion or caused people to wonder;
- Actual evidence that some people may have been misled is not essential but is admissible and may be persuasive if given;
- A corporation does not avoid liability for breach of s18 because a person who has been the subject of misleading or deceptive conduct could have discovered the misleading or deceptive conduct by proper inquiries.

Application of Relevant Case Law – ‘Positive’ Labelling Representations.

These principles form the basic legal framework for evaluation, in terms of ACL s18, of the ACCC’s allegations against Hestia.

In relation to the first allegation, existing case law demonstrates how the ACL can be successfully employed against Hestia in relation to the first set of the ACCC's allegations; that Hestia has engaged in misleading or deceptive conduct in falsely representing that its 'Healthy Choice Range' eggs are free-range.

Since 2010, the Australian Competition and Consumer Commission has instituted proceedings in the Federal Court of Australia⁴⁰ against several Australian suppliers alleging misleading, deceptive or false claims concerning food animal products.

At the time of writing, one of those causes of action remains on foot⁴¹ while fresh proceedings against yet another supplier, Rosie's Free Range Eggs, were instituted by the ACCC on 8 March 2012.⁴²

The unreported decisions in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd*⁴³ and *Australian Competition and Consumer Commission v Turi Foods Pty Ltd*⁴⁴ provide useful guidance about the relationship between product labelling and food animal welfare and how the misleading or deceptive conduct provisions of the ACL can be deployed to ensure food animal products accurately reflect antecedent animal husbandry practices.

In *Australian Competition and Consumer Commission v C.I & Co Pty Ltd*, a Western Australian based family owned company, C.I & Co Pty Ltd ('CI'), acquired eggs from egg farms and supplied them to retailers, cafes and restaurants.

Between June 2008 and April 2010, CI acquired more than a million dozen eggs produced by battery cage hens and 12,000 dozen free-range eggs. However, in that period, CI supplied its customers with nearly 900,000 dozen eggs that it had labelled 'free range', conduct described by the Court as involving 'a high level of dishonesty'.⁴⁵

40 Part XI, s138(1) of the Competition and Consumer Act 2010 (Cth) confers jurisdiction on the Federal Court of Australia in relation 'to any matter arising under this Part or the Australian Consumer Law'.

41 ACCC v Baiada Poultry Pty Ltd (ACN 002 925 948) & Ors (VID 974 of 2011).

42 ACCC Takes Court Action Against SA Egg Supplier, ACCC Media Release 8 March 2012.

<<http://www.accc.gov.au/content/index.phtml/itemId/1037910>> (Accessed 12 May 2012).

43 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511

44 *Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2)* [2012] FCA 19.

45 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

In doing so, CI and its directors earned a significant amount of revenue they would not otherwise have earned if the eggs had been truthfully labelled as ‘cage eggs’. For example, the Court noted that in a two-week representative period between 15 and 30 April 2010, CI and its directors earned between \$5,744 and \$9,008 in revenue ‘which they would not have derived had the eggs been labelled clearly as ‘cage eggs’’.⁴⁶

Following an ACCC investigation, CI and its directors admitted the deception and that they had contravened Sections 52, 53(a) and 55 of the *Trade Practices Act 1974* (Cth).⁴⁷

Both CI and the directors consented to certain orders being made against them, including declarations, injunctive relief and corrective advertising.

Because CI and its directors had admitted the contraventions and consented to orders being made, the Court was not required to establish CI’s liability through the Taco Bell and Campomar methodologies discussed above. It has become increasingly common for respondents to agree to consent orders and to make joint submissions on penalties with the ACCC, thereby avoiding a substantive trial on the issues.

Nevertheless, the Court cannot simply make orders and impose penalties just because parties consent to them. Before it does so, the Court must be satisfied that the facts before it actually do disclose a breach of the CCA or ACL.⁴⁸

In this case, the Court accepted that the relevant sections of the TPA (now ACL) had been breached ‘following many years of unlawful conduct which must have yielded considerable undeserved profit’.⁴⁹

Significantly, the Court clearly explained the relationship between the misleading labelling and consumer interest in food animal welfare. The misleading labels ‘amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to

⁴⁶ Ibid [14].

⁴⁷ These are now Sections 18, 29(1)(a) and 33 respectively, of the ACL.

⁴⁸ *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (1999) ATPR 41-702, 43,000.

⁴⁹ *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [21].

advance the cause of animal welfare by so doing.’⁵⁰

This is a simple and direct statement of the intended use of the ACL anticipated by the Commonwealth Labelling Logic Report.

In an increasingly competitive market for food products, the Labelling Logic Report anticipates that consumer demand for ethically produced animal products, what it calls ‘values issues’, will signal producers to implement food animal welfare practices such as free-range farms.⁵¹ Unfortunately the case is also a clear example of the dishonest and unethical practices warned about by ACCC Commissioner Martin and discussed earlier.

Growing consumer demand for welfare-friendly animal products is reflected in the continued willingness of some suppliers to mislead consumers. For example, on 8 March 2012, the ACCC instituted proceedings against Ms Rosemary Bruhn, trading as Rosie’s Free Range Eggs in South Australia. In instituting proceedings, the ACCC ‘alleges that from March 2007 to October 2010, Ms Bruhn represented that eggs she supplied to business customers including 117 customers in South Australia such as retail outlets, bakeries, cafes and restaurants, were free range eggs when a substantial proportion of the eggs were not free range but cage eggs’.⁵²

At the time of writing, the matter is before the Federal Court.

Also still before the Court are proceedings commenced in September 2011 by the ACCC against Turi Foods Pty Ltd, Baiada Poultry Pty Ltd, Bartter Enterprises Pty Limited and the Australian Chicken Meat Federation Inc (‘the ACMF’). Baiada Poultry and Bartter Enterprises supply chickens throughout Australia under the well-known ‘Steggles’ brand name while Turi Foods supplies ‘La Ionica’ brand chickens in New South Wales and Victoria.

The ACCC alleged that these corporations engaged in misleading or deceptive conduct in breach of both the TPA and the ACL in making certain representations associated with the chicken meat products they

⁵⁰ Ibid [31].

⁵¹ Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 47, [3.20].

⁵² ACCC Takes Court Action Against SA Egg Supplier, ACCC Media Release 8 March 2012.

<<http://www.accc.gov.au/content/index.phtml/itemId/1037910>> (Accessed 12 May 2012).

supplied.⁵³ The ACCC alleged that *'Baiada Poultry and Barter Enterprises made false or misleading claims in print advertising and product packaging, that Steggle's meat chickens are raised in barns with substantial space available allowing them to roam freely' when this was not the case at all*.⁵⁴

Similar allegations were made against Turi Foods where it was alleged that *'Turi Foods made false or misleading representations through in-store displays and advertising on delivery trucks. La Ionica brand meat chickens were claimed to be able to roam freely in barns with substantial space and in conditions equivalent to a free range system*.'⁵⁵

While it is on-going, this litigation has been bitterly contested. In December 2011, the Australian Chicken Meat Federation sought interlocutory orders dismissing the ACCC's proceedings either on the basis that no reasonable cause of action was disclosed⁵⁶ or that the ACCC had no reasonable prospect of successfully prosecuting its claims.⁵⁷

The actual evidence indicated that the average space available to each chicken was about 500 square centimetres.⁵⁸ To provide some perspective, an A4 sheet of paper has an area of 625 square centimetres. A standard laying hen is at least 40-cm high when she stands erect and is approximately 45-cm long and 18-cm wide, without her wings extended. Her body space takes therefore takes up an area of about 810 square centimetres.

Despite the mathematical bleakness of the evidence, the ACMF claimed that there were simply no grounds for alleging that chickens were not 'free to roam' as they had represented.⁵⁹ Perhaps not surprisingly, Tracey J refused to strike out the ACCC's action, observing that 'five hundred centimetres squared is a remarkably small space. In order for any one chicken to have a larger area of movement, others would have

53 ACCC Takes Action over 'Free to Roam' Chicken Claims, ACCC Media Release 7 September 2011.

< <http://www.accc.gov.au/content/index.phtml/itemId/1006465/fromItemId/966100>> (Accessed 12 May 2012)

54 Ibid.

55 Ibid.

56 Rule 26.01(1)(e) Federal Court Rules 2011.

57 Rule 26.01(1)(a) Federal Court Rules 2011.

58 Australian Competition and Consumer Commission v Turi Foods Pty Ltd [2011] FCA 1382, [14] (Unreported decision of Tracey J dated 2 December 2011).

59 Ibid [10].

to be confined within an even smaller space.’⁶⁰

By January 2012, Turi Foods Pty Ltd had decided to conclude the proceedings against it by admitting the contraventions and submitting to consent orders.⁶¹ After reviewing the evidence, Tracey J concluded:

*the stock densities, which La Ionica has admitted are to be found in the barns in which its chickens are raised, are maintained at such a level that the chickens have severe restrictions placed on their capacity to roam, if, indeed any such capacity exists.*⁶²

These conclusions would later return to haunt Tracey J. The three other respondents continue to fight the ACCC’s allegations and⁶³ at least two of the respondents have also decided to personally attack the Judge.

In February 2012 Baiada Poultry Pty Ltd and Bartter Enterprises attempted to have Tracey J disqualify himself from hearing the case on the grounds of apprehended bias.⁶⁴ Both Baiada Poultry and Bartter Enterprises owned and operated chicken growing sheds in the same way as Turi Foods, including equivalent stocking densities.

Accordingly, they alleged that Tracey J’s conclusion about stocking densities made in concluding the proceedings against Turi Foods ‘travelled beyond the agreed facts ... and constituted findings independently made by me.’⁶⁵ His Honour rejected the application and, at the date of writing this article, the litigation continues.

60 Ibid [13].

61 Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19 (unreported decision of Tracey J dated 23 January 2012)

62 Ibid [23].

63 It is usual for food animal suppliers to vigorously litigate against persons who threaten to expose their treatment of animals – see Takhar & Anor v South Australian Telecasters Ltd (BC 9702320, Unreported decision of Perry J of the Supreme Court of South Australia, 1997) involving an application for an injunction to restrain a current affairs program from airing footage of a battery hen egg farm operated by a supplier falsely selling eggs as ‘free range’; ABC v Lenah Game Meats Pty Ltd (2001) 185 ALR 1 in which a supplier of possum meat sought an injunction to restrain display of footage taken of the plant’s processing practices.

64 Apprehended bias exists where ‘a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.’ Michael Wilson & Partners v Nicholls (2011) 282 ALR 685, 692.

65 Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [2012] FCA 19 (unreported decision of Tracey J dated 23 January 2012) [18].

These decisions demonstrate that the misleading or deceptive conduct provisions in the ACL can be effectively deployed to prevent suppliers of food animal products from deceiving consumers about value issues such as animal welfare conditions. They also reflect an awareness by the Courts of the relationship between consumer concern for food animal welfare and the information provided by suppliers on labels and advertising material.

At least in relation to positive representation such as ‘free-range’ or ‘free-to-roam’, the policy behind the Labelling Logic Report is likely to be well served by the effective enforcement of the ACL.

By preventing suppliers from making misleading or false claims associated with food animal products, consumers will be provided with sufficient and accurate information enabling them to make informed choices about their purchases.

This is especially important when, as North J in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* noted, consumers ‘seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.’⁶⁶

Part IV – Silence, Can Nothing Become Something?

The second of the ACCC’s allegations against Hestia are far more difficult for the case law to evaluate. It is alleged that Hestia sold meat products in circumstances that did not inform consumers that the meat products originated from animals that had been slaughtered according to religious rituals. The ACCC’s case depends on establishing that ACL s18 is wide enough to encompass a failure to advise or to inform as misleading or deceptive conduct.

In beginning this evaluation, the first step is to identify the relevant class of consumers alleged to have been misled by Hestia’s conduct.

Identifying the Relevant Class of Consumers

In assessing whether consumers have been or might have been misled or deceived by conduct allegedly in breach of s18 of the ACL, the Court must ‘test’ the conduct against the relevant class of consumers.

⁶⁶ *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

The Taco Bell methodology involves the Court first identifying the relevant section(s) of the public by reference to whom the question of whether conduct is or is likely to be misleading or deceptive falls to be tested; and once the relevant section of the public is established, considering the effect of the conduct by reference to all who come within the identified class, including the astute or the gullible, the intelligent or not so intelligent, educated or not educated and men and women of various ages and vocations.

Accordingly, the very first step involves identifying the class of consumers who are alleged to have been or may have been misled by the conduct. But this begs the further question: ‘how is the relevant class identified?’

This question is particularly problematic in the circumstances of the ACCC’s case against Hestia. For example, is the relevant class of consumers everyone in Australia who buys groceries at retail stores? Or is the relevant class of consumers smaller, only those who buy groceries at Hestia stores? Or is the relevant class confined by excluding some sub-set or other of a larger group? Or is it necessary to file and serve affidavit evidence from actual consumers polled, for example, on Saturday mornings while they were shopping?

These difficulties were adverted to by Gibbs CJ in *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* where His Honour stated:

Section [18] does not expressly state what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. It seems clear enough that consideration must be given to the class of consumer likely to be affected by the conduct. Although it is true, as has often been said, that ordinarily a class of consumers may include the inexperienced as well as the experienced and the gullible as well as the astute, the section must in my opinion, be regarded as contemplating the effect of the conduct on reasonable members of the class.

The heavy burdens which the section creates cannot have been intended to be imposed for the benefit of consumers who fail to

*take reasonable care of their own interests*⁶⁷

This view; that the section must be ‘regarded as contemplating the effect of the conduct on reasonable members of the class’⁶⁸ would seem to further complicate the exercise of identifying the relevant class. Now the High Court is apparently suggesting that however the relevant class of consumers is to be defined for the purposes of testing the allegedly misleading or deceptive conduct, that class only includes ‘reasonable members’.

But how does the Court go about identifying a reasonable member of a class that has, itself as yet eluded identification? Fortunately, the High Court in *Campomar Sociedad v Nike International*⁶⁹ provided some guidance in identifying the relevant class of consumers for the purposes of evaluating conduct against ACL s18.

In *Campomar*, the High Court commenced its discussion of identifying the relevant class of consumers by referring to a passage from the *Taco Bell* decision where the Full Federal Court stated:

*In some cases, such as an express untrue representation made only to identified individuals, the process of deciding that question of fact may be direct and uncomplicated. In other cases, the process will be more complicated and call for the assistance of certain guidelines upon the path to decision*⁷⁰

The High Court in *Campomar* noted that this passage drew a distinction between conduct that is directed towards identified individuals on the one hand, and to the general public (or larger class) on the other.

When the alleged misleading conduct is directed toward identified individuals, such as the purchasers of a business, the relevant ‘class’ is confined to those specific, identified purchasers.

However, in many cases, the relevant conduct is directed toward the public at large, especially when it is alleged that a company has breached ACL s18 in its advertising through the mass media or through labelling (or the lack thereof) of food animal products in a supermarket.

⁶⁷ *Parkdale Custom Built Furniture Proprietary Limited v Puxu Proprietary Limited* (1988 - 1982) 149 CLR 191, 199.

⁶⁸ *Ibid.*

⁶⁹ *Campomar Sociedad v Nike International* (2000) 202 CLR 45.

⁷⁰ *Ibid.* 84.

The Campomar Methodology

In that situation, the High Court created a three-stage methodology for identifying the relevant class. First it noted:

Here (conduct directed to the public) the issue with respect to the sufficiency of the nexus between the conduct or the apprehended conduct and the misleading or deception or likely misleading or deception of prospective purchasers is to be approached at a level of abstraction not present where the case is on involving an express untrue representation allegedly made only to identified individuals.⁷¹

This extract recognises that different evaluative methodologies are required when assessing conduct directed toward an identified consumer on the one hand, and more generalised conduct directed toward the public at large on the other.

When allegedly misleading conduct is directed toward identified individuals the inquiry is focussed on the conduct and whether it misled those individuals. As the High Court in *Backoffice Investments* noted:

In the case of an individual, it is not necessary that he or she be reconstructed into a hypothetical 'ordinary' person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct. The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct⁷²

In other words, the evaluation is relatively straightforward; identify the conduct alleged to be misleading and deceptive, examine whether the misled state of mind of the actual consumer (purchaser) was caused by the conduct in question or by some other cause.

This was the methodology outlined by the High Court in *Butcher v Lachlan Elder Realty Pty Ltd*, where the Court stated:

The plaintiff must establish a causal link between the impugned

⁷¹ Ibid 85.

⁷² *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610; 620-621.

*conduct and the loss that is claimed. That depends on analysing the conduct of the defendant in relation to that plaintiff alone. So here, it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known.*⁷³

However, this methodology focusses attention on the impact of the conduct on an individual consumer, and would not necessarily work well when there is no individual consumer. But it is still necessary to establish a nexus between the alleged misleading conduct on the one hand, and a misled state of mind of a consumer on the other. How is this nexus to be proven if there is no actual consumer against whom to test the conduct? For this reason the Campomar methodology admits to the necessity of approaching the task with a certain level of abstraction. What does this mean?

The second step therefore is to note that this 'level of abstraction' involves the following inquiry:

*Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class.*⁷⁴

Once that representative member of the class has been identified, the third step requires an 'inquiry to be made with respect to this hypothetical individual why the misconception complained has arisen or is likely to arise'.⁷⁵

This methodology was repeated by the High Court in its subsequent decision in *Campbell v Backoffice Investments Pty Ltd*:

This Court has drawn a practical distinction between the approach to characterisation of conduct as misleading or

⁷³ *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, [37].

⁷⁴ *Campomar Sociedad v Nike International* (2000) 202 CLR 45, 85, [103].

⁷⁵ *Ibid.*

*deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other. In the former case, the sufficiency of the connection between the conduct and the misleading or deception of prospective purchasers 'is to be approached as a level of abstraction not present where the case is one involving an express untrue representation made only to identified individuals'. Where conduct is directed to members of a class in a general sense, then the characterisation enquiry is to be made with respect to a hypothetical individual 'isolated by some criterion' as a 'reasonable member of that class.'*⁷⁶

In the context of the ACCC's case against Hestia, the alleged misleading conduct - i.e. the failure to advise consumers that meat products have originated from animals slaughtered according to religious ritual - falls within this second category, a national retailer selling food animal products to the general public.

The High Court in its *Campomar* and *Backoffice Investments* decisions refers to the evaluation of allegedly misleading or deceptive conduct directed toward a large class of consumers or the public generally taking place at a certain 'level of abstraction'.

According to the Court in *Campomar*, that 'level of abstraction' involves the following inquiry:

*Where the persons in question are not identified individuals to whom a particular misrepresentation has been made or from whom a relevant fact, circumstance or proposal was withheld, but are members of a class to which the conduct in question was directed in a general sense, it is necessary to isolate by some criterion a representative member of that class*⁷⁷

However, the issue that then presents itself is exactly what criterion is to be used in 'isolating' a representative member of the class? In *Backoffice Investments*, the High Court referred to 'reconstructing a hypothetical 'ordinary' person' for this purpose.⁷⁸ How is this 'reconstruction' to be undertaken?

⁷⁶ *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610, 620 [26].

⁷⁷ *Campomar Sociedad v Nike International* (2000) 202 CLR 45, 85 [103].

⁷⁸ *Campbell v Backoffice Investments Pty Ltd* (2009) 257 ALR 610, 620.

Reconstructing the ‘Ordinary Reasonable Member’ of the Class

Given this theoretical framework, the challenge for the ACCC is to identify an ordinary, reasonable member of the class of consumers against whom Hestia’s failure to inform is evaluated. Once that hypothetical reasonable member has been identified, and consistent with the Taco Bell methodology, the Court can then investigate whether there is a nexus between Hestia’s conduct and the alleged misled state of mind of that hypothetical reasonable member.

As the High Court in *Campomar* noted, the task of identifying this hypothetical reasonable member of the class occurs in the abstract. The ACCC must construct this member by ‘isolating by some criterion’ the qualities this member possesses.⁷⁹

Accordingly, the ACCC argues that the hypothetical representative of the class is an Australian consumer whose values include a concern for animal welfare issues and who seeks to exercise those values in the purchasing decisions they make. In support, the ACCC notes the observation made by North J in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* where His Honour noted, consumers ‘seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing’.⁸⁰

Despite the relatively straight-forward guidance provided by the High Court in its *Campomar* and *Backoffice Investments* decisions to identifying the hypothetical representative member of the class when conduct is directed to the public at large, there are several issues of interpretation that have arisen and must be addressed if the ACCC’s case is to succeed.

Necessity of Proving a Significant Proportion of Class Misled?

Hestia’s first attack alleges that in order for the ACCC to successfully establish a contravention of ACL s18, it is necessary for a certain proportion of the identified class to be misled. Hestia argues that the potential class of consumers of meat products in Australia is huge and that only a small number of that class would be misled by the conduct.

⁷⁹ Above n74.

⁸⁰ *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

Hestia argues that in these circumstances, it is not sufficient if, within a large class, only a small number of that class is misled when the majority are not or would not be misled.

The first argument has its origins in the decision in *10th Cantanae Pty Ltd v Shoshana Pty Ltd*⁸¹ where Wilcox J stated that it was necessary to establish that a significant proportion of the public must be misled before a statement could be considered misleading or deceptive in breach of the Act.

However, subsequent case law has rejected this approach. For example, in *National Exchange Pty Ltd v Australian Securities and Investments Commission* the Full Court concluded:

*To speak of a reasonable member of a class necessarily implies that one is speaking of a significant proportion of that class. It is impossible to postulate a situation in which the reasonable member of a class is not representative of such a proportion*⁸²

The conclusion of the Court in *National Exchange* was affirmed by the Full Federal Court later that year in *Domain Names Australia Pty Ltd v .au Domain Administration Ltd*.⁸³

This is a common sense conclusion. The High Court's Campomar approach in effect designates the hypothetical representative member of the class as 'proxy' for the balance of the class. It's as if all of the members of the identified class were rolled into the single hypothetical representative who stands as proxy for the whole.

Differential Knowledge?

Hestia's second attack concerns the level of knowledge to be imputed to the hypothetical representative member of the class.

Hestia argues that within the wide class of consumers purchasing meat products, some consumers are very informed about sales and marketing techniques and would not be misled by the absence of labels advising of the religious slaughter of animals. Hestia therefore argues that because

81 *10th Cantanae Pty Ltd v Shoshana Pty Ltd* (1988) ATPR 40-833, 49,001.

82 *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) ATPR 42-000, 48,715.

83 *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* [2004] FCAFC 247, [27] - [28].

some members of the class would not be misled, then the hypothetical representative cannot be misled.

This is a slightly more subtle argument. Both Hestia and the ACCC accept that it is necessary to identify a hypothetical consumer who stands in place of all the members of the relevant class of consumers to whom the impugned conduct is directed. However, in effect, Hestia is attempting to argue that because members of the identified class differ in their commercial and intellectual abilities, unless all members of the class would be misled by the relevant conduct, then none of them could be misled.

The Court in *National Exchange Pty Ltd v Australian Securities and Investments Commission* rejected such an argument, noting that:

*Whilst it is true that members of a class may differ in personal capacity and experience; that is usually the case whenever a test of reasonableness is applied. Such a test does not necessarily postulate only one reasonable response in the particular circumstances. Frequently, different persons acting reasonably, will respond in different ways to the same objective circumstances. The test of reasonableness involves the recognition of the boundaries within which reasonable responses will fall, not the identification of a finite number of acceptable reasonable responses.*⁸⁴

It is true that within an identified class of consumers, there will be different levels of knowledge, intelligence and commercial experience. But when the High Court in *Campomar* talks about isolating 'by some criterion a representative member of that class', it does not mean an attempt is made to identify one or other particular member of that class.

Rather, the process involves confecting a hypothetical reasonable member of the class who stands as proxy for the entire identified class of consumers.

This point was raised in *ACCC v Ascot Four Pty Ltd*⁸⁵ in the context of allegations that price representations in a jewellery catalogue were false or misleading. In that case, the ACCC had instituted proceedings against Ascot Four, trading under the name 'Zamels' alleging that price

⁸⁴ *National Exchange Pty Ltd v Australian Securities and Investments Commission* (2004) ATPR 42-000, 48,715 – 6.

⁸⁵ *ACCC v Ascot Four Pty Ltd* (2008) ATPR 42-251.

representations relating to jewellery in 'was' 'now' format and contained in a Christmas catalogue were false and misleading.

The Court recognised that there were consumers who possessed knowledge of the jewellery industry and others who did not.⁸⁶ There were also consumers who did not even read the catalogue.

The ACCC had instituted criminal proceedings under Part VC of the TPA. The Court approached the task of identifying the class of consumers in the following way:

The appropriate question is whether ordinary or reasonable members of the classes of prospective purchasers of the 11 jewellery items would understand the relevant contents of the Christmas catalogue as conveying the representation which I have found to have been made... . Of course, upon the whole of the evidence, clearly not all ordinary or reasonable prospective purchasers of the 11 jewellery items necessarily would have so understood that material There are obviously ordinary and reasonable members of the public among the potential purchasers of the defendant's jewellery who did not read or understand the Christmas catalogue

*There are also obviously ordinary and reasonable members of the public among the potential purchasers of the defendant's jewellery who are aware that, notwithstanding a ticketed price, they can negotiate a lower price However, such considerations do not detract from my conclusion that there was a group of ordinary and reasonable members of prospective purchasers of the 11 jewellery items to whom the representations I have found were made about the 11 jewellery items.*⁸⁷

However, the fact that not all of the consumers within an identified class would have been misled did not mean that none of the consumers were misled. The Court concluded that:

The fact that most or many of the consumers understood the representation in the way I have identified, but that some may not have done so, does not mean that the representation was

⁸⁶ Ibid 49, 530.

⁸⁷ Ibid.

*not made at all. The representation was still made ... even if some customers might reasonably have understood what was represented by the relevant parts of the Christmas catalogue in all the circumstances, that would not mean that the representation which I have identified was not made.*⁸⁸

Although the Court recognised that within the class of consumers, there would be differing levels of awareness and understanding concerning the price representations, it did not attempt to impute these different levels of knowledge to the consumers in testing the representations.

The approach of the Court in *Ascot Four* was referred to with approval by the Full Federal Court in *ACCC v Prouds Jewellers Pty Ltd*.⁸⁹ In *Apotex Pty Ltd v Les Laboratoires Servier (No 2)*⁹⁰, discussed above, the Court evaluated the representations directed toward three distinct classes of consumers; patients who used the drug ‘Coversyl’, the doctors who prescribed the drug and the pharmacists who dispensed the drug. The Court concluded:

The sections of the public to whom the stamp representations are directed are medical practitioners (doctors), pharmacists and patients who take or who are prescribed new Coversyl No reason has been advanced to sub-divide these groups into any sub-classes or areas of specialisation. The question is whether the advertisements would be likely to lead to a misconception arising in the minds of that section of the public to whom the conduct, or silence, has been directed.

*Where, as here, the representations are made to various classes of the public, the characteristics of the members of that class are relevant in order to determine whether a misconception is likely to arise from the conduct alleged (Campomar at [98]–[103]; Astrazeneca at [34]) It is therefore necessary to assess the reactions or likely reactions of the members of each class to whom the conduct was addressed (Campomar at [105]). The representations are to be tested by their effect on ordinary and reasonable persons within those groups (Campomar at [102]).*⁹¹

⁸⁸ *ACCC v Ascot Four Pty Ltd* (2008) ATPR 42-251, 49-530-1.

⁸⁹ *ACCC v Prouds Jewellers Pty Ltd* (2008) ATPR 42-268, 49,803.

⁹⁰ *Apotex Pty Ltd v Les Laboratoires Servier (No 2)* (2008) ATPR 42-235.

⁹¹ *Ibid* 49,209.

This extract demonstrates the Court's reluctance to sub-divide or fragment members of a particular class according to individual characteristics. The Court found that a reasonable member of each of these classes would be misled to varying degrees by the representations.

In Hestia's case, some consumers don't know or don't care about whether the meat products they purchase comes from animals slaughtered according to religious rituals.

However, the ACCC notes the observation of the Court in *ACCC v Ascot Four Pty Ltd*⁹² where the Court concluded that the fact that not all of the consumers within an identified class would have been misled did not mean that none of the consumers were misled.

In the circumstances of the present case, the Court is likely to conclude that the hypothetical representative member of the class is an Australian consumer who buys food animal products, including meat and who is not possessed of special industry knowledge about the slaughter of food animals.

The next field of battle therefore involves the difficult issue of whether Hestia's failure to advise the ordinary reasonable consumer that meat products they purchase may have originated from animals slaughtered according to religious ritual, constitutes misleading or deceptive conduct in breach of ACL s18. This is Hestia's strongest vector of attack.

Silence and the ACL – An Incoherent, Inconsistent and Lonely Concept

Whether and in what circumstances a failure to act, to disclose or to correct some information can constitute misleading or deceptive conduct in breach of ACL s18 is one of the more vexed issues in Australian consumer law. Although the case law does recognise the possibility, the Full Federal Court has lamented that it is 'not properly subject to any unifying principle.'⁹³

Accordingly, the issue lacks 'an entirely coherent and consistent framework of principles which is necessary for maximising the prospect

⁹² *ACCC v Ascot Four Pty Ltd* (2008) ATPR 42-251.

⁹³ *Rafferty v Madgwicks* (2012) FCAFC 37, [278].

of correctly applying the law to the facts.’⁹⁴

Answering the question: ‘does a failure by suppliers to advise consumers that meat products have originated from animals slaughtered by religious ritual, constitute misleading or deceptive conduct in breach of ACL s18?’, therefore involves the application of an inconsistent legal framework not only lacking coherency but also any form of unifying jurisprudential principles.

There are at least three reasons for the confused, inconsistent and often incoherent state of the law associated with this issue.⁹⁵

First, the prohibition in ACL s18 is directed toward ‘conduct’. Sections 2(2)(a) and 2(2)(c)(i) of the ACL provide that conduct can take the form of a refusal to do an act as well as refraining (otherwise than inadvertently) from doing that act. Most contraventions of ACL s18 are therefore positive in the sense that some extant written, visual or spoken representation has allegedly misled another party.

Now, it is accepted that a subjective or even objectively determined intention on the part of one party to mislead or deceive another is not required in order to breach ACL s18.⁹⁶ However, the presence of the words ‘otherwise than inadvertently’ in ACL s2 significantly complicates matters because it apparently does require the presence of intention or advertence. Courts across all Australian jurisdictions are divided in their attempts to reconcile these apparently contradictory elements.

But even if ACL s18 does require some degree of information disclosure, the second difficulty involves the extent of that disclosure. In the context of sensitive commercial negotiations, a balance needs to be struck between the competing imperatives of maintaining a strong tactical bargaining position on the one hand, with the necessity of disclosing sufficient information in a way that avoids breaching ACL s18 on the other.

Third, how is an absence of a representation, statement or information to be evaluated under ACL s18?

⁹⁴ *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) WASCA 76, [43].

⁹⁵ Frederika De Wilde goes so far as to conclude that the entire issue is ‘fundamentally flawed’; ‘The Less Said – The Worse: Silence as Misleading or Deceptive Conduct’ (2007) 15 *Trade Practices Law Journal* 7, 10-11.

⁹⁶ *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216, 234.

All of these difficulties are encountered in evaluating whether Hestia's failure to advise consumers that the meat products they have, or are about to purchase have originated from animals that have not been stunned prior to slaughter but instead have had their throats cut without prior stunning pursuant to Jewish or Islamic religious requirements.

At this point, the temptation is to conclude that because the question is simply too difficult to answer, it is not likely to be the subject of legal proceedings requiring a Court to do so. This is especially so in Australia where the legal costs structure makes no exception for speculative or public interest litigation.⁹⁷

For example, if it were not the ACCC taking legal action, but Animals Australia,⁹⁸ a non-profit, charitable organisation reliant on public donations and dedicated to animal welfare, instituting what it called 'public interest' proceedings in the Federal Court of Australia against Hestia alleging misleading or deceptive conduct over meat labels that did not advise consumers that the meat was halal or kosher, they would face similar costs orders as private commercial litigants.⁹⁹

Despite any public interest characterisation of its cause of action, the High Court has consistently decided that public interest litigants such as Animals Australia should not be granted a 'free kick' in relation to costs orders.¹⁰⁰

Given the conceptual uncertainty associated with Animal Australia's cause of action (silence as misleading conduct) if it were to lose a lengthy trial, an eventual adverse costs order may be crippling. And even before a substantive trial, a strategically timed application for security for costs by Hestia may have the effect of summarily terminating Animal Australia's proceedings before a substantive resolution of the issues.¹⁰¹

As the discussion in the first of these two articles indicated, this issue is

97 Security for Costs and Associated Costs Orders, New South Wales Law Reform Commission, Consultation Paper 13, May 2011, Sydney, 81.

<[http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/CP13.pdf/\\$file/CP13.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/CP13.pdf/$file/CP13.pdf)> (Accessed 14 May 2012).

98 <http://www.animalsaustralia.org/about/> (Accessed 14 May 2012).

99 Section 43 Federal Court of Australia Act 1976 (Cth) and Rules 40.01 and 40.02 of Federal Court Rules 2011.

100 *Australian Conservation Foundation v Forestry Commission* (1988) 81 ALR 166, 170-171; *Oshlack v Richmond River Council* (1998) 193 CLR 72, [134]

101 *Sales-Cini v Wyong City Council* [2009] NSWLEC 201, [47], [60].

far from speculative. Consumers in the European Union, the United Kingdom, New Zealand, Australia and the United States care about whether food animals have been slaughtered according to religious practices. This concern is simply a reflection of the observation made by the Court in *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* about consumers deploying their buying power to express concern for the welfare of food animals generally¹⁰²

An Absence can be a Presence

The prohibition in ACL s18 is directed toward engaging in ‘conduct’ that is misleading or deceptive or likely to mislead or deceive. The word ‘conduct’ is commonly associated with positive acts, such as representations made in an advertisement. However, is the term wide enough to encompass a failure to act; that is, negative conduct?

The Explanatory Memorandum certainly states that it does:

*Section 18 of the ACL refers only to ‘conduct’ which is misleading or deceptive or is likely to mislead or deceive. The High Court has found that the ambit of ‘conduct’ is not limited to a positive action or representation, and that silence can be considered misleading or deceptive in certain circumstances.*¹⁰³

At the time the Explanatory Memorandum was written, this extract was actually incorrect. In support of its conclusion there is a footnoted reference to the decision in *Demagogue Pty Ltd v Ramensky*.¹⁰⁴ However, *Demagogue* is not a decision of the High Court, but of the Full Federal Court and so is not authority for the proposition that the High Court has found that silence can be considered misleading or deceptive conduct.

Since then, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*¹⁰⁵ has accepted that silence; the failure to disclose certain information can constitute ‘conduct’ for the purposes of s52 of the TPA (including ACL s18). How did the High Court reach this conclusion?

102 *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

103 Explanatory Memorandum to Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth), [3.16].

104 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

105 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357.

To begin with, the High Court referred to the definition of ‘conduct’ as it then existed in s4 of the TPA, which is in identical terms to ACL s4. ‘Conduct’ is defined in s 2(2) of the ACL by reference to the expression ‘engaging in conduct’. Section 2(2) of the ACL is quite extensive and provides:

2(2) In this Schedule:

(a) a reference to engaging in conduct is a reference to doing or refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

(iii) the requiring of the giving of, or the giving of, a covenant; and

(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), is a reference to the doing of or the refusing to do any act, including:

(i) the making of, or the giving effect to a provision of, a contract or arrangement; or

(ii) the arriving at, or the giving effect to a provision of, an understanding; or

(iii) the requiring of the giving of, or the giving of, a covenant; and

(c) a reference to refusing to do an act includes a reference to:

(i) refraining (otherwise than inadvertently) from doing that act; or

(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

For the High Court in Miller, the crucial parts of this definition are s2(2)(a) and s2(2)(c)(i). These sections provide that conduct can take the form of a refusal to do an act and refraining (otherwise than inadvertently) from doing that act. These subsections correspond to the former s4(2)(a) and (b) of the TPA. The definition of 'engaging in conduct' in s2(2) of the ACL is wide enough to bring a failure to do or say something within that definition.

However, this is just the first step because it is then necessary to explore the circumstances in which that conduct can be misleading or deceptive in breach of ACL s18.

The starting point is the seminal decision of the Full Federal Court in *Demagogue Pty Ltd v Ramensky*, where Black CJ observed:

Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.

To speak of 'mere silence' or of a duty of disclosure can divert attention from that primary question. Although 'mere silence' is a convenient way of describing some fact situations, there is in truth no such thing as 'mere silence' because the significance of silence always falls to be considered in the context in which it occurs. That context may or may not include facts giving rise to a reasonable expectation, in the circumstances of the case, that if particular matters exist they will be disclosed¹⁰⁶

This approach to the evaluation of silence as misleading or deceptive conduct has been consistently applied by the Courts across all

¹⁰⁶ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.

Australian jurisdictions and was approved of by the High Court in Miller.¹⁰⁷

There are several points to note about this extract from Demagogue:

- The comment concerning ‘not imposing any general duty of disclosure’ is a reference to early case law that required a plaintiff to establish that the defendant owed a positive duty of disclosure before the failure to disclose could be considered misleading or deceptive in terms of the TPA; *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd*,¹⁰⁸
- However, the Courts have comprehensively rejected the need to establish a ‘duty to disclose’ in favour of evaluating the conduct as a whole, within the entirety of the circumstances of the case – *Commonwealth Bank of Australia v Mehta*,¹⁰⁹
- Therefore, the crucial question is whether the context of the facts gave rise to a ‘reasonable expectation of disclosure’ that if a particular matter existed, that matter would be disclosed; and
- If the answer to that question is ‘yes’ then it may be that in the circumstances of the case, that failure to disclose the particular fact amounted to conduct that was misleading or deceptive or likely to mislead or deceive in breach of s18 of the ACL.

The essential inquiry concerns whether, in the circumstances of the case, there existed a reasonable expectation that the relevant information would be disclosed.

A Reasonable Expectation of Disclosure

This phrase ‘reasonable expectation of disclosure’ is not found in either the ACL generally or s18 specifically. Initially, French J (now Chief Justice of the High Court) in *Kimberley NZI Finance Limited v Torero Pty Ltd*:

The cases in which silence may be so characterised are no doubt many and various and it would be dangerous to essay any principle by which they might be exhaustively defined.

107 *Stora Enso Australia Pty Ltd v CPI Group Limited* (2007) ATPR (Digest) 46-270, 54,523.

108 *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) ATPR 46-010.

109 *Commonwealth Bank of Australia v Mehta* (1991) 23 NSWLR 84.

*However, unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed it is difficult to see how mere silence could support the inference that that fact does not exist*¹¹⁰

This comment was then referred to with approval by Gummow J (now Justice of the High Court) in *Demagogue Pty Ltd v Ramensky*:

*unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist*¹¹¹

Finally, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* confirmed:

*The language of reasonable expectation is not statutory. It indicates an approach which can be taken to the characterisation, for the purposes of [s18], of conduct consisting of, or including, non-disclosure of information*¹¹²

Since the decision of the Full Court in *Demagogue*, and now more recently since *Miller*, it has been accepted that a failure to disclose information can constitute misleading or deceptive conduct when the circumstances of the case in question indicate that if some fact existed, there was a reasonable expectation that the fact would be disclosed.

In these circumstances, the ACCC argues that Hestia is aware that meat offered for retail sale is derived at least in part from animals slaughtered according to religious ritual; that is, slaughtered without prior stunning. It argues that consumer sensitivity to animal welfare generally and the religious slaughter issue specifically, is information that the hypothetical representative consumer would expect to be disclosed at or before the time of purchase. The failure of Hestia to do so means that it has engaged in misleading or deceptive conduct in breach of ACL s18.

Pressing its case, the ACCC argues that the question of whether there was a reasonable expectation of disclosure is answered from the

110 *Kimberley NZI Finance Limited v Torero Pty Ltd* (1989) ATPR (Digest) 46-054, 53,195.

111 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41.

112 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357, [19].

perspective of the hypothetical representative member of the class. After all, the High Court in Miller emphasised the importance of the knowledge of the person to whom conduct is directed¹¹³

In its response, Hestia alleges that the ACCC has misconstrued the reasonable expectation test. The ACCC alleges that whether it was reasonable to expect certain information to have been disclosed is a question tested from the perspective of the hypothetical representative of the class of consumers.

However, Hestia argues that the question is not asked from the perspective of the hypothetical representative of the class but is asked in the abstract, after an examination of all the circumstances of the case at hand.¹¹⁴ The ACCC's emphasis on the extract from Miller to the effect that the knowledge of the person to whom conduct is directed is important is impermissibly selective because that knowledge is only one circumstantial factor amongst many that informs the resolution of the issue.

In support, Hestia notes that the Full Federal Court in *Demagogue Pty Ltd v Ramensky* stated 'the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or likely to mislead or deceive.'¹¹⁵ That the issue involves an examination of the wider circumstances of the case was affirmed by the High Court in Miller¹¹⁶

When this wider analysis is undertaken, Hestia argues that the ACCC's allegation is one of 'mere silence' of the kind referred to in Miller¹¹⁷ and which the law has consistently recognised as conduct that without more, cannot be misleading or deceptive in breach of ACL s18. Hestia draws the Court's attention to the decision of Justice Gummow in *Demagogue Pty Ltd v Ramensky* where His Honour confirmed:

Unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists, it would be disclosed, it is difficult to see how mere silence could

113 Ibid 369- 370.

114 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited (2010) 241 CLR 357, 369.

115 Demagogue Pty Ltd v Ramensky (1992) 39 FCR 31, 32.

116 Above n114, 369-370.

117 Ibid 364.

*support the inference that the fact does not exist.*¹¹⁸

While Hestia acknowledges the observations of North J in *Australian Competition and Consumer Commission v C.I & Co Pty*¹¹⁹ about consumers seeking out free-range eggs as a matter of principle, hoping to advance the cause of animal welfare, it alleges that the case is clearly distinguishable from the present circumstances. In that case, there were positive representations about the nature and quality of the eggs; that they were ‘free-range’.

The deliberate and direct marketing of consumer values associated with animal welfare squarely raised the expectation in the circumstances of that case that if the eggs in fact originated from battery farms, that fact would be disclosed.

In the present case, Hestia argues that it has not attempted to market the meat in circumstances that squarely raise consumer values issues. The mere fact of non-disclosure of this or that slaughtering technique of itself cannot amount to misleading or deceptive conduct in breach of ACL s18.¹²⁰

In any case, Hestia argues, for ‘mere’ non-disclosure to amount to misleading or deceptive conduct, the case law requires that it must have formed the subjective intention not to disclose the fact of the religious slaughter of animals to consumers. Hestia argues that at no time had it formed this intention.

Relevance of Intention?

A person or corporation does not have to intend to engage in misleading or deceptive conduct before its conduct breaches ACL s18. Accordingly, the High Court has confirmed that subjective intention is not an element of the contravention.¹²¹

However, the definition of ‘refusing to do an act’ set out in s2(2)(c) of the ACL means ‘refraining (otherwise than inadvertently) from doing that act.’ The expression ‘otherwise than inadvertently’ raises the

¹¹⁸ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 41.

¹¹⁹ *Australian Competition and Consumer Commission v C.I & Co Pty Ltd* [2010] FCA 1511, [31].

¹²⁰ *Kimberly NZI Finance Ltd v Torero Pty Ltd* [1989] ATPR (Digest) 64-054.

¹²¹ *Hornsby Building Information Centre Pty Limited v Sydney Building Information Centre Limited* (1977 – 1978) 140 CLR 216, 234.

difficult question as to whether some form of intentional non-disclosure is required before there can be a breach of ACL s18. The issue is important because a person may unintentionally fail to disclose certain information. Has that person engaged in conduct for the purposes of ACL s18?

This would suggest that in order to be liable under ACL s18, the person who failed to disclose information must have had actual knowledge of the facts that he or she failed to disclose. In other words, the person must have adverted to the facts but made a subjective intentional decision not to disclose them; otherwise, how can it be said the non-disclosure was 'inadvertent'?

The case law on this point is very unsettled and confused. Some decisions suggest that the person does not have to be subjectively aware of the facts that he or she fails to disclose. Other decisions suggest that the person is required to be subjectively aware of the non-disclosed facts because such non-disclosure is required to be 'otherwise than inadvertent.'

Unfortunately, the recent decision of the High Court in Miller did not resolve the issue.

In *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* the Court stated:

It is clear that a failure to provide information can be conduct which is misleading or deceptive. For the purposes of [s18](1) "engaging in conduct" is defined in 4(2)(a) as a reference to doing or refusing to do any act and by s4(2)(c) a reference to refusing to do an act includes a reference to refraining (otherwise than inadvertently) from doing that act. However, when the complaint is that [s18](1) has been infringed by conduct that involves either refusing or refraining from doing an act before that conduct is actionable it must have been deliberately engaged in.¹²²

For the Court, the element of deliberation was necessary. The respondent or defendant must have the relevant information in mind and adverted to the non-disclosure.

¹²² *Costa Vraca Pty Ltd v Berrigan Weed & Pest Control Pty Ltd* (1999) ATPR 41-694, 42,879.

This reasoning was followed by the NSW Court of Appeal in *Semrani v Mamoun*¹²³ where the Court concluded that in order for silence to constitute a breach the defendant must have had actual knowledge of the facts that he or she intentionally failed to disclose. Similar reasoning was employed by the Court of Appeal in *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* where the Court concluded:

*the requirement ... that a refraining be otherwise than inadvertent requires that there be actual advertence to the question of whether something should be done or not and the formation of an intention that it not be done.*¹²⁴

The Abigroup reasoning was subsequently adopted in *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd*¹²⁵ and *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)*.¹²⁶

Earlier in 2012, the Western Australian Court of Appeal in *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* concluded that in the absence of clarification by the High Court's decision in *Miller*, in order for a defendant to breach the misleading or deceptive conduct provisions of the ACL through failure to disclose, that defendant must 'advert to the question and form an intention not to disclose.'¹²⁷

At least in terms of an allegation of failure to disclose certain information, this line of reasoning seems both intuitively appealing and supported by the statutory context. After all, and in the words of the Court in *Spedley Securities Ltd (in liq) v Bank of New Zealand* a person 'cannot fail to inform of a matter of which one was unaware ... concepts of 'refusal' or 'refraining' involve some element of mental process or decision making.'¹²⁸

However, there is also a line of authority in which the exact opposite view has been expressed. In *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd*¹²⁹ the Court considered that as a general proposition, it was not

123 *Semrani v Mamoun* [2001] NSWCA 337, [62].

124 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, [58].

125 *Alpine Hardwood (Aust) Pty Ltd v Hardys Pty Ltd* [2001] FCA 1876.

126 *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566.

127 *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* [2011] WASC 76, [59] per McLure P (Pullin JA agreeing), Murphy JA dissenting.

128 *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1991) ATPR 41-143, 53,065.

129 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2001) ATPR 41-794, 42,548.

necessary to show that the party who failed to disclose the information did so with the intent to mislead or deceive. These comments were approved and adopted in *Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited*¹³⁰ and in *Crump v Equine Nutrition Systems Pty Ltd*.¹³¹

Just to complicate matters slightly, the Victorian Court of Appeal in *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd*¹³² made a distinction between the non-disclosure of information on the one hand and a refusal to provide information on the other. The Court stated:

*... the misleading and deceptive quality of remaining silent inheres in the non-disclosure of information; not in any refusal to provide it. Consequently, it does not follow from the fact that a failure to act must be intentional in order to be actionable, that silence must be intentional in order to be actionable. It is plain in principle and authority that it is not necessary that silence be intentional in order that it may constitute misleading and deceptive conduct for the purposes of [s18].*¹³³

On this view, the issue of whether the failure to disclose was ‘otherwise than inadvertent’ would never arise. This is because the fact of remaining silent is non-disclosure and not a refusal to disclose. A more recent 2009 decision of the NSW Court of Appeal in *Dwyer v Craft Printing Pty Ltd*¹³⁴ referred to the *Costa Vraca* and *Semrani* decisions with approval but did not decide the issue.

At the date of writing this article, the most recent 2012 decisions of the Federal Court involving silence; *Mecland Investments Group Pty Ltd v Duncalm Pty Ltd*¹³⁵ and of the Full Federal Court in *Rafferty v Madgwicks*¹³⁶ have not addressed the issue.

The ACCC's response to Hestia's argument on intention is that while mere silence without more may not amount to misleading or deceptive

130 *Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited* (2005) ATPR (Digest) 46-263, 52,519.

131 *Crump v Equine Nutrition Systems Pty Ltd* [2006] NSWSC 512, [149].

132 *CCP Australian Airships Ltd v Primus Telecommunications Pty Ltd* (2005) ATPR 42-042,

133 *Ibid* 42,514.

134 *Dwyer v Craft Printing Pty Ltd* [2009] NSWCA 405, [55]

135 *Mecland Investments Group Pty Ltd v Duncalm Pty Ltd* [2012] FCA 183.

136 *Rafferty v Madgwicks* [2012] FCAFC 37.

conduct, the extended meaning given to the term ‘conduct’ by ACL s2 means that mere silence can constitute misleading conduct if the failure to inform was deliberate or adverted to.

The ACCC alleges that Hestia knew the meat originated from animals slaughtered according to religious ritual but made the deliberate decision not to inform consumers of this fact. In those circumstances, the ACCC alleges the retailer’s conduct was misleading in breach of ACL s18.¹³⁷

Part V - Returning to the Central Question

What is to be made of all this conflicting authority and does it matter anyway? One way through this maze is to return to the basic principles set out by the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited*.¹³⁸ Chief Justice French and Justice Kiefel commenced their judgment by recognising:

*Where silence or non-disclosure is relied upon, the pleading should identify whether it is alleged of itself to be, in the circumstances of the case, misleading or deceptive or whether it is an element of conduct, including other acts of omissions, said to be misleading or deceptive.*¹³⁹

This statement reflects the practice of the Court in dividing allegations of deception by silence into two broad conceptual categories; situations of ‘mere’ silence and cases ‘in which silence is part of a wider factual matrix.’¹⁴⁰

Where it is alleged that misleading conduct has occurred in isolation from the surrounding factual matrix, then that failure to disclose will not constitute a breach of the ACL unless the relevant knowledge is deliberately withheld.¹⁴¹ Rather, silence or a failure to disclose information will be misleading or deceptive where circumstances, including the wider factual matrix of conduct indicate that there was a

¹³⁷ Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors (1999) ATPR 41-696, 42,888.

¹³⁸ Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited (2010) 241 CLR 357.

¹³⁹ Ibid [5].

¹⁴⁰ Stephen Corones, *The Australian Consumer Law*, (Thompson Reuters (Professional) Limited, Sydney, Australia, 2011) 100.

¹⁴¹ Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd (1986) 12 FCR 477.

reasonable expectation that the information should have been disclosed and it was not.

This approach seems both to attract the weight of present authority¹⁴² and accord with the basic legal interpretation of ACL s18 in that intention is not required in order to establish a breach.

In this way, the failure to disclose the information is assessed like any other form of alleged misleading or deceptive conduct.¹⁴³ This is a recognition that any theoretical discussion cannot be quarantined from the actual circumstances of the case being decided and that in the context of a failure to warn are often determinative. For example, all of the decisions discussed above invariably involved commercial transactions between identified individuals or corporations.

In those circumstances, the Courts experienced little real difficulty in determining the threshold question whether, in the circumstances, there was a reasonable expectation that certain information that in fact existed and was known to one of the parties should have been disclosed.¹⁴⁴

In terms of practical indicia informing the existence of a reasonable expectation of disclosure, the High Court in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* emphasised the importance of:

*The knowledge of the person to whom the conduct is directed... Also relevant ... may be the existence of common assumptions and practices established between the parties or prevailing in the business profession, trade or industry in which they carry on business. The judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective.*¹⁴⁵

These factors assist the Court in evaluating the reasonableness of an expectation of disclosure in the context of a confined commercial transaction involving identified parties in a particular industry. It is less

142 Noor Al Houada Islamic College Pty Limited v Bankstown Airport Limited (2005) ATPR (Digest) 46-263, 52,520.

143 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited (2010) 241 CLR 357, 369 – 370.

144 Bernard McCabe, 'When Silence Misleads and When it Doesn't' (2011) 19 Australian Journal of Competition and Consumer Law 47; Kathryn O'Shea, 'Undisclosed Unusual and Unexpected Matters – Liability Issues under s 52 of the Trade Practices Act' (2006) 14 Competition & Consumer Law Journal 1.

145 Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited (2010) 241 CLR 357, 369 – 370.

clear how a Court would approach the evaluation of a reasonable expectation of disclosure in the context of a representation to the public at large. Different considerations inform the task of evaluating representations directed toward identified parties on the one hand and consumers at large on the other. The High Court confirmed:

*That approach may differ in its application according to whether the conduct is said to be misleading or deceptive to members of the public, or whether it arises between entities in commercial negotiations*¹⁴⁶

In fact, these principles have yet to be tested in the context of representations made to the public at large and evaluated under the Campomar framework. In these circumstances, the task is complicated because the Court is not faced with identified parties involved in a defined commercial transaction where it is alleged that there was a reasonable expectation that specific information known to one of the parties (such as the status of a security, the existence of debt or the status of a commercial contract) should have been disclosed to the other.

Rather, the issue of disclosure of the religious slaughter of animals exists at a certain level of abstraction.

The question to be answered is whether, in the circumstances of purchasing meat, there is a reasonable expectation that the fact of the religious ritual slaughter of food animals should be disclosed to the hypothetical representative member of the relevant class of consumers?¹⁴⁷

A Principled but Ultimately Negative Resolution

Based on the present state of the law explained above, the ACCC's argument concerning non-disclosure is likely to fail. The mere non-disclosure of the method of slaughter of animals, absent a wider context of advertising accentuating animal welfare issues, is not likely to be misleading or deceptive conduct in breach of ACL s18.

¹⁴⁶ Ibid.

¹⁴⁷ Alex Bruce, Introduction to Misleading or Deceptive Conduct, Chapter 3 in Consumer Protection Law in Australia, (LexisNexis Butterworths, Australia, 2011) 51, 77 – 78.

While the High Court in *Miller* did acknowledge that in evaluating conduct directed toward a wide class of consumers different considerations may be called upon in determining whether a reasonable expectation of disclosure exists, it did not explain what those considerations might be.¹⁴⁸ In resolving the dispute in *Miller* the Court was not required to, because the allegation related to a commercial exchange between two identified parties.

However, the decision of the Full Federal Court in *Fraser & Anor v NRMA Holdings Limited & Ors*¹⁴⁹ and of the Federal Court in *Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors*¹⁵⁰ although pre-dating the High Court's *Campomar* and *Miller* decisions, did involve allegations of misleading conduct by silence directed toward a wide class of consumers. In both cases the allegations failed.

In both cases it was held that 'mere silence' without additional circumstantial conduct necessary to render the context of the alleged omission misleading or deceptive, could not breach s52 of the Trade Practices Act 1974 (Cth).¹⁵¹

These decisions are understandable because the weight of case law suggests two prerequisites are required before silence alone can support a cause of action in misleading or deceptive conduct in breach of ACL s18. First, the respondent/defendant must be subjectively aware of the facts expected to be disclosed but decided not to do so (thus adverted to those facts).¹⁵² And second, the non-disclosure must operate within a wider factual context in a way that renders the totality of the conduct misleading or deceptive; that is, where there is a reasonable expectation of disclosure.¹⁵³

In this way, despite the 'reasonable expectation test' lacking a statutory basis in ACL s18 it nevertheless 'indicates an approach which can be taken to the characterisation, for the purposes of s52, of conduct

148 *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357, 369.

149 *Fraser & Anor v NRMA Holdings Limited & Ors* (1995) ATPR 41-374.

150 *Johnson Tiles Pty Ltd & Ors v Esso Australia Ltd & Ors* (1999) ATPR 41-696.

151 *Ibid* 42,888.

152 Peter Gilles, 'Non-disclosure: Trade Practices Act, s 52' (2004) 78 *Australian Law Journal* 653.

153 Bernard McCabe, 'When Silence Misleads and When it Doesn't' (2011) 19 *Australian Journal of Competition and Consumer Law* 47, 48.

consisting of, or including, non-disclosure of information'.¹⁵⁴

That approach inevitably directs attention back to the principles explained at the start of Part IV and seminal decision in the oft-quoted *Demagogue Pty Ltd v Ramensky*, where the Court emphasised:

*Silence is to be assessed as a circumstance like any other. To say this is certainly not to impose any general duty of disclosure; the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive.*¹⁵⁵

In the circumstances of the ACCC's hypothetical case, without additional contextual behaviour by the national retailer, simply offering meat products for sale without disclosing antecedent religious slaughter practices will not amount to misleading or deceptive conduct in breach of ACL s18.

Conclusion: What Must be Done?

If the Commonwealth government intends to regulate consumer values issues, including animal welfare and religious slaughter practices associated with food product labelling, through existing consumer laws, then it will only partially succeed. While Australia's new consumer protection regime has been constructed to apply across all Australian jurisdictions, its legal reach will be relatively confined.

Food animal welfare is one of the less visible consumer values issues associated with labelling of food products purchased on a daily basis. Food safety, preventative health and new technologies are the principal focus of the Commonwealth government's Labelling Logic framework.¹⁵⁶

Consumer values issues are at the bottom of the 'Food Labelling

¹⁵⁴ *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Limited* (2010) 241 CLR 357, [19].

¹⁵⁵ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 32.

¹⁵⁶ Principles and Criteria, Chapter 3 in Food Labelling Law and Policy Review Panel, *Labelling Logic: Review of Food Labelling Law and Policy*, 27 January 2011, Commonwealth of Australia, 41.

Hierarchy' and are intended to be regulated through market forces¹⁵⁷

However, while Australian consumers are clearly becoming aware of and concerned for the welfare of food animals, their influence will depend almost entirely on complex legal and economic market forces. If consumers are to signal preferences for welfare friendly products to suppliers, then the market must facilitate that signalling so that suppliers respond in non-deceptive ways. The recent decisions of the Federal Court concerning free-range eggs or free-to-roam chickens clearly suggest that this signalling mechanism can be exploited by suppliers.

To address potential market failures, the Commonwealth government's intention to use the ACL is contingent on the legal framework in which misleading or deceptive conduct is evaluated by Australian Courts.

That framework suggests that 'positive' representations associated with food animal products (such as free-range) are certainly within the scope of the ACL's prohibitions against misleading, deceptive or false conduct.

Offering food animal products for retail sale to consumers will squarely fall within the conception of 'in trade or commerce' for the purposes of ACL s18, consistent with the High Court's Concrete Constructions decision.¹⁵⁸

Courts will have little difficulty in then applying the High Court's Campomar methodology in identifying the hypothetical reasonable representative member of the class of consumers toward whom the conduct is directed. Even constructed at a certain level of abstraction, Courts can and have identified such a representative as a consumer concerned with food animal welfare issues.¹⁵⁹

Labels that make untrue marketing representations through word or image, concerning food animal welfare will lead that representative into error and will be characterised as misleading or deceptive or likely to mislead or deceive in breach of ACL s18.¹⁶⁰

However, 'negative' representations as to, for example, the antecedent

¹⁵⁷ Ibid.

¹⁵⁸ Concrete Constructions (NSW) Pty Limited v Nelson (1990) 169 CLR 594, 640.

¹⁵⁹ Australian Competition and Consumer Commission v C.I & Co Pty Ltd [2010] FCA 1511, [31].

¹⁶⁰ Ibid.

slaughter of food animals according to religious practice are unlikely to be caught by the ACL. Where suppliers and retailers offer these forms of meat products to consumers in supermarkets without any form of identification or labelling information it is unlikely that the conduct will be considered misleading or deceptive in breach of ACL s18.

Although the case law does recognise the possibility, it lacks ‘an entirely coherent and consistent framework of principles which is necessary for maximising the prospect of correctly applying the law to the facts.’¹⁶¹ Nor is it ‘subject to any unifying principle.’¹⁶²

Accordingly, the divisive case law on this point necessarily reverts to general principles by investigating whether, in the overall context of the facts of the case, the failure to disclose is misleading or deceptive.

And in these circumstances, it is unlikely that the bland cellophane packaging of meat products available for purchase at supermarkets will create a reasonable expectation that retailers should disclose the fact that some meat products have originated from animals slaughtered according to religious ritual.

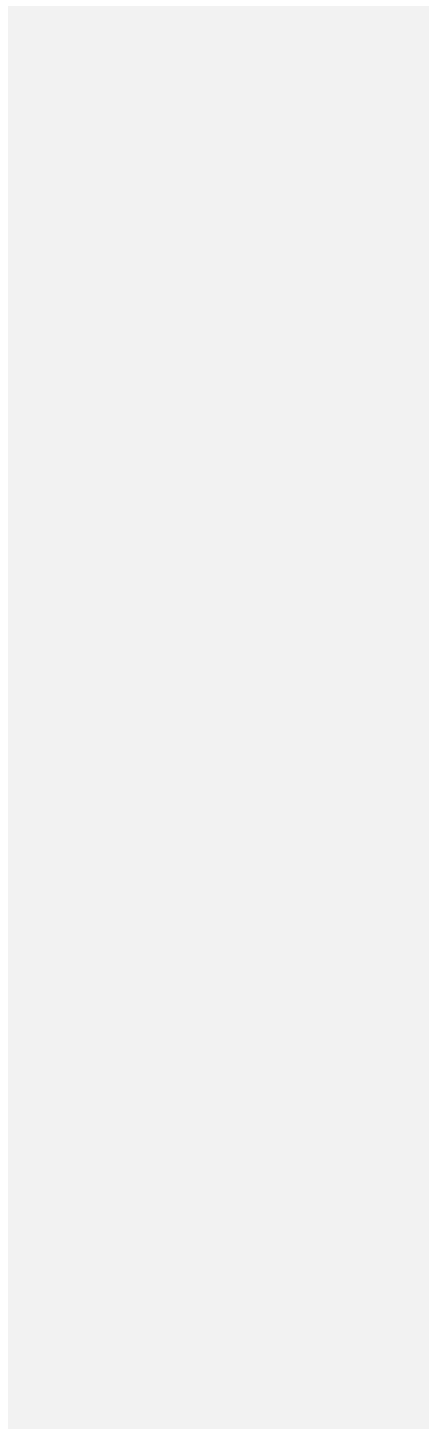
These jurisprudential difficulties highlight the importance of the legislative initiatives that are anticipated by the European Union and United Kingdom and discussed in the first article.

Although not without their own difficulties and controversies, if it is seriously intending to take note of consumer values issues associated with food animal welfare, the Commonwealth government would be wise to supplement the general provisions of the ACL with more specific initiatives enabling consumers to make accurate and informed purchasing decisions that will enable them to express their demonstrated concern for food animal welfare.

Legislative initiatives such as the United Kingdom Food Labelling (Halal and Kosher Meat) Bill 2012 or the European Union proposed Amendment 205, operating concurrently with the ACL, would go a long way to enlarging the law’s heart to include food animals.

161 *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) WASC 76, [43].

162 *Rafferty v Madgwicks* (2012) FCAFC 37, [278].



NOTE

ACCC v Pepe's Ducks Ltd

The Pro Bono Animal Law Service (PALS @ PILCH),¹ and its client Animal Liberation NSW used the *Consumer and Competition Act 2010*² in formulating a joint complaint³ to the Australian Consumer and Competition Commission (ACCC), alleging that a leading commercial producer of duck meat had engaged in misleading and deceptive conduct in commerce.

The ACCC investigated the complaint and instituted Federal Court proceedings against Pepe's Ducks Ltd.⁴ It was alleged that Pepe's Ducks had made false or misleading claims on its packaging, website, delivery trucks, signage, stationery and merchandise by use of :

- a written representation that its ducks were 'open range' ducks
- a written representation that its ducks were 'grown nature's way', and/or
- various pictorial representations of a duck living in outdoor conditions against the background of a lake.

The ACCC alleged that the duck meat products Pepe's Ducks sold or offered for sale were processed from ducks raised solely in indoor sheds without access to the outdoors or other conditions in which ducks naturally live. It sought declarations, pecuniary penalties, injunctions, and orders that Pepe's Ducks implement a trade practices compliance program, publish corrective notices on its website, a corrective letter to its customers, and costs. The matter was filed in the Melbourne Federal

1 Established in 2007 with a special grant of \$15,000 to Redfern Legal Centre from Voiceless - the animal protection institute. In 2008, Redfern Legal Centre received a grant from the NSW Public Purpose Fund and PILCH Victoria received funding from Victoria's Law Foundation to further the work of PALS. In 2009 Redfern Legal Centre transferred its PALS grant to PILCH NSW, allowing PALS to evolve into PALS@PILCH, a national advocacy service for animals jointly operated by PILCH Victoria and PILCH NSW http://old.voiceless.org.au/Law/Misc/Supporting_the_community.html (accessed 18.2.12).

2 s18 and s29.

3 Reproduced as an addendum to this Note.

4 ACCC Release # NR 138/12 Issued: 11th July 2012

Court's Fast Track List.

In December 2012, the Federal Court declared, by consent, that Pepe's Ducks had breached the Act.⁵ The Federal Court imposed penalties of \$375,000 and \$25,000 costs. It also made consent orders:

- restraining Pepe's Ducks for a period of three years from using the phrases 'open range' or 'grown nature's way' on its product packaging, website, delivery vehicles, signage, stationery and merchandise (save for a limited exception relating to supply to certain wholesale customers by 17 February 2013 of certain pre-packaged frozen products);
- restraining Pepe's Ducks for a period of three years from using the pictorial representation it had previously used without the words 'Barn Raised' prominently displayed in close proximity to the pictorial;
- that Pepe's Ducks implement a trade practices compliance program by 1 February 2013 and maintain it for a period of three years; and
- that Pepe's Ducks provide corrective notices to its customers and on its website and business premises.⁶

The matter had not been reported at the time of writing.⁷ However, the ACCC statement read (inter alia):

"Pepe's Ducks used the phrase 'open range' from 2004 to 2012 and the phrase 'grown nature's way' from 2007 to 2012 on its product packaging, website, delivery vehicles, signage, stationery and/or merchandise, often in conjunction with a pictorial representation of a duck in the outdoors walking on grass against a background of a lake with hills behind.

Pepe's Ducks is a leading supplier of duck meat products (with approximately 40% market share), and supplied around 80,000 ducks per week in Australia in 2011. The phrases were part of an important promotional message used by Pepe's Ducks and were communicated to a large number of wholesale and retail customers of duck meat products.

⁵ ACCC Release # NR 274/12 Issued: 19th December 2012.

⁶ Ibid.

⁷ 14.2.13.

“Consumers must be able to trust that what is on the label is true and accurate. This penalty is a warning to businesses to make sure they are not misleading consumers into paying a premium for products that don’t match the claims made on the label,” ACCC Commissioner Sarah Court said.

“Traders who abuse the trust of Australian consumers in this way expose themselves to enforcement action.”

The ACCC welcomes the Court orders and notes that this decision continues its focus upon protecting consumers from misleading statements regarding food production methods. For example, on 19 December 2011 the Federal Court made orders against Turi Foods Pty Ltd (trading as La Ionica) in relation to misleading representations made by La Ionica that its meat chickens were raised and grown in barns in which the chickens had at all times substantial space available allowing them to roam around freely, when this was not the case. The orders included an order that La Ionica pay a civil pecuniary penalty in the amount of \$100,000.

- Ed.

Addendum

Form of Pro Bono Animal Law Service and Animal Liberation NSW
1.2.12 submissions to the ACCC^{8 9}:

Re: Misleading and deceptive conduct claim against Pepe's Ducks Pty Ltd

Animal Liberation

Animal Liberation is a non-Government funded animal protection organisation that works towards ending the suffering of animals used for food, clothing, entertainment and research. Animal Liberation advocates for law reform, undertakes consumer advocacy, gathers evidence of animal abuse and is heavily involved in educating the community. For further information about Animal Liberation please see our website at <http://animal-lib.org.au/>.

⁸ Kindly provided to the AAPLJ by PALS@PILCH and Animal Liberation (NSW) - Ed.

⁹ Marked annexures not included.

Pro Bono Animal Law Service (PALS@PILCH)

The Pro Bono Animal Law Service (**PALS@PILCH**) is a project of the Public Interest Law Clearing House (PILCH) NSW. PALS@PILCH is a national legal referral service that puts not for profit animal protection organisations in contact with lawyers able to provide pro bono legal advice and assistance. Our members include prominent Australian law firms, barristers and universities. In addition to our referral service, PALS@PILCH is also committed to addressing significant animal welfare issues.

1. Pepe's Ducks

Pepe's Ducks Pty Limited (**Pepe's Ducks**) is the largest producer of intensively farmed ducks in Australia and New Zealand, producing over 70,000 ducks per week. Pepe's own and manage broiler farms, breeder farms and hatcheries. Pepe's Ducks deliver their products Australia wide to a number of distributors including ...
[name of retailer deleted - Ed.]

2. Pepe's Ducks' labelling

- 2.1 In labelling their duck products, Pepe's Ducks uses the terms "open range ducks" and "grown nature's way" on its packaging, together with images of a duck located adjacent to a pond, outdoors.
- 2.2 Animal Liberation and PALS@PILCH are concerned about the packaging on the following products:
 - (a) **Grimaud Duck:** the term "grown nature's way" is used, together with an image of the duck beside a pond. A copy of this packaging as it appears on the Pepe's Ducks website is annexed and marked "A"; and
 - (b) **Peking Duck:** both the terms "open range ducks" and "grown nature's way" are used, together with an image of a duck next to a pond. A copy of this packaging as it appears on the Pepe's Ducks website is annexed and marked "B".
- 2.3 Annexed and marked "C" are copies of various screenshots of the Pepe's Ducks website located at www.pepesducks.com.au (Website).
- 2.4 Animal Liberation and PALS@PILCH submit that this packaging is misleading and deceptive or likely to mislead or deceive, contravening the *Australian Consumer Law* (ACL) for the following reasons:
 - (a) By labelling their duck products as "open range" Pepe's Ducks are representing to consumers that the ducks are raised in an environment that gives them access to open areas, and to surface

water. This is contrary to fact, contravening sections 18 and 29 of the ACL; and

- (b) By labelling their duck products as "grown nature's way", together with an image of a duck beside a pond outdoors Pepe's Ducks are representing to consumers that the ducks are raised in an environment that gives them access to open areas, and to surface water. This is contrary to fact, contravening sections 18 and 29 of the ACL.

3. Intensively farmed ducks

- 3.1 There are serious welfare concerns for intensively farmed ducks (broiler ducks). The conditions in which they are held seriously inhibit their natural behaviours and cause suffering on both physical and behavioural level. There are issues with overcrowding, de-beaking, disease and general environment.
- 3.2 One of the major welfare issues for broiler ducks is the lack of surface water. The only access broiler ducks have to water is via drinking nipples. As ducks are aquatic birds they are biologically designed to live on water not just on land. Without access to surface water broiler ducks are unable to float and suffer bone and joint problems as a result of constantly holding their body weight.
- 3.3 Broiler ducks also suffer eye problems. We understand that their eyes crust over as they are unable to immerse their heads into water for the purpose of preening.
- 3.4 In early 2000, Viva! (a UK based organisation) prepared and published, "Ducks Out Of Water" by Juliet Gellatley (Viva!) and Clare Druce (FAWN) on the duck industry in the United Kingdom. Annexed and marked "D" is a copy of that report.
- 3.5 As a result of that report, large retailers, such as Marks and Spencers, refused to sell broiler duck meat for animal welfare reasons. There is no recent report on the welfare of broiler ducks in Australia at this time.

4. "Free Range"

- 4.1 Although there is no legislated definition of "free range" in Australia, the industry clearly recognises the term to generally refer to animals that are not closely confined and have some access to the outdoors. Animal Liberation and PALS@PILCH are of the opinion that the reasonable duck consumer is able to distinguish these terms.
- 4.2 Animal Liberation and PALS@PILCH submit that the incorrect labelling of the Pepe's Ducks products is likely to lead to more than

uncertainty or confusion. We submit that the reasonable consumer would be misled or deceived into thinking that the duck product has been raised in a free range environment.

- 4.3 Animal Liberation and PALS@PILCH submit that Pepe's Ducks contravenes section 29 of the ACL by representing their product as “grown nature’s way” and “open range” when these ducks are intensively produced indoors with no access to surface water.
- 4.4 Animal Liberation and PALS@PILCH seeks your further investigation and intervention.
- 4.5 Please contact us if you require any further information.

Yours sincerely

Emma Hurst, **Campaigns Manager, Animal Liberation**
Jillian Field, **Managing Solicitor, PALS@PILCH (NSW)**

Pig Dog Hunting: Putting a Leash on Feral Hunters?

*By Ruth Hatten*¹

The act of using dogs to hunt feral pigs raises serious animal welfare concerns.² While seemingly cruel, the sport has been justified as a means of abating feral pig populations. Whether or not the sport can be so justified, when addressing the threat posed to local ecosystems by feral pigs, to what extent should the welfare of the pigs and dogs be taken into account? Though legislation exists to regulate and 'put a leash on' the sport, a question remains whether such legislation is genuinely protective or simply decorative. This article will provide a critique of the legal framework surrounding pig-dogging in New South Wales (NSW) including a brief analysis of the body responsible for regulating the sport.

The legal framework

The body with authority for regulating pig-dogging is the Game Council NSW, a statutory authority set up in 2002 to regulate hunting in NSW, subject to the control and direction of the Minister for Regional Infrastructure and Services jointly with the Minister for Primary Industries.³ The Game Council is to consist of 17 members appointed by the Minister, including eight persons nominated by hunting organisations, one person nominated by the State Management Council of Livestock Health and Pest Authorities, two wildlife management scientists, one person nominated by the Australian Veterinary Association and five persons nominated by the Minister.⁴ For the 2011/2012 period, the Game Council had 15 members, the majority of

¹ Ruth Hatten is Legal Counsel at Voiceless, the animal protection institute. This article is derived from a presentation given by Ms Hatten at the Greens NSW public event 'Pig Dog Hunting: Conservation or Cruelty', 25 October 2012, entitled 'Pig-dogging: The legal framework'. Thanks to Sarah Margo for her assistance with this article.

² See for example RSPCA Australia, *Is hunting pigs with dogs legal in Australia?* at http://kb.rspca.org.au/Is-hunting-pigs-with-dogs-legal-in-Australia_295.html and Animals Australia, *Stop savage 'pig dogging' in Australia* at http://www.animalsaustralia.org/take_action/stop-pig-dogging/.

³ See Status Information, *Game and Feral Animal Control Act 2002 (NSW)*, as it appears on the NSW Government legislation website, www.legislation.nsw.gov.au.

⁴ *Game and Feral Animal Control Act 2002 (NSW)*, section 8.

whom were representatives of hunting clubs.⁵ Robert Brown and Robert Borsak, Shooters and Fishers Party MPs,⁶ are former chairmen of the Council⁷ and strong proponents of recreational hunting.⁸

The Game Council is often referred to as a “pro-hunting group” and the Shooters and Fishers Party is often criticised for making deals with the NSW Government.⁹ A former employee refers to the Game Council as “the hunting fraternity’s ongoing fantasy of making killing animals for sport socially acceptable”.¹⁰ Recently, the Shooter and Fishers Party managed to persuade the NSW Government to expand hunting into national parks, which will extend the scope of the Game Council’s regulatory reach.¹¹

With a primarily self-regulating body, the level of enforcement carried out by the Game Council must be questioned. In 2010/2011, the Game Council employed seven Game Managers who co-operated with other Government agencies to undertake compliance.¹² In that period, the Game Council conducted 32 compliance campaigns, issued 21

5 Game Council NSW, 2011/2012 Annual Report at 11, available at <http://www.gamecouncil.nsw.gov.au/docs/AR-1112-PartA.pdf>. The Annual Report for 2012/2013 is not yet available.

6 The Shooters and Fishers Party stands for protecting “your freedoms and the future of outdoor sports” and possesses “a proud history of supporting recreational fishing and hunting in regional NSW”, see www.shootersandfishers.org.au. It has the balance of power in the NSW Upper House, see <http://www.smh.com.au/environment/conservation/ofarrell-over-a-barrel-as-the-shooters-take-aim-20110412-1dcpm.html>.

7 Game Council NSW, Game Council of NSW: 2004-2005 Annual Report at 11, available at <http://www.gamecouncil.nsw.gov.au/docs/AR-0506.pdf>.

8 See for example Richard Guiliart, ‘Calling the shots’, *The Australian* (online), 24 November 2012, <http://www.theaustralian.com.au/news/features/calling-the-shots/story-e6f98h6-1226520433946> and Andrew Clennell, ‘Macdonald’s game council thrill killer’, *The Sydney Morning Herald* (online), 21 July 2011, <http://www.smh.com.au/environment/conservation/macdonalds-game-council-thrill-killer-20090720-dqui.html>.

9 Greens NSW is running a campaign to abolish the Game Council, see <http://davidshoebriidge.org.au/2011/04/19/abolish-the-game-council/>. For some attacks on the Game Council and the Shooters and Fishers Party making deals due with the NSW Government, see <http://www.nswalp.com/media/news/o-farrell-does-dirty-deal-on-duck-hunting-to-push-/>;

<http://www.smh.com.au/nsw/ofarrell-under-fire-as-gun-lobby-grows-20120616-20gq4.html>;
<http://davidshoebriidge.org.au/2012/09/04/thank-you-you-stopped-the-game-council-and-shooters-party/>.

10 David Dixon, ‘Agency a fantasy land for brothers in arms’, *The Sydney Morning Herald* (online), 19 June 2010, <http://www.smh.com.au/opinion/politics/agency-a-fantasy-land-for-brothers-in-arms-20100618-ymmo.html>.

11 Lema Semander, ‘Law passed to allow hunting in national parks’, news.com.au, 23 June 2012, .

12 Game Council NSW, 2010/2011 Annual Report at 6, available at <http://www.gamecouncil.nsw.gov.au/portal.asp?p=Reports#Annuals>. As at 14 August 2012, there was only 4.2 full time staff employed by the Game Council responsible for monitoring hunting, see NSW Parliament, Legislative Council Questions and Answers No. 96 - Tuesday 14 August 2012 at 1835.

infringement notices and conducted five prosecutions.¹³ This might seem like a fair amount considering the limited resources allocated to compliance. However, to provide a comparison, in the same period, the RSPCA NSW inspectorate (which consisted of 32 inspectors in 2010/2011) responded to 15,011 complaints and initiated 91 prosecutions.¹⁴ While RSPCA NSW employs more compliance staff than the Game Council (which would contribute to the greater compliance activity) it is a charity, not a statutory authority, which receives significantly less government funding than the Game Council.¹⁵ It would seem therefore that RSPCA NSW has a higher regard for compliance than the Game Council.

There is serious concern about the Game Council having power to regulate matters of animal welfare, including its ability to effectively monitor hunting¹⁶

Four pieces of legislation govern pig-dogging in NSW:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBCA*')
- *Game and Feral Animal Control Act 2002* (NSW) ('*GFACA*')
- *Game and Feral Animal Control Regulation 2012* (NSW) ('*GFACR*')
- *Prevention of Cruelty to Animals Act 1979* (NSW) ('*POCTAA*')

EPBCA

The EPBCA is Australia's key piece of environmental legislation. It requires establishment of a list of key threatening processes,¹⁷ which list includes predation, habitat degradation, competition and disease transmission by feral pigs,¹⁸ and requires threat abatement plans to

13 Game Council NSW, Hunting Compliance Public Benefit Assessment 2011-12 at 6, available at <http://www.gamecouncil.nsw.gov.au/docs/2012GCPublicBenefitAssessment-ComplianceReport.pdf>.

14 RSPCA NSW, Annual Report 2010-2011, page 50, available at http://www.rspcansw.org.au/nested_content/footer/about_us2.

15 RSPCA received \$424,000 from the NSW Government in 2010, see *ibid* at 43; the Game Council received \$2,556,000, see Game Council of NSW, Financial Statement for the Year Ended 30 June 2011.

16 For the debate on expanding hunting in national parks, see New South Wales, Game and Feral Animal Control Amendment Bill 2012 Second Reading, Legislative Council, 20 June 2012, from 13084.

17 Section 183 EPBCA. See also a Game Council former employee's view of the Council, which includes mention of

18 Australian Government, Department of Sustainability, Environment, Water, Population and Communities (2009)

Listed Key Threatening Processes, <http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl>.

address key threatening processes.¹⁹

In 2005, a Threat Abatement Plan for predation, habitat degradation, competition and disease transmission by feral pigs was developed.²⁰ The Plan includes:

4.7 Use of Dogs

Hunting with dogs is commonly used by recreational pig hunters. However, studies have shown that it is of limited value in reducing feral pig density on a large scale ... There are animal welfare concerns with the use of dogs, not only for the pig, but also for the injuries that dogs incur during hunting. There is also the risk that unrestricted use of dogs will disturb non-target species and simply scatter pigs, and hence be counter productive with respect to control...

GFACA and GFACR

This legislation attempts to provide for the effective management of introduced species of game animals (specified animals that are living in the wild, which include pigs)²¹ and to promote responsible and orderly hunting of those game animals on public and private land. Nothing in the GFACA affects the operation of the Firearms Act 1996 (NSW), the Weapons Prohibition Act 1998 (NSW) or the POCTAA.²²

There are two types of licences available for hunting game and feral animals – a general licence, which authorises hunting of game animals on any private land²³ and a restricted licence, which authorises hunting

¹⁹ Chapter 5 EPBCA.

²⁰ Australian Government, Department of Environment and Heritage (2005) Threat Abatement Plan for predation, habitat degradation, competition and disease transmission by feral pigs, available at <http://www.environment.gov.au/biodiversity/threatened/publications/tap/pig.html>.

²¹ Section 5 GFACA.

²² Section 6 GFACA.

²³ "Private land" is defined in the GFACA to mean land other than any public land or any other land of a kind prescribed by the regulations, section 4. The Regulation does not prescribe any other land as private land.

of game animals on both public²⁴ and private land.²⁵ A restricted licence is only available to a member of a hunting club or organisation approved by the Game Council who has undertaken “adequate training”.²⁶

Within the two licence classes are four sub-classes – a standard hunting licence, a visitor’s hunting licence, a hunting guide licence and a commercial hunter’s licence.²⁷ The standard and visitor’s licences are available to people from the age of 12, with the visitor’s licence only available for 12 months and the standard licence available for a maximum period of five years. The hunting guide and commercial hunter’s licences are restricted to people 18 and over for a maximum period of five years.²⁸

A person who hunts an animal on private or public land without a game hunting licence is guilty of an offence under the GFACA.²⁹ However, the GFACA provides a number of exemptions where a licence is not required.³⁰ These exemptions arise in the following circumstances:

- A person hunting wild pigs, dogs, cats, goats, rabbits, hares and foxes on private land;
- A person hunting on land owned or occupied by the person or a member of the person’s household, or by the person’s employer;
- A person hunting on land that is owned or occupied by a corporation of which the person is an officer;
- An Aboriginal person [pursuant to a native title right or interest subject of an approved determination or who is a member or in the company of a member of a Local Aboriginal Land Council] undertaking traditional hunting;

24 “Public land” is defined in the GFACA to mean Crown land within the meaning of the Crown Lands Act 1989, or State forest, or national park estate land, or land under the control and management of a public or local authority that is declared by the regulations, on the recommendation of the authority, to be public land for the purposes of the GFACA but does not include: any land (other than State forest) that is occupied under any lease or other arrangement for private purposes that confers a right to exclusive possession of the land, or any land leased under the Western Lands Act 1901, or any other land of a kind prescribed by the regulations, section 4.

25 Section 15 GFACA.

26 Section 19 GFACA. “Adequate training” is defined in the GFACR to be training approved by the Game Council, see clause 12.

27 Clause 6 GFACR.

28 Clauses 13, 15 GFACR.

29 Section 16(1) GFACA.

30 Section 17 GFACA.

- A person who is an employee of any public or local authority acting in execution of his or her duties;
- A veterinary practitioner or other person who is acting for the purposes of killing or treating an animal in distress due to injury or illness.

Licences are subject to conditions³¹ and it is an offence to contravene these.³² These conditions include that a person must not use a dog for hunting pigs on public land except in compliance with the following requirements:

a dog must not be used for hunting pigs except for locating, holding or bailing pigs,

a person hunting alone must not use more than 3 dogs for locating, holding or bailing pigs,

a person must not hunt as part of a group that is using more than 5 dogs for locating, holding or bailing pigs,

a dog must not be used for locating, holding or bailing pigs unless the dog:

- (i) is wearing a collar to which is securely attached a metal tag or label on which is legibly printed the name, address and telephone number of the owner of the dog and the dog is identified as required by section 8 of the Companion Animals Act 1998, and*
- (ii) is wearing a radio tracking collar or is on a lead,*
- (a) a person using a dog for locating, holding or bailing pigs must ensure that the dog does not chase any other species of animal,*
- (b) a person using a dog for locating, holding or bailing pigs must not leave or abandon the dog on public land.³³*

³¹ Section 22 GFACA.

³² Section 23 GFACA.

³³ Clause 18 and Sch 1, Cl 13 GFACR.

It is also a condition of licences that mandatory provisions of the Game Council NSW Code of Practice are complied with.³⁴ The mandatory provisions include:

5. *Obligation to avoid suffering*

An animal being hunted must not be inflicted with unnecessary pain. To achieve the aim of delivering a humane death to the hunted animal:

(a) it must be targeted so that a humane kill is likely, and

(b) it must be shot within the reasonably accepted killing range of the firearm and ammunition or bow and arrow being used, and

(c) the firearm and ammunition, bow and arrow, or other thing used must be such as can reasonably be expected to humanely kill an animal of the target species.

7. *Wounded animals*

If an animal is wounded, the hunter must take all reasonable steps to locate it, so that it can be killed quickly and humanely.

8. *Use of dogs*

Dogs and other animals may be used to assist hunters but only if:

(a) their use is not in contravention of the Prevention of Cruelty to Animals Act 1979, and

³⁴ Section 24 GFACA.

*(b) their use is with the permission of the occupier of the land concerned*³⁵

There are circumstances in which the Game Council must refuse to grant a licence, such as where a person has been found guilty of an offence in NSW or elsewhere (in the previous 10 years) involving cruelty or harm to animals,³⁶ personal violence, damage to property or unlawful entry into land; has been found guilty of an offence under section 55 (releasing a game animal into the wild for the purpose of hunting the animal or the animal's descendants); or if the person is not a fit and proper person.³⁷

The Game Council and police officers have inspectorate powers under the GFACA.³⁸ Police officers are not required to act under the control or direction of the Game Council.³⁹ Inspectors' powers include powers of entry, search warrants and power to detain.⁴⁰

Prevention of Cruelty to Animals Act 1979

The POCTAA attempts to prevent cruelty and promote animal welfare. It defines an act of cruelty to include any act or omission as a consequence of which an animal is unreasonably, unnecessarily or unjustifiably:

(a) beaten, kicked, killed, wounded, pinioned, mutilated, maimed, abused, tormented, tortured, terrified or infuriated,

(b) over-loaded, over-worked, over-driven, over-ridden or over-used,

(c) exposed to excessive heat or excessive cold, or

³⁵ Schedule 2 GFACR.

³⁶ This ground of refusal is of limited utility where the rate of prosecutions for animal cruelty offences is low due to circumstances including inadequate enforcement and sentencing. See for example: Annabel Markham, 'Animal Cruelty Sentencing in Australia and New Zealand' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (The Federation Press, 2009) 289. Further, it is unclear as to the extent the Game Council will go to enquire as to the commission of animal cruelty offences.

³⁷ Section 21 GFACA.

³⁸ Part 4 GFACA.

³⁹ Section 34(2) GFACA.

⁴⁰ Part 4, Division 2 GFACA.

*(d) inflicted with pain.*⁴¹

An act of aggravated cruelty occurs where an act of cruelty is carried out, or where a person in charge of an animal fails to take reasonable care to prevent an act of cruelty or take reasonable steps to alleviate pain or provide veterinary treatment, and it results in:

(a) the death, deformity or serious disablement of the animal, or

*(b) the animal being so severely injured, so diseased or in such a physical condition that it is cruel to keep it alive.*⁴²

A person is prohibited from committing, or authorising if in charge of an animal, acts of cruelty or aggravated cruelty upon an animal. A person in charge of an animal must take reasonable care to prevent the commission of an act of cruelty and take reasonable steps to alleviate pain and provide veterinary treatment.⁴³

Explicit acts are prohibited including animal baiting, fighting, coursing and other similar activities.⁴⁴ With relevance to pig-dogging, the POCTAA provides:

Section 18 Animal baiting and fighting prohibited

(1) A person shall not:

(a) use any place, or manage or control any place which is used,

(b) authorise any place to be used, or

(c) receive money for the admission of another person to any place which is used,

for the purpose of conducting a bull-fight, baiting an animal or causing an animal to fight.

⁴¹ Section 4(2) POCTAA.

⁴² Section 4(3) POCTAA.

⁴³ Sections 5 and 6 POCTAA.

⁴⁴ Part 2 POCTAA.

(2) A person must not:

(a) cause, procure, permit, encourage or incite a fight in which one or more animals are pitted against another animal or animals, whether of the same species or not, or

(b) advertise the intention to conduct such a fight, or

(c) promote, organise or attend such a fight.

A number of defences are available to those suspected of engaging in animal cruelty. These include where an act is:

(b) in the course of, and for the purpose of:

(i) hunting, shooting, snaring, trapping, catching or capturing the animal, or

(ii) destroying the animal, or preparing the animal for destruction, for the purpose of producing food for human consumption,

*in a manner that inflicted no unnecessary pain upon the animal.*⁴⁵

In effect, this means that it is a defence to hunt an animal if “no unnecessary pain” was inflicted upon the animal.

Self-regulation

In addition to legislation, the pig-doggers representative body, Australian Pig Doggers and Hunters Association, self-regulates pig-dogging via a Code of Conduct. Generally, the Code promotes self-regulation and attempts to prevent cruelty. Provisions include:

It is preferable that dogs be only used to locate and bail feral pigs to enable human dispatch. Dogs must respond to commands from the controller/handler and not harass the pig.

⁴⁵ Section 24 (1)(b) POCTAA.

The use of dogs to attack, mutilate or bring down a pig should not be allowed. It is an offence in some areas to allow dogs to do this.

When the pig has been caught, it must be dispatched humanely and as quickly as possible.

Methods used to dispatch pigs must be rapid, effective and the most humane alternative possible to minimise pain and distress.⁴⁶

It is questionable whether this code is enforced and if it is, what the outcomes are if it is breached. It appears that outcomes include a possible fine, suspension, or at the most, loss of club membership.

Conclusion

The justification of pig-dogging as a means of abating feral pig populations, in light of the recognition that feral pigs are an environmental threat, is disputed based upon studies that show the sport is of limited value in reducing feral pig density on a large scale. The Government has acknowledged (via the Threat Abatement Plan for predation, habitat degradation, competition and disease transmission by feral pigs) that there are animal cruelty concerns with the sport, yet the sport continues with oversight by a conflicted statutory authority.

While the legislation imposes certain restrictions, it does not seem to adequately curtail cruelty. There are a number of ways cruelty can go unseen, including where the sport is insufficiently monitored and where a game hunting licence is only required if hunting wild pigs on public land. Welfare of the dogs is barely considered, and further, while dogs may only be used to locate, bail or hold pigs, in reality it is unlikely that hunters completely control or monitor the dogs in the heat of the hunt. Although the law requires a “humane death” with no “unnecessary pain”, it is plausible that dogs are often the cause of pig death, and death by dog would likely amount to an offence. However, a defence might be available to hunters under the POCTAA if they can produce evidence showing that no “unnecessary pain” was inflicted. Therefore, though animal welfare considerations apply, they are substantially undermined

46 Australian Pig Doggers and Hunters Association Code of Conduct / Practice (2005), available at <http://apdha.org.au/index.php?page=code-of-conduct>.

by the exemptions and defences contained in the legislation.

As such, the only leash imposed by the legal framework is an extremely flimsy one, which is in dire need of tightening. A conflicted body with a pro-hunting agenda should not have oversight of hunting. The use of dogs should be prohibited. The abatement of feral pig populations must be extensively researched with animal welfare a core factor; it must be heavily monitored and carried out by professionals, with humane death a last resort

Essay[#]

Human Rights v Animal Rights: Mutually Exclusive or Complementary Causes?

By Stephen Keim SC and Jordan Sosnowski¹

In a 2010 lecture, human rights barrister, Julian Burnside, invoked the idea that people care more about animals than their fellow humans.² Burnside was contrasting the upsurge of public outrage in response to the treatment of animals exported to the Middle East to the apparent lack of public concern about the treatment of asylum seekers who make it to Australian shores. However, the difference in public response should not be cause for concern, as empathy is surely something that should be promoted, no matter the genus of the subject.

The word ‘empathy’ comes from the Greek ‘pathos’ and is defined as the ‘power of projecting one’s personality into (& so fully comprehending) the object of contemplation’.³ Through focussed thought, an understanding of the suffering of one species may lead the consciousness to be enlivened to injustice in all its forms.

Throughout the history of human learning, there have been people whose lives have arguably demonstrated this philosophy. These individuals have been able to work to further human rights in various ways, but have also found room to promote kindness and tolerance towards animals. The example of these remarkable people teaches us that the two causes are not mutually exclusive. In many ways, an

[#] This new section of the AAPLJ is intended to provide an outlet for ideas that go beyond specific animal protection law issues - Ed.

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² Julian Burnside, ‘Injustice Within the Law - an Update: Blackburn Lecture 2010’ (2010) 216 *Ethos* - Official Publication of the Law Society of the Australian Capital Territory 14-19.

³ The Pocket Oxford Dictionary of Current English (Oxford University Press, 5th ed, 1969) FG. & HW. Fowler (eds) 269.

understanding of human rights encourages one to engage in the afflictions of others – whether the victim is human or non-human.

A *Pythagoras*

Pythagoras, born around 570 BC, is best known for his contribution to mathematics and western philosophy.⁴ He also practised a Buddhist-like notion of kindness towards animals and was a strict vegetarian⁵

His greatest mathematical discovery was his theorem concerning right-angled triangles.⁶ What was it about geometry that allowed Pythagoras to make important discoveries in philosophy and lay down principles concerning the protection of human rights? The answer may be that geometry commences with maxims that are self-evident and leads, by way of deductive reasoning, to conclusions that are not only not self-evident but not at all obvious.

This method made it ‘possible to discover things about the actual world by first noticing what is self-evident and then using deduction’.⁷ This method developed by Pythagoras influenced later philosophers as diverse and prominent as Plato, Descartes and Kant.

Pythagoras also founded a religion based on the transmigration of souls, making him one of the first Western thinkers to voice the concept of reincarnation. Pythagoras’ teaching led to men and women being equally allowed to enter his religious order,⁸ a very progressive statement in a social context that allowed little social freedom to women. Pythagoras, through his order, practised an early form of communism.⁹

His cyclical view of the world awakened Pythagoras’ consciousness to the suffering of humans and animals:

4 Christoph Riedweg, *Pythagoras: His Life, Teaching, and Influence* (Steven Rendall trans, Cornell University Press, 2005) ix [trans of: *Pythagoras: Leben, Lehre, Nachwirkung, Eine Einführung* (first published 2002)].

5 Howard Williams, *The Ethics of Diet: An Anthology of Vegetarian Thought* (White Crow Books, 2010) 53.

6 [‘That the sum of the squares on the sides adjoining the right angle is equal to the square on the remaining side, the hypotenuse’.] Bertrand Russell, *A History of Western Philosophy* (George Allen & Unwin, 1946) 54.

7 *Ibid.*

8 *Ibid.* 51.

9 He taught that ‘the property of friends is to be held for the common good; that friendship is equality; and his disciples laid down their money and goods at his feet, and had all things in common’. Williams, above n 4, 53.

*First, that the soul is an immortal thing, and that it is transformed into other kinds of living things; further, that whatever comes into existence is born again in the revolutions of a certain cycle, nothing being absolutely new; and that all things that are born with life in them ought to be treated as kindred.*¹⁰

Pythagoras did not eat animal flesh or slay animals in sacrifice.¹¹ He taught, 'As long as men massacre animals, they will kill each other. Indeed, he who sows the seeds of murder and pain cannot reap joy and love'.¹² He also encouraged a continual moral questioning of one's actions in relation to others, even one's enemies.¹³ These ideas are strongly connected to the emphasis on compassion found in the essential teachings of the Buddhist and Hindu religions.

Bertrand Russell said of Pythagoras, 'I do not know of any other man who has been as influential as he was in the sphere of thought'.¹⁴ Pythagoras was an intellectual genius and a political and social progressive, who promoted equal rights, regardless of gender. His teachings concerning animals had the effect of widening the moral compass of future great thinkers so that, rather than obstructing human rights, the two causes were complementary.

B Mary Wollstonecraft and the Romantics

Born in London in 1759, Mary Wollstonecraft was one of the earliest feminists and is famous for championing the women's rights movement.¹⁵ Her inspiring views forged the way for other Romantic writers, closely connected to her moral and social circle, to highlight the cause of animal rights.

The majority of women in the Romantic era were poorly educated, extremely restricted socially and sexually, and deprived of legal rights.¹⁶ In 1792, Wollstonecraft wrote *A Vindication of the Rights of Woman*,

10 Russell, above n 5, 51.

11 Williams, above n 4, 53.

12 Pythagoras cited in Danny Crossman, *The Animal Code: Giving Animals Respect and Rights* (Arcadia, 2011) 6.

13 Williams, above n 4, 53.

14 Russell, above n 5, 56.

15 Claire Tomalin, *The Life and Death of Mary Wollstonecraft* (Penguin, 2004) 4.

16 Jack Stillinger and Deidre Shauna Lynch, *The Norton Anthology of English Literature: The Romantic Period* (Norton, 8th ed, 2006) 5.

which advocated sexual equality and also argued for a dramatic change in education, so that women were not simply taught how to be 'alluring mistresses' but also 'rational mothers'.¹⁷ She said of women, 'I do not wish them to have power over men; but over themselves'.¹⁸ Her work concerning equality was so ahead of its time, that political reform by way of universal adult suffrage, did not take place in Britain until 1928, more than 130 years after her *Vindication* was published.

These ideas inspired members of her family to write stories with animal-sympathetic undercurrents. Wollstonecraft's daughter, Mary Shelley, wrote the famous *Frankenstein*, which has feminist and vegetarian undercurrents.¹⁹ In her *Vindication*, Wollstonecraft wrote that women 'are treated as a kind of subordinate beings, and not as a part of the human species'.²⁰ Building on that idea, Mary Shelley created the character of Dr Frankenstein's Monster. The Monster is physically stronger than a man and capable of killing animals for food. It is nevertheless, a vegetarian.²¹ It is cast as an outsider, in the same way that women, and those who viewed animals as worthy subjects of rights, were treated at the time.

The Monster may be seen to represent the 'Other' or 'Outsider'. Whether this Other be characterised as the Woman, the Vegetarian, or the Animal, Mary Shelley utilises her mother's concept of equality to highlight issues common to women's rights and animal rights.

Mary Shelley's husband, Percy Bysshe Shelley, was also influenced by Wollstonecraft's ideas of equality when he wrote *A Vindication of Natural Diet*. Shelley saw abstinence from meat as a social levelling mechanism, a way to bring about a restructure of the classes by foregoing needless luxuries.²² Shelley's writing has a theme of pacifism towards all beings and his work carries 'an explicitly vegetarian message'.²³ His vegetarian ideas carried a deeper message of promoting non-violence towards others. 'I wish no living thing to suffer pain',²⁴

17 Ibid 171.

18 Ibid 191.

19 Carol J Adams, *The Sexual Politics of Meat: A Feminist Vegetarian Critical Theory* (Continuum Publishing, 2006) 120-132.

20 Stillinger and Lynch, above n 15, 171.

21 '[M]y food is not that of man; I do not destroy the lamb and the kid, to glut my appetite; acorns and berries afford me sufficient nourishment'. Mary Shelley, *Frankenstein* (Norton, 1996) J. Paul Hunter (ed) 99.

22 Colin Spencer, *The Heretic's Feast: A History of Vegetarianism* (University Press, 1995) 250-251.

23 Ibid.

24 Ibid.

Shelley said. His teachings influenced later writers including George Bernard Shaw²⁵ and Mahatma Gandhi.²⁶

Shelley articulated the idea that pacifism and equality extended beyond the human circumstance, to all those who could feel pain. This was also the message voiced by Wollstonecraft and Mary Shelley. In Shelley's work, his doctrine of non-violence towards all beings expressly united the ideas of rights of human beings and animals. In this way it can be seen that by contemplating another's suffering, the consciousness can be broadened in such a way as to enliven our empathy to other beings.

C William Wilberforce and his Legacy

William Wilberforce was born in 1759 and is primarily known for his pivotal role in abolishing the slave trade in England.²⁷ He was also one of the founding members of the Society for the Prevention of Cruelty to Animals (SPCA) and a strong supporter of legal rights for animals.²⁸

Wilberforce took up many causes, politically and in the private sphere. Using his personal finances, he funded hospitals and schools and was a patron of the arts. He also advocated for laws to prevent the exploitation of child labour.²⁹ His passion for social justice stemmed from a deeply religious base and a commitment to benevolence towards others. It is his opposition to slavery and quest for emancipation that led his name to become synonymous with the human rights movement. He attempted to introduce anti-slavery legislation in 1789 but met staunch opposition. While many could see the obvious moral objections to the slave trade, the justification for its continued existence was that a departure would lead to commercial ruin.

The abolition statute finally came into effect in 1808. Rather than bask in the glory of this hard won victory, Wilberforce reacted to the news by asking, '[W]ell, what shall we abolish next?'³⁰ His determination to correct injustice in all its forms was indefatigable.

He devoted his energies, alongside MP Richard Martin and other

²⁵ Shaw converted to vegetarianism after reading Shelley, *Ibid* 280.

²⁶ Gandhi read Shelley's views on his visit to England, *Ibid* 291.

²⁷ William Hague, *William Wilberforce: The Life of the Great Anti-Slave Trade Campaigner* (Harper Press, 2008) 4.

²⁸ Hilda Kean, *Animal Rights: Political and Social Change in Britain since 1800* (Reaktion Books, 1998) 36.

²⁹ Kevin Belmonte, *William Wilberforce: A Hero for Humanity* (Zondervan, 2007) 17.

³⁰ John Stoughton, *William Wilberforce* (London, 1880) 76.

humanitarians, to establish the SPCA,³¹ whose first goal was to reduce the improper treatment of cattle in the trip to urban slaughter.³² They achieved this in 1822, when Martin's Act', the first specific piece of anti-cruelty legislation was passed.

Wilberforce's religious-based philosophy of 'do unto others', lies at the heart of human rights ethics. The Universal Declaration of Human Rights started with a debate about 'what is right'.³³ Wilberforce took his religious notion and applied it to both fellow human and fellow 'creature'. For Wilberforce, the Christian concept of kindness linked the two causes. The issue was not whether the abolitionist cause was more important than preventing cruelty to animals. Both causes sought to correct injustice caused, in both cases, by a lack of benevolence and consideration for others. In this way, Wilberforce's sense of injustice concerning the slave trade translated to a deep understanding of the suffering of all beings.

Conclusion

Philosophically, human and animal rights stem from the ability to empathise with the feelings of others. The work of the aforementioned campaigners and thinkers are but examples of the capacity to fight injustice on more than one plane. Even if such multi-focussed activity is not possible for us as individuals, the work of others who fight injustice in a different sphere to that in which we fight ourselves should still be appreciated.

The enemy of most people who campaign against injustice is a lack of empathy on the part of those not yet enlisted to the cause. By contemplating injustice towards one species, so too may our moral compass be widened to include all beings. Far from being mutually exclusive, the two causes each generate a complementary pathos. In this way, it is important to encourage the ability to feel empathy for both the humans and the animals with whom this small planet is shared.

31 Stephen Tomkins, *William Wilberforce: A Biography* (Lion, 2007) 207.

32 M. J. D. Roberts, *Making English Morals: Voluntary Association and Moral Reform in England 1787-1886* (Cambridge University Press, 2004) 113.

33 Daniel Warner, 'An Ethics of Human Rights: Two Interrelated Misunderstandings' (1996) 24 *Denver Journal of International Law & Policy* 395, 414.

BOOK REVIEWS

Humanising Animals: Civilising People

Mirko Bagaric & Keith Akers

CCH Australia 2012

ISBN 978 1 921948 60 2 (pbk)

As its title indicates, despite its familiar format, this is not a typical CCH "information service for professionals". An introductory heading, "the moral black spot that is animal suffering", and early chapters on the physiology of pain and the moral status of animals suggest that it is better seen as "a book of moral and legal analysis".¹

The authors set out to explore what they describe as "one of the most striking and important paradoxes of our time": "the gap that exists", when it comes to animals, "between our stated moral values and emotional sentiments ... and our actual conduct".

Three chapters (6, 7 & 8) "of most interest to lawyers, law students and legislatures" stand apart from the rest of the book.

The mode of legal analysis of state and territory "anti-animal cruelty legislation and adopted codes of practice" (in Ch. 6) strongly supports the authors' conclusion that animal welfare laws across Australia are "inconsistent, overly-technical and patchy in their coverage", and that "the definition of cruelty should be universal and cover all forms of

¹ borrowing words used by the Hon. Michael Kirby in a foreword, in which the former High Court justice and patron of Voiceless - the animal protection institute, notes wryly: "before Peter Singer wrote *Animal Liberation*, [1975 - Ed.] many of the ideas in this book would have been dismissed as the daydreaming of out-of-touch bleeding hearts".

human infliction of unnecessary pain". Lack of uniformity in animal cruelty offences is concisely shown under sub-headings such as "Animal cruelty offences in only one Australian state or territory", followed by dot point entries noting the offence and relevant provision.² The following chapter looks at the legislative regimes affecting particular types of animal-related conduct: animal experimentation and testing, jumps racing, rodeos, recreational duck hunting, intensive farming of pigs and hens, and live animal exports.

The final chapter (9) reads to this reviewer like a call to arms for the newly converted. The authors describe it as their approach to "clawing back the moral high ground in relation to the treatment of animals". It addresses itself to "the animal protection movement" for which apparent entity it states that the "first imperative" is "to eradicate principles that are cruel to animals, unless there is a countervailing benefit to be obtained from such conduct, particularly for the animal suffering or for animals generally".

Of course, from a practising lawyer's point of view, it is not a legally comprehensive handbook such as Graham McEwen's innovative and freely available online e-book *Animal Law: Principles and Frontiers*.³ Nor, does it try to be. On balance, this book is a very welcome addition to the national animal protection law library, particularly for animal law students and the general community. - *John Nancy*, barrister-at-law.

2 e.g.:

- . trap shooting of birds (Vic)
- . breeding of animals with inheritable defects (Vic)
- . the performing of medical procedures on animals by persons other than veterinarians (ACT)
- . when the driver of a vehicle involved in an accident in which an animal is injured fails to contact the owner of the animal or an inspector (SA)

3 Published at www.bawp.org.au

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