

**JURISDICTION:** MAGISTRATES COURT OF WESTERN AUSTRALIA  
(CRIMINAL JURISDICTION)

**LOCATION :** PERTH

**CORAM :** Magistrate C.P. Crawford

**HEARD :** 5-8, 13-14 February 2007

**DELIVERED :** 8 February 2008

**CASE NO/S :** FR 9975-7/05, FR 10225-7/05 & FR 10253-5/05

**BETWEEN :** DEPARTMENT OF LOCAL GOVERNMENT & REGIONAL  
DEVELOPMENT  
Prosecutor

AND

EMANUEL EXPORTS PTY LTD ACN 008 676 131  
GRAHAM RICHARD DAWS & MICHAEL ANTHONY  
STANTON  
Accused

### **Representation**

Counsel:  
Prosecutor Mr B. King & Ms Yeats  
Accused Mr T. Bannon SC

Solicitors:

Prosecutor State Solicitors Office  
Accused Cocks Macnish

### **Case(s) referred to in judgment:**

*Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47  
*Ex parte McLean* (1930) 43 CLR 474  
*Song v Coddington* (2003) 59 NSWLR 180  
*Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61  
*Victoria v The Commonwealth (The Kakariki)* (1937) 58 CLR 618

### **Cases also cited:**

*Airlines of NSW Pty Ltd v NSW* (1964) 113 CLR 1  
*Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237  
*Clyde Engineering Co Ltd v Cowbum* (1926) 37 CLR 466  
*Commonwealth v Western Australia (The Mining Act Case)* (1999) 196 CLR 392

*Dunne v P* (2004) 29 WAR 232  
*McWaters v Day* (1989) 168 CLR 289 at 296  
*Metal Trades Association of Australia v The Amalgamated Metal Workers and Shipwrights' Union* (1983) 152 CLR 632  
*Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402  
*P v P* (1994) 181 CLR 583  
*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355  
*R v Credit Tribunal; ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545  
*Shanahan v Scott* (1956-1957) 96 CLR 245  
*T A Robinson & Sons v Haylor* (1957) 97 CLR 177

### **REASONS FOR DECISION**

1. In November 2003, 103,232 live sheep were loaded on the MV Al Kuwait at Fremantle Harbour bound for the ports of Muscat in Oman, Kuwait, Bahrain and Jebel Ali in the United Arab Emirates.
2. Emanuel Exports Pty Ltd ("Emanuel") and its directors were charged with cruelty to the sheep in that the way in which they were transported, and confined, was likely to cause the sheep unnecessary harm. Further that they failed to provide the sheep with proper food.
3. The prosecution case was confined to fat adult sheep, referred to as A class wethers and Muscat wethers. There were a total of 13,163 sheep in those classes on board. It was alleged that fat adult sheep transported by ship in the second half of the year were likely to suffer inanition or salmonellosis or both and thereby suffer unnecessary harm, including death.
4. Research into the live sheep export trade had identified the risk of higher mortality rates from inanition and salmonellosis or a combination of those conditions, in adult fat sheep transported in the second half of the year.
5. Emanuel and its directors vigorously defended the charges on various bases including that the Animal Welfare Act 2002 (WA) was partially invalid under section 109 of the Commonwealth Constitution ("the Constitution") to the extent that it purports to criminalise conduct authorized by Commonwealth law. Further, that it neither owned nor controlled the sheep, once delivered dockside; that Emanuel neither employed nor controlled the stockman or the crew who tended the sheep on board the ship. Emanuel argued that the research did not demonstrate that fat sheep have a higher risk of mortality in the second half of the year. It argued that the farm of origin risk could not be excluded, and could have applied at any time of the year.
6. Each of the three charges is discussed below before consideration of the constitutional issue. For the reasons discussed below I find that the elements of the offence set out in Charge 1 were proven beyond reasonable doubt, and the defence negated to the requisite standard. Charges 2 and 3 were not proven and are dismissed. However after considering the constitutional issue I find that there is operational inconsistency between the Commonwealth legislative regime and the Animal Welfare Act 2002 ("AWA"). To the extent of the inconsistency the AWA is invalid, that is of no effect. Accordingly the accused are acquitted on all charges.

## **Charge 1 - Whether sheep transported in a way likely to cause unnecessary harm**

7. Emanuel is charged as follows:

Between the 10 November 2003 and 14 November 2003 at Fremantle on the waters of the Indian Ocean off Fremantle, were cruel to animals, namely sheep, in that it was a person-in-charge of those animals when they were transported in a way that was likely to cause them unnecessary harm; contrary to section 19(1) and 19(3) of the Animal Welfare Act 2002.

8. At the outset the State confined its case to the first 24 hours of the ship's journey, commencing 11 November 2003 at 1800 hours, which by agreement represented the period of the ship's passage through Australian territorial waters. The Court has no jurisdiction with respect to the treatment of animals in international waters or beyond.

9. The prosecution alleged by way of particularization that:

a. Emanuel was in charge of the relevant sheep through its member of staff, the onboard stockman, Norman House, who had physical custody or control of the sheep.

b. The sheep were fat adult sheep namely A class wethers and Muscat wethers.

c. The relevant time was 11 November 2003 to about 12 November 2003.

d. The way of transport was by sheep transport ship, namely the MV Al Kuwait ("the ship"), in the second half of the year.

e. The way of transport was likely to cause a percentage of the sheep to suffer from inanition or salmonellosis.

f. Sheep which suffer from inanition or salmonellosis suffer the harm of injury, pain or distress;

g. That harm was unnecessary because it was justified only by financial profit.

10. The issues with respect to proof of charge 1 may be stated as follows:

- Was Emanuel a "person in charge" of the sheep transported?
- Were the sheep transported in a way likely to cause harm?
- Was any harm caused to the sheep unnecessary?

### **Was Emanuel a "person in charge" of the sheep transported?**

11. The phrase "person in charge" is defined at section 5 of the AWA as follows:

"Person in charge" in relation to an animal, means -

- a. the owner of the animal;
- b. a person who has actual physical custody or control of the animal;
- c. if the person referred to in paragraph (b) is a member of staff of another person, that

other person; or

d. The owner or occupier of the place or vehicle where the animal is or was at the relevant time."

12. The prosecution case is that Emanuel was in control of the sheep through its member of staff, Norman House ("House"). "Staff" is defined at s5 of the Act to include, inter alia, "all the people working for, or engaged by, that person whether as officers, employees, agents, contractors, volunteers or in any other capacity".

13. Was House working for, or engaged by Emanuel as an officer, agent, contractor, volunteer or in any other capacity? House was onboard stockman. Gary Robinson ("Robinson"), Export Manager for Emanuel had asked him to undertake that role on board the ship. He was paid for the trip by Kuwait Livestock Transport and Trading ("KLTT"), a foreign entity. House had previously completed 12/13 voyages of this type, accompanying stock to the Middle East and been paid by Emanuel. House had not signed any employment contract with Emanuel for the voyage in November 2003.

14. House received a document entitled Shipboard Stockmans Instructions ("the Instructions") on 11 November 2003, in the form of a letter on Emanuel's letterhead, stated to be "For Norm House" from Robinson. The document set out a series of instructions, as the title suggests, with respect to the care of the sheep and at the end of the letter requests him to "confirm with captain". What precisely is to be confirmed is not clear. The Master of the ship and House both signed the document.

15. The Instructions were directed to the care of the sheep and maintaining relevant records, including directions to:

- Ensure stock are "evenly distributed when loading and any overcrowded areas eased off,
- Monitor fodder consumption, ensuring minimum 1.5kgs per head per day,
- Ensure water is clean and available at all times, and
- Ensure mortalities are counted accurately.

16. The Instructions specifically authorized House to destroy any sick or injured animals, and directed that he advise Emanuel immediately "in the event of any unusual occurrences out of the ordinary".

17. In terms of distribution of the sheep within the ship, House said it was the Chief Officer's job, on a ship, to make a load plan before loading based on data provided by the exporter. Subsequently stock unsuitable for the ship would be removed. Then he, the captain or chief officer would decide how to redistribute the sheep. Generally he made decisions about redistributing sheep.

18. There were daily meetings on the ship involving the master, chief officer and House to discuss issues relating to the management and welfare of the sheep. Each morning during the journey the mortalities were removed from the pens. House kept his own list of mortalities, in each category of sheep to ensure he could check figures obtained by the Chief Officer.

19. There was a crew of about 34-50 who assisted with the sheep, including ensuring that there was feed and clean water available in the pens, checking for mortalities and extracting

them from the pens and undertaking any maintenance required of feeding and watering systems. If the latter was not attended to then he would raise the matter with the bosun or chief officer. The bosun allocated work to the crew and made sure the job was done. House himself checked that the crew had attended to the feed and water requirements of the sheep.

20. If House saw an animal with scabby mouth, lame or pinched up he would move the animal to the hospital pen, and give it medication if appropriate. If he observed that a sheep was unlikely to survive he made the decision to euthanize the animal without reference to the master or chief officer. Rather than give commands about the welfare of the sheep the officers made suggestions to him.

21. House did his own daily report which he gave to the master. He recognized information which he had supplied to the Master in daily written reports from the ship's Master to Emanuel.

22. Livecorp, the industry body, in a publication for shipboard stockmen entitled, Livecorp Shipboard Program: Stockman's Handbook (Sheep and Goats), 3rd ed., July 2003, p5 described the role as follows:

"... as the specialist stockman on board you are the eyes and ears of the exporter on stock husbandry matter. The exporter needs to know how the consignment is progressing throughout the voyage. This information comes principally from daily reports sent by the Master. You should provide the master with a daily stock report... Your daily report...is a confidential report to the exporter (your boss) and must not go anywhere else."

23. Robinson, who had been export manager for Emanuel for about 4 years at the time of the relevant shipment of sheep, said that Emanuel had purchased the sheep for shipment, assembled them at feedlots where they were sorted into like-type animals and prepared for shipment over 5-7 days. He said the sheep were the subject of a contract of sale to KLTT which required Emanuel to deliver the sheep alongside the vessel at which point they became the property of KLTT. He said the ship was owned by KLTT. Emanuel, he said, did not have a person in charge, or employee, on the ship. Nor did it employ, engage or pay House to undertake the relevant voyage, although he did concede a longstanding relationship between Emanuel and House. 24. Robinson accepted that Emanuel had a duty as exporter to ensure there was a suitably experienced stockperson on board the ship. The reference in his letter, addressed to House to shipboard stockmen's instructions was included in order to ensure Emanuel "satisfied its obligations" under the Live Export Accreditation Programme. With respect to the reference in the Instructions to, humane destruction of any sick or injured animals, that was related to the obligation, in the Australian Livestock Export Standards ("the Standards"), to provide instructions on that issue, and was done to ensure the authority was conveyed to the master. Robinson ensured the letter was signed by the master because Emanuel did not own the sheep when they were loaded on the ship. He agreed that the best way to comply with the Standards was to provide the Instructions and have the master sign off on them.

25. Emanuel argued that House was engaged by KLTT, not it, and that the Master of the ship, not Emanuel, was in control of the ship and sheep. Robinson caused House and the master of the ship to sign the letter but did not intend, by that letter, to engage House in any capacity

on behalf of Emanuel. Robinson maintained that the reference to shipboard stockmen's instructions in the letter to House was done so as to satisfy Emanuel's obligations under the Standards.

26. The question is not whether Robinson intended that House be its servant, agent, contractor, volunteer or act in another capacity, but rather, as a matter of law, whether House fell into one of those categories.

27. From the time the sheep were loaded, they were the property, and responsibility of KLTT, according to Robinson. From that point on Emanuel had no insurance. It was paid per head of sheep, delivered dockside. If sheep died during the voyage there was no reduction in the price paid to Emanuel.

28. Emanuel as exporter was subject to a detailed legal regime established by the Commonwealth. It was the holder of a Licence to Export, issued by the Commonwealth Department of Agriculture, Fisheries and Forestry, subject to compliance with the Australian Meat and Livestock Industry Act 1997, various regulations, orders and directions. Relevant Orders require, inter alia, the exporter to submit a consignment plan, the express written consent of the Secretary to export live sheep to specified Middle East ports and a minimum floor area per head of sheep on board a ship engaged in this trade between the months of November and April.

29. The Standards set out in considerable detail the mandatory requirements imposed upon exporters of live sheep including detailing minimum requirements for space, shelter, feed while in feed lots awaiting transportation and during transportation by sea. The Standards specifically require an exporter to ensure that there is a suitably experienced stock person on board "whose duty to care for the animals takes priority over other duties, and sufficient staff to care for the sheep and goats during the voyage" (Standards, para 7.9.13).

30. Standard 7.9.15 requires the exporter to provide the ship's Master with clear, written instructions or standard operating procedures which cover nominated issues, including the quantity and type of feed to be provided, frequency of feeding; if water is not freely available, the quantity of water and frequency with which it is to be supplied; the authority to humanely destroy any animal that is seriously ill or injured. The Instructions to House for the most part cover the issues on which the Master is required to be instructed. I note however that the Standard requires instruction to the Master on "procedures for contacting the Exporter in the event of an animal health or welfare emergency. For this purpose the Exporter must provide the Master with phone numbers that will allow contact with either the Exporter or an authorized representative of the Exporter."

31. In fact the Instructions include contact details for Emanuel and name the contact person as Graham Daws, the first named Accused and a director of Emanuel.

32. There are 3 noteworthy differences between the Standards and the Instructions. Firstly, the Standards provide for instructions to be issued to the Master of the ship. Here they were issued to House, the onboard stockman. Secondly, there is the difference in language regarding the circumstances in which the exporter is to be contacted during the voyage. The Standards refer to "an animal health or welfare emergency". The Instructions to House refer to "any unusual occurrences out of the ordinary". Thirdly, the Standards require the Master be

instructed as to "reporting procedures during and on completion of the voyage". Save for retaining the load plan and counting mortalities during the journey the Instructions do not appear to comply. However, House did complete an "End of Voyage Report" and daily reports were sent to Emanuel by the master.

33. The essential features of "a person in charge" of animals was discussed in *Song v Coddington and Another* [2003] NSWSC 1196, in the context of an appeal by a veterinarian, employed by Australian Quarantine Inspection Service from convictions for breaches of a NSW animal welfare regulation regarding authorization of carriage of large stock animals in a cage. The vet had issued an export permit for a consignment of live goats and signed a certificate of health to accompany the animals. His Honour Justice James said:

" In my view, before a person might be held to be in charge for the purpose of the *Prevention of Cruelty to Animals Act 1979* and the *Prevention of Cruelty to Animals (General) Regulation 1996* it is necessary for that person to have some responsibility or authority of an immediate kind for the physical control of an animal rather than merely having some legal responsibility to undertake a limited function in connection with the animal even if that function involves looking over of the animal.

The concept of person in charge, in my view, in the *Prevention of Cruelty to Animals (General) Regulation 1996* particularly refers to a person's ability and authority (to) take positive steps to effect the immediate physical circumstances of the animal so that person's authority might be employed to ensure care, treatment in a humane manner and the welfare of the animal. In my view, in order for the person to be able to be held to be a person in charge of the goats, it is not enough that the person perform some ancillary legal function in relation to the goats but it is necessary that the person, whether on their own or in combination with others, have that degree of authority and responsibility as would enable the person to engage in the physical disposition of the goats."

34. The Defence submits House was not in actual physical custody and control of the sheep. The master and crew were in physical control. House had no means of controlling any of the acts or omissions alleged to have constituted animal cruelty.

35. On the evidence House was given the responsibility for caring for the sheep during the voyage which he did with the assistance of crew members. He made the decisions regarding humane destruction when necessary. His role in terms of care of the animals was done on a co-operative basis as the assistance of the ship's crew was necessary, for which he relied on the authority and co-operation of the master. House satisfied the test propounded in *Song v Coddington*. Emanuel, through House, was "a person in charge" of the sheep, in that he was engaged by Emanuel, at least, in "any other capacity" as that phrase is used in s.5 of the Act. It matters not that KLTT paid House, or that the master was in charge of the ship. The AWA and s.5 in particular must be interpreted having regard to the purposes set out in s3, which includes the stated intention to: (a) promote and protect the welfare, safety and health of animals; (b) ensure the proper and humane care and management of all animals in accordance with generally accepted standards; and (c) reflect the community's expectation that people who are in charge of animals will ensure that they are properly treated and cared for (s.3(2) AWA).

36. The definition of staff is inclusive and at para (a) of the definition is broad in its reach. Having regard to the stated intentions of the legislation there is no doubt the Parliament sought to cover a wide range of diverse situations, not limited to the employment, agency or contractor relationships.

37. Emanuel had a longstanding relationship with House. It had legal obligations to discharge with respect to the Commonwealth legal regime regulating export of sheep. House was Emanuel's 'man', stockman, on board, to oversee the care and welfare of the sheep. Instructions were issued to him. He was required to contact Daws, at Emanuel's in the event of any unusual occurrence. As his role was 'stockman' the reference to unusual occurrence must be intended to refer to any unusual occurrence impacting on the welfare of the sheep. Thus despite ownership passing to KLTT dockside at Fremantle, and Emanuel having no financial interest in the sheep during the voyage House was directed to contact Emanuel in the event of an unusual occurrence.

38. I am satisfied, and find, that through House, Emanuel was a 'person in charge' of the sheep as that concept is defined in the AWA, having regard to the stated intention of the Act which is directed to proper and humane care and management of animals. As for the submission that House had no means of controlling any of the acts or omissions alleged to constitute cruelty, that is correct, and the reason no doubt that the Prosecution did not allege that House had committed any of the offences with which Emanuel was charged. With respect to the first charge, it was Emanuel who contracted to transport fat adult sheep in November, notwithstanding the likelihood of higher mortality rates to that category of sheep, as discussed further on.

### **Were the sheep transported in a way likely to cause harm?**

40. The question for consideration is whether fat adult A class wethers and Muscat wethers were transported in a way likely to cause them harm. This element requires consideration of 2 discrete issues:

- What 'transported in a way' means?
- Whether the transportation was likely to cause harm?

41. The prosecution case focused on 2 conditions suffered by sheep in the live export trade: inanition and salmonellosis. Inanition is a disease which has been defined as a consequence of research into the live sheep trade undertaken in the late 1980s and early 1990s. It has been called "failure to eat", persistent inappetance or inanition syndrome. At post mortem affected animals were found to have an almost empty rumen, or stomach, with few other symptoms or signs of disease. Research established different metabolic effects in sheep who had suffered inanition including kidney failure and liver failure which developed over 5-10 days of illness.

42. Section 19 (3) creates the offence of cruelty to an animal if it is transported in a way that is likely to cause it harm. Relying on expert evidence the prosecution alleged that transporting fat adult sheep in the second half of the year exposed them to a much greater risk of fatal inanition and salmonellosis than if the sheep had been younger and leaner or if they were transported in the first half of the year. What does 'transported in a way mean' mean? Can it be interpreted to include the season when transportation by ship occurred?



43. In *William Holyman and Sons Pty Ltd v Eyles* [1947] S.R. 11 at 16 His Honour Chief Justice Morris found that transportation of horses, by sea, in weather known to be rough, was cruel. He was considering a charge created by an Imperial Act, Protection of Animals Act, 1911 which at s. 1 read as follows: "If any person - (b) shall convey or carry, or cause or procure, or being the owner, permit to be conveyed or caused any animal in such a manner or position as to cause that animal any unnecessary suffering .... such person shall be guilty of an offence of cruelty within the meaning of this Act ...."

44. The question considered by his Honour was: Has it been proved that it was because of the manner or position in which the horses were conveyed that they were caused suffering? In answering this question his Honour made the following remarks: "This section relates to how on a journey the animals are conveyed. That is, it assumes the journey itself to be something lawful and is concerned with manner only upon the journey. In that view one might say that it was not the "how" of conveying on the journey which caused the suffering in this case since the horses were conveyed in a well recognized manner in horse boxes universally used and roped as horses always are. But I think that is too narrow a view. The manner of conveying these horses was on the top deck of a heavily rolling ship, where they were being buffeted about, and wetted with, at least, spray in circumstances likely to promote panic among them. The alternative manner of conveying was upon a ship not expected almost certainly to be a heavily rolling ship but a ship in reasonable waters. In other words, the captain should have waited for another day."

45. His Honour distinguished between a situation where rough weather was encountered unexpectedly and, as in the case before him, rough weather was expected. In the latter situation he considered the horses being subjected to violent throwing about by the rolling ship, and the likelihood of panic among them, ought to have been anticipated. His Honour interpreted the phrase "conveyed ... in such a manner or position" broadly.

46. "Transport in a way" must be given a construction which is informed by the purpose of the AWA which may be broadly stated as the protection of animals and promotion of their welfare, safety and health, see s.3. The stated intention of Parliament includes ensuring the proper and humane care and treatment and management of all animals in accordance with generally accepted standards, see s3(2). Section 19(3) makes transportation in a way that causes or is likely to cause unnecessary harm an unlawful act. Indeed the Act defines that conduct as cruelty to an animal. The Act covers all animals that are invertebrates except humans or fish.

47. One can readily understand that transportation of a crocodile and joey would be different, as would the transport of a cow in calf. The obligation cast by the legislation is to avoid transport in a way likely to cause unnecessary harm. That obligation requires reference to the particular attributes of the animal concerned which for example may include whether the animal is in season, in calf, needs suckling or is at a particular stage in its growth or development cycle. Reference would then be necessary to the impact of transport, and the particular conditions to which the animal would be subjected during transport so as to assess whether harm is likely before turning to the question of whether that harm is unnecessary or may be avoided. 'Transport in a way' is to be interpreted as including all relevant circumstances of the particular transport event.

48. I am satisfied and find that the sheep were transported in the second half of the year and

that "transported in a way" is properly constructed to include that as an attribute, element or characteristic of the transport.

49. The second issue then is whether the transportation of fat, adult sheep, that is A class wethers and Muscat wethers was likely, as at 11 November 2003, 6pm, to cause harm. That issue raises the following questions:

- What harm, if any, was transport in November 2003 likely to cause to fat, adult sheep?
- What does "likely" mean?
- Whether experiencing the condition, inanition and/or salmonellosis would constitute harm?

50. From scientific research undertaken in the late 80s and early 90s into the mortality of sheep in the live export trade, and morbidity risk factors, it emerged that two conditions, inanition (50 percent) and salmonellosis (25 percent) accounted for 75 percent of all deaths on board ship. The two conditions interacted, in that inanition appeared to predispose sheep to salmonellosis. 51. Dr Kelly ("Kelly") described inanition syndrome as follows: "The inanition syndrome begins with the failure of sheep to eat at the commencement of the export process - in the assembly feedlots. A proportion of the population do not adapt to the pelleted ration which is offered, becoming the so-called "shy feeders". The numbers are quite variable but up to 20 plus percent has been observed in some farm groups of sheep. Most of these animals (around 85 percent) eventually adapt, but a small fraction never begins eating, and thus spend the entire voyage losing weight. Some die from the condition with the signs as listed above, and others succumb to other diseases due to general weakness ... My research found evidence that the inanition syndrome stemmed from a basic failure of affected sheep to learn that the pelleted rations offered in the trade were food. ... the vast majority of sheep which did not eat in the feedlot went on to be healthy animals on board ship."

52. Kelly reported that his own studies on inanition syndrome indicated that the size of the survivor group, that is those sheep who failed to eat but did not die, was 2% to 5% of the population.

53. Salmonellosis, the other condition that made a significant contribution to mortality rates in the live sheep export trade, was described as a gastrointestinal infection with salmonella bacteria. Kelly noted that it was a well known disease amongst intensively reared livestock, usually associated with stress, which caused proliferation of latent infections in carrier animals and then spread from animal to animal by faecal contamination. He said the clinical signs of salmonellosis are primarily diarrhoea, dehydration, high temperature and depression. Whereas salmonellosis is a rare condition in Australia, epidemic salmonellosis occurred frequently in the live sheep trade.

54. Research by Kelly and others indicated that salmonellosis epidemics began in the feedlot, following arrival and mixing of sheep from long distance trucking. Large numbers of sheep were infected although few died; most recovered after a bout of diarrhoea. Kelly said there was a "strong interaction between salmonellosis and inanition with many animals having both conditions at post-mortem. Inanition is likely to pre-dispose an animal to death from salmonellosis, tipping an otherwise non-fatal case over the edge".

55. The following table reflects the number of the two relevant classes of sheep on board when the ship departed Fremantle, the average weight per head, the total number of

mortalities and the mortality rate, as calculated by Kelly:

Type	Number	Weight	Total Mortality	Percentage
A Class Wethers	4,010	70.47 kgs	135	3.367
Muscat Wethers	9,153	65.67 kgs	183	1.999

These were fat, adult sheep, transported in the second half of the year. Kelly analysed the data for the relevant voyage and found the overall mortality rate of the voyage was 1.3%, which was higher than the average mortality of shipments that year, 0.9%. A mortality rate of 2% was considered high. He compared the 1.3% mortality rate on the relevant voyage with the average for other voyages undertaken from Fremantle in the second half of 2003, which was 1.1%.

56. Kelly analysed the mortality for each type of sheep on the ship and found that 4 groups of animals contributed substantially to the overall death rate: A wethers, B wethers, C wethers and Muscat wethers; the remaining animals were generally low in mortality. He noted that the classifications A, B, C are based upon different weight/fatness classes, A being the fattest. Muscat wethers were intermediate between A and B at 65.67 kg. He concluded that fatness as a risk factor is also consistent with the mortality trends between the 3 groups: 2.27% fattest, 1.81% 2nd fattest, 1.24% 3rd fattest, 1.03% leanest.

57. Kelly also analysed the pattern of deaths on the ship. He said the pattern for A wethers: rising death rates through time, was consistent with inanition syndrome - fat animals, transported second half of the year, mortalities low initially, increase through time. The Muscat wethers had the second worst mortality rate. He noted the stockman's daily reports expressing concern at the high early mortality rate and references to pneumonia and diarrhoea. He noted that diarrhoea is classic sign of salmonellosis and concluded from the pattern of deaths that the group had probably suffered epidemic salmonellosis.

58. During the course of the 1980s and 1990s each of the two multidisciplinary research teams, one based in WA and led by Doctors Richards and Norris (the WA team); the other based in Victoria and led by Kelly established that approximately 2-3% of exported sheep died en route to the Middle East. Both teams noted that younger animals died at a lower rate than mature animals. National mortality statistics are reported annually. They demonstrate consistently higher mortality in the second half of the year since 1985.

59. Kelly noted that research undertaken by both teams established that there was strong evidence that fatter sheep suffered higher mortality rates particularly from inanition and that shipping in the second half of the year was associated with higher mortality.

60. In 1991 the WA team published its finding that death rates were higher in the second half of the year in 4 of 5 years. That finding has now been confirmed by national statistics for the period 1985 to 2006. The second finding of their research at that time was that sheep condition, adiposity or fatness was positively correlated with the proportion of sheep that did not eat pellets in the feedlot and with shipboard mortality in 2 of 3 voyages. Individual sheep

identified as fat had approximately twice the risk of death from inanition aboard ship than sheep identified as not fat.

61. In the early 1990s the WA team had published research that established a relationship between shipboard death rates in sheep and season when exported, age and degree of adiposity. It identified adiposity as a central factor leading to persistent inappetance and subsequent death from inanition.

62. The WA team hypothesized that high death rates in mature sheep in the second half of the year was probably related to interference with long term mechanisms controlling appetite and energy metabolism. Appetite and metabolism had an annual cycle in sheep such that in the first half of the year in south west WA sheep are in a period of live weight loss with the converse, that is live weight gain, in the second half. They considered that the ability of adult wethers to adapt to the live sheep export system depended in part on whether they were in a fat loss or a fat deposition phase, and suggested that sheep in the fat deposition phase were less able to adjust to a period of fasting. This, it was suggested, would lead to large numbers of sheep developing the persistent inappetance syndrome in the second half of the year.

63. The WA team analysed data from 59 voyages, involving almost 2 million sheep and subjected the data to 3 different methods of comparison. Whichever method was utilised death rates in hogget wethers, that is sheep up to 24 months old, were approximately half those of adult wethers. These results were considered strong evidence of the difference between the ability of hogget and adult wethers to adapt to sea transport.

64. Subsequently the WA team analysed metabolic responses to persistent inappetance in sheep transported by sea in May and August. They concluded that the higher death rate in sheep exported in August was due to the failure of inappetant sheep to continually mobilise depot fat as an alternative energy source. The metabolism in the second half of the year is tuned to fat accretion rather than mobilisation and fails to use fat efficiently, or for very long, and switch to other sources of energy supply, presumed to be muscle reserves. That metabolic "decision" was associated with a much higher death rate in inappetant export sheep. The team noted that cause of death was similar in voyages in August and May however mortality in August was four-fold higher.

65. In a joint publication of the Department of Agriculture, WA and the Australian Meat and Livestock Research and Development Corporation in December 1999, entitled "Research on the health, husbandry and welfare of sheep during live export", the high risk group was identified and future direction for research, suggested, as follows: "The results so far suggest that age, season of the year and fatness are all associated with farm group variation. Young sheep in store condition, shipped during the first half of the year, have the lowest risk of death. However, our overseas customers want wethers of 50 to 65Kg live weight throughout the year. Consequently, sheep in the high risk category (forward store, mature wethers, in the second half of the year) will continue to be exported. Future research should be directed at minimising death rates in this high risk group."

66. Drawing directly upon research conducted by Norris, Richard and others the industry body, Livecorp in a joint publication with the Department of Agriculture, WA dated May 2003 noted that death rates are higher in adult wethers in fat condition, exported in the second half of the year and conversely death rates are lower in adult wethers in lean condition exported

during the first half of the year.

67. The Defence contended that the research relied upon by the State did not support a conclusion that one can combine a higher overall mortality rate of a voyage in the second half of the year with a higher mortality rate of fat sheep; that there is no research which demonstrates that fat sheep have a higher risk in the second half of the year. Notably these points were not put to either Richards or Norris.

68. Richards confirmed that season, age and fatness were established as risk factors for mortality in the scientific community. The only other factor that played a major role, he said was farm of origin, in that a small proportion of farm groups, about 13%, contributed about 50% of mortalities. Richards and Kelly agreed that some farm group variation could be explained by the 3 risk factors of age, fatness and season, but some could not; in other words, said Richards, those 3 factors would account for most of the variation.

69. The Defence points to Richards' evidence to the effect that it's possible that A wethers and Muscat wethers may have contained one or more lines of high mortality sheep that died for reasons that were not understood and which would have died whenever they were shipped. Norris said that one could not exclude the possibility that the A Class wethers and Muscat wethers if shipped in the earlier part of the year would not have had a lower mortality rate, or a similar mortality rate. That however is not required here. The prosecution are not required to prove actual harm but rather likely harm to the relevant classes of sheep. Norris made clear that a lower death rate for the relevant classes of sheep, if shipped in the first half of the year was likely, although one could not be certain. Likelihood, not certainty is the test.

70. I am satisfied and find that the transportation by sea of A Class Wethers and Muscat wethers in the second half of the year exposed them to a greater risk of fatal inanition and salmonellosis than if the sheep had been younger or leaner. Although farm of origin is a risk factor for live sheep export and according to the expert evidence may explain some of the variation in mortality that does not diminish the proven risk factors of age, season or adiposity, or fatness, of the sheep. I do not accept that either Richards or Norris suggested otherwise.

71. Norris, in cross examination, when taken to Kelly's comparable mortality rates between groups of sheep on the ship considered that one couldn't conclude that there was a different mortality rate for different groups of sheep without a statistical analysis of the data. He implied that the comparable mortality table had no validity.

72. Kelly is a qualified veterinarian, who specialised in epidemiology, that is the study of epidemics. He completed his masters degree in Canada on patterns of death in feedlot cattle. His doctorate, completed over 6 years examined mortalities of sheep transported by sea. He published 23 referred scientific papers, 14 of which dealt with mortalities in the live sheep trade.

73. Unfortunately, by agreement between Counsel, Norris and Richard were not qualified, that is their expertise was not the subject of evidence, although Kelly referred to their leadership of the WA team, the collaboration between teams and a number of their scientific papers were tendered.

74. The issue of the validity of Kelly's comparable mortality table was not put to Kelly. He was

an impressive witness, demonstrating depth of knowledge of the field, independence, he was readily prepared to make concessions where appropriate, was careful and conscientious in his approach. He was rigorously challenged by the Defence. I do not accept that his comparable mortality table is not valid, for the purpose, in this case, of demonstrating different mortality rates between different classes of sheep on the ship. Clearly it had its limitations, and these were acknowledged by Kelly in his evidence.

75. Kelly's calculations of mortality rates for the different classes of sheep on the Al Kuwait demonstrate that the two relevant classes had the highest mortality rates on the ship and are consistent with the findings from research by Kelly, Richards, Norris and others. The pattern of mortality was consistent with inanition and salmonellosis. The calculations however do not go to the proof of the charge, the gravamen of which is likelihood of harm to adult fat sheep transported in the second half of the year, from inanition and salmonellosis, based on the extensive research previously undertaken and, as evident from the Livecorp literature, accepted by the industry body, and I infer, well known to the industry.

### **What does "likely" to cause harm mean?**

76. "Likely" means "something less than probability but more than a remote possibility; a real or not remote chance or possibility regardless of whether it is less or more than 50 percent: see *Waugh v Kippen* (1986) 160 CLR, 156 at 166-7, per Gibbs, CJ.

77. Approval for a similar formulation is evident in *Boughey v R* (1986) 161 CLR 10 at 22 where the majority said: "His Honour's comments clearly and properly made the point that, whatever may be the difficulties of precise definition, the expression "likely to cause death" in section 157(5) is an ordinary expression which is meant to convey the notion of a substantial or real chance as distinct from what is a mere possibility: "a good chance that it will happen", "something that may well happen". In our view those comments went as far as was desirable in the circumstances of that case."

78 The Defence argued that the AWA requires each animal be considered individually. No authority for that proposition was cited. The charges are framed in terms of likelihood of harm, not actual harm, to 2 groups or classes of sheep.

79. The Defence argued that the prosecution case amounts to, heavy wethers have a 2 percent chance of dying or put another way, a 98 percent chance of survival. Death was a remote possibility. I was invited to conclude a 98 percent chance of survival did not represent likely death. I do not accept that construction. Firstly, the submission ignores forms of harm, short of death. Secondly, the higher mortality rate for heavy wethers by comparison with younger lean sheep means deaths in the first category are greater historically than for the second category. To speak of mortality of two per hundred sheep in the relevant categories, that is 'A' class wethers and Muscat wethers is likely, means, in this case, of 13,163 sheep in those classes, 263 were likely to die during the voyage; more likely to die than if shipped in the first part of the year, more likely to die than younger, leaner sheep. In fact, 415 sheep in the relevant classes died. The issue is likelihood of harm, not survival. A related issue is the necessity of the harm, which is discussed below.

80. I am satisfied that research over the years from the late 1980s had established the

likelihood of older, fat sheep, shipped in the second half of the year, suffering significantly higher mortality rates, in the sense that there was a real prospect of that occurring, than if transported in the first half of the year.

**Whether sheep which contracted inanition and/or salmonellosis would suffer harm.**

81. Harm is defined in the Act to include injury, pain and distress, evidenced by severe, abnormal physiological or behavioural reactions. Thus death itself may constitute harm, depending upon the circumstances.

82. Kelly's research, which included hundreds of on-board postmortems established that after 5-10 days of illness, death of a sheep affected by inanition resulted from various metabolic defects including kidney failure and liver failure. He said weight loss may be apparent from hollowness in the flanks of the sheep. With respect to salmonellosis clinical signs of the condition are diarrhoea, dehydration, high temperature and depression.

83. Professor Gregory, Professor of Animal Welfare Physiology at the Royal Veterinary College in the United Kingdom, by analogy with the human experience, considered there was potential for sheep suffering and for some mild form of pain as a consequence of experiencing inanition syndrome.

84. Gregory stated that "it is implicit that sheep that die from inanition will experience severe, abnormal, physiological or behavioural reactions in the events leading to death. If they did not experience those reactions they would not die". He said an external sign of distress in a sheep suffering from inanition is likely to be less activity or the sheep lying down. He accepted the possibility that sheep, or some sheep, suffering inanition did not experience pain. With respect to salmonellosis he considered it likely sheep suffering that condition would suffer pain.

85. Professor Gregory frankly admitted he was not able to say with certainty whether sheep were capable of experiencing pain or suffering. Depending upon the condition of the sheep, the environment and circumstances, he may conclude that the sheep was suffering. One example given was the number of sheep on board ship, in a field or market place, exhibiting signs of sickness including bloody diarrhoea, then behaviours associated with the condition may lead to a conclusion, with a strong likelihood, that the animals were suffering.

86. He was asked if he could exclude the possibility that a sheep suffering combined salmonellosis and inanition did not suffer pain or anguish, to which he replied it could not be excluded for unusual individual cases.

87. Gregory referred to depriving sheep of its normal feed whilst presenting it with material that is not recognised or consumed as feed, as likely to provoke distress in sheep through normal rewards and relief associated with feeding. Sheep he said were not inclined to exploratory or sample feeding such as the brush tail possum. Only when they are extremely hungry will they engage in "genuine" exploratory feeding, for example grazing on Paterson's curse. He noted that distress associated with normal feed deprivation may be compounded by stress associated with being in an unfamiliar environment. Sheep weakened by inanition are likely to be less active, recumbent and less competent to respond to physical hazards. He pointed to the risk of sheep in that condition being trampled by other animals when stocked in

densities commonly used during transport.

88. Sheep severely affected by combined salmonellosis and inanition, to the extent that they die from it, are likely, according to Gregory, to suffer gut pain from inflammation of the small intestine (most sheep) and the abomasum (some sheep); malaise from toxæmia at the advanced stage (most sheep) usually accompanied by associated with malaise (most sheep); and weakness from dehydration (most sheep) and in some cases thirst when availability of water is restricted.

89. Where salmonellosis does not arise from inanition sheep are likely to suffer gut pain from inflammation of the small intestine and abomasum.

90. Although Gregory is not familiar with sheep suffering inanition on board ship, and did not have experience in the diagnosis of that condition in merino sheep, his evidence regarding the type of suffering in a sheep affected by salmonellosis, and combined salmonellosis and inanition was corroborated to a significant extent by Dr Kelly who had conducted extensive research and hundreds of post-mortems on board of research voyages. I accept Gregory's evidence regarding the type of suffering likely to be experienced by sheep affected by salmonellosis, or combined salmonellosis and inanition and that suffering qualifies as harm as defined in the Act.

91. I accept and find sheep suffering from inanition are likely to suffer harm in the sense of a mild form of pain and those that die, suffered distress in the form of severe abnormal physiological reactions, before death.

### **Other issues raised by the Defence**

92. The Defence argues that charge 1 pertains to one day only at the commencement of the voyage, out of a 21 day voyage and the prosecution evidence does not address conduct on one day in November. It is based upon an analysis of voyages over a period of time. It was submitted that no evidence has been adduced to analyse the effect, or likely effect, of any conduct by putting any sheep on board a ship for 24 hours. That submission misses the point. The offence goes to the likelihood of harm, as at 11 November 2003, when the voyage commenced. Proof of actual harm within the first 24 hours of the voyage is not required. Neither is it necessary to establish that harm is likely within the first 24 hours of the journey. The offence is, transporting relevant sheep in a way likely to cause harm. That offence was committed, or not, on 11 November 2003, when the voyage commenced from Fremantle due to evidence that relevant sheep shipped at that time of year were more likely to suffer harm.

### **Was any harm, caused to the sheep, unnecessary?**

93. The prosecution are required to prove that harm to relevant sheep was likely, and unnecessary. "Unnecessary" is defined in the Oxford Shorter English Dictionary (5th Edition) as: adj., 1. not necessary or requisite, needless, redundant, more than is necessary, excessive; 2. not requiring much. Noun - an unnecessary thing. The Macquarie dictionary (2nd Edition) defines "unnecessary" as not necessary, superfluous, needless.

94. Robinson, Emanuel's export manager, said he received an order from KLTT requiring sheep for export specifying weight categories and numbers. He then proceeded to acquire



and supply the sheep in accordance with the order. Robinson agreed with Defence Counsel's proposition that the only way Emanuel could have done the business of supplying the requested sheep on the required delivery date was to supply sheep of that weight at that time of year. Robinson presumed that otherwise the export trade could not have taken place. Presumption is not evidence. Sheep in the two relevant categories comprised approximately 13% of the sheep transported. There was no independent evidence that the failure to supply 'A' class wethers and Muscat wethers would jeopardize the whole export.

95. In any event the evidence of Robinson discloses a commercial motive for the transport of adult fat sheep in the November voyage.

96. That the risk of inanition was greater in fat sheep and greater in the second half of the year was known within the industry. See Shipboards Stockmen's Handbook. I infer from Robinson's evidence that the accused, as exporters, knew of the greater risk of mortality to adult fat sheep exported in the second half of the year but chose to ignore that in order to fulfil the KLTT order in November 2003. I do not accept Robinson's assumption that the particular "trade" would not have proceeded had Emanuel declined to supply fat adult sheep in November.

97. The question is was it necessary to supply fat adult sheep in November 2003 when the research and industry publications highlighted the higher mortality rate in the second half of the year. In *Ford v Wiley* (1889) 23 QB 203 Lord Chief Justice Coleridge noted that it was difficult to define necessary and necessity and continued "but we may perhaps approach a definition from the negative. There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent a rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary. That without which an animal cannot attain its full development or be fitted for its ordinary use may fairly come within the term "necessary" and if it is something to be done to the animal it may fairly and properly be done."

98. The principle which emerges from His Honour's judgement and that of Lord Justice Hawkins is that necessity requires proportion between the object and the means. In his words, "in each case however the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of suffering caused, and in no case can substantial suffering be inflicted, unless necessity for its infliction can reasonably be said to exist."

99. The Defence argues that the Prosecution have not proved that the particular sheep, the subject of likelihood of harm, could have been shipped at a different time of year. As I understood that submission, it was to the effect that it was for the Prosecution to prove that the order could have been filled with the relevant sheep, at another time of the year. The prosecution have no such obligation. What made shipment of fat adult sheep in November a necessity? An order from KLTT, that is, the prospect of profit. There was no evidence that failure to supply sheep in that category would jeopardise the whole shipment. If that evidence were available, the logic of the Defence submission is to say in order to do the business it was necessary to export fat adult sheep notwithstanding the higher risk of pain, injury or death in the second half of the year. That is, trade for commercial gain. In the context of this case that commercial gain has to be balanced against the likelihood of pain, injury or death to

relevant sheep shipped in the second half of the year. I am satisfied and find that any harm suffered to fat adult sheep was unnecessary.

100. The Defence argues that the concept of cruelty must be inferred from the Act's stated intention to ensure that animals receive proper and humane care and management in accordance with generally accepted standards (s.3(2)(b) AWA). The Australian Livestock Exports Standards expressly contemplate and permit shipment of heavy sheep in November and thus, it is submitted, one cannot conclude, beyond reasonable doubt that any harm likely to be caused in compliance with those standards and Commonwealth legislation, is unnecessary.

101. The answer to that proposition is that the Commonwealth legislation, and ALES are focused on facilitating the export of livestock as cargo not animal welfare per se. Indeed the various legislative instruments refer to the need to comply with State animal welfare law. The "standards" in s.3(2)(b) of the AWA qualifies and conditions "proper and humane care and management" of animals. Thus it is to be interpreted as standards for the care of the relevant animal, or group of animals. ALES did not fit that description, directed as they are to regulating the export by way of trade, not the welfare of the sheep.

#### **Honest and reasonable but mistaken belief.**

102. Emanuel relies on the defence of honest and reasonable but mistaken belief and refers to the decision of *Bell v Gunter*, a decision of His Honour Justice Dowd, Supreme Court NSW delivered 24/10/97, BC 9708066 regarding whether mens rea had to be established by the prosecution in relation to a charge of aggravated cruelty to a cow.

103. Western Australia is a Code State. The relevant defence at section 24 of the Criminal Code relieves an accused person of criminal liability where there is a finding of honest and reasonable but mistaken belief in a state of things. There is an evidentiary onus on the accused to adduce evidence of its belief which the prosecution must then negative to the requisite standard.

104. Emanuel says Robinson, prosecution witness, is its relevant responsible person, and he and Mr House, who was not employed by Emanuel, believed everything was done to address the welfare of the sheep and comply with the Standards, hence the defence has not being negated beyond reasonable doubt.

105. Neither Emanuel nor the directors charged elected to give evidence. There was no evidence as to any belief held by the controlling mind behind Emanuel or any belief held by either of the directors as at 11 November 2003. Hence the accused have failed to discharge the evidentiary onus. If that is wrong, the evidence of Robinson regarding the welfare of the sheep and compliance with Standards was a statement of his personal opinion, not a statement of his belief: see *Ertech Pty Ltd v Reid* Supreme Court WA, delivered 6/12/91, Lib No. 9174.

106. What was the state of things that Emanuel believed to exist? Robinson's evidence in fact goes to compliance with the Standards and he says he did not believe that he or Emanuel were engaging in an act of animal cruelty in supplying the sheep. That was an opinion as to a legal issue and is not a belief as to the relevant "state of things". The relevant belief, for the

purposes of section 24 is a belief as to the likelihood of harm to adult fat sheep shipped in November. There being no evidence as to any belief by Emanuel or the other accused on that issue the defence of honest and reasonable but mistaken belief is not available to the accused.

### **Charge No. 2 - Were sheep confined in a manner likely to cause unnecessary harm**

107. The second charge is that Emanuel, and the two named directors, were cruel to sheep in that it was a person in charge of those animals when they were confined in a manner likely to cause them unnecessary harm.

108. The discussion above regarding whether Emanuel was in charge of the relevant sheep, is applicable to the second charge.

109. The prosecution allege that the way in which the sheep were confined made it practically impossible to ascertain whether sheep were suffering from inanition or salmonellosis (or both) due to the density of the sheep, the poor lighting and the low ceiling. It was not possible to isolate sheep for treatment or humane slaughter. Thus, as a result of the way in which they were confined, the sheep were likely to suffer unnecessary harm.

110. The issues which require consideration may be stated as follows:

- How were the sheep confined on the ship.
- Was the manner of confinement likely to cause harm.
- Was that harm unnecessary?

### **How were the sheep confined?**

111. The ship was a converted oil tanker. It had seven decks. Each deck had been divided vertically so as to create 2 levels. There were 256 pens on board, each containing approximately 400 sheep. Density was around 3 sheep per square metre, which Kelly noted did not allow easy movements through the pens. I note that 'A' class and Muscat wethers, were among the heaviest class of sheep on board, average weight being 70.47kg and 65.67kg respectively.

112. The mortality rate for A Class wethers was 3.367% and for Muscat wethers was 1.999%. The mortality rate, overall, that is across all classes of sheep carried was 1.298%. 113. Ceilings in the pens were around 120cms high, sufficient clearance for sheep but not for a person to walk through without bending double.

114. Lighting was on the top, or upper level of each deck and in the alleyways running along the outer sides of the pens that is on the port and starboard sides of the ship and at intervals on the ceiling of the narrow passageway between pens running across the ship. House said there were a few 'grey' areas in the ship.

115. In the final report prepared by House, dated 8 December, 5 days after the voyage ended, he noted that a lot of scouring sheep, that is sheep with diarrhoea, were missed due to bad lighting.

116. Kelly, who had previously undertaken voyages on the ship during his research on the

live sheep trade, noted that lighting in the pens could be very poor. The lower tier on each deck had no roof mounted lighting so the centre of the pens was semi-dark. Inspection of sheep was routinely performed from outside the pens. It was not possible to see every sheep, and not subtle clinical signs like diarrhoea or weight loss. Moribund sheep, he noted, fail to move away when the pen is disturbed so they can be seen and are routinely removed. Kelly noted it was more common to find sheep dead.

117. House indicated that the pens were checked for mortality once a day, except when going into port when it may be twice. A poly-pipe, with a garbage bag attached, to make noise, was used. It was inserted into the pen. It generally caused sheep to move so sick or dead sheep could be located. Generally crew only got into a pen if they found a dead or sick animal. House considered it better to view the sheep from outside the pen, although he conceded there may be a few sheep go unseen. He said about 80% of the mortalities were found in the pens in the morning. 118. I am satisfied and find that the manner of confinement of the sheep, that is the combination of the density of the sheep in the pens, the low ceiling and poor lighting made it practically impossible to observe clinical signs such as diarrhoea or weight loss and that in the vast majority of cases those conditions were not identified before death.

### **Was the manner of confinement likely to cause harm?**

119. The State says that as a consequence of the manner of confinement it was not possible for the sheep to be isolated for treatment or to be humanely slaughtered, hence they suffered unnecessary harm.

120. Again the charge requires proof of likelihood of harm, not actual harm, as at day 1 of the voyage. At its root the State case with respect to charge 2 was about visibility, that is sheep in the relevant categories, requiring treatment for inanition, salmonellosis or both could not be identified and therefore treated and hence were likely to suffer harm, that is injury, pain, distress or death.

121. House referred in his final report to diarrhoea being the main health issue during the voyage. He reported that Muscat wethers were the worst affected at the outset although mortality improved towards the latter end of the journey. He noted that he had isolated sheep in various categories which were lame and scouring between day 3 and 6 of the voyage. He said a lot of scouring sheep were missed due to bad lighting. Of 27 sheep isolated for scouring, 21 died. House performed sample post mortems and identified cause of death based upon his experience as a stockman. When asked about the difficulty of determining whether sheep have died from salmonellosis, inanition or pneumonia he said, "it would be a guess".

122. Was the mortality rate, being one measure of harm, higher than for sheep confined in lower pens which were poorly lit? Kelly described the research showing a tendency, but not consistent finding, for more deaths on better lit upper tiers and lower mortality on poorer lit lower decks. He accepted as reasonable, the proposition that any problem with lighting of lower tiers was offset by the benefit of not being in an upper tier which appeared to correlate with higher mortality.

123. The State must establish, by evidence, the link between the manner of confinement and the harm likely to be suffered by relevant sheep, which on its case is the lost opportunity of

alleviating injury, pain, distress by treatment or humane slaughter.

124. There were hospital, or sick, pens on the vessel. House said if he found a sheep caste, or lying on its side, he would get it out of the pen, roll it over and if it was a "viable proposition" within 10-15 minutes relocate it to the sick pen, leave it there and quite often he said it made a quick recovery. Otherwise it was destroyed. Sheep that had scabby mouth, lame or had lost condition were moved to the hospital pen. In the hospital pen sheep had more space and less competition.

125. Would it have been possible to identify sheep suffering inanition, salmonellosis or both, so as to treat or humanely slaughter them? Kelly noted that the clinical signs of inanition are failure to eat and progressive weight loss. He reported it is impossible to measure or even detect failure to eat without significant equipment which had been developed during research trips undertaken by him and others. Otherwise weight loss will only be apparent, he said, after a period of 1-2 weeks by hollowness in the flanks of the sheep.

126. As for treatment of sheep suffering inanition Kelly reported it had seldom been attempted. Changing the diet is likely to be of benefit but depending upon the point at which the disease is detected, it could easily fail to save the animal. There was only pellet feed on the ship.

127. Kelly noted that 'shy feeders' could be detected in the feedlot by special apparatus to measure individual feed but such measurement was of little practical use due to poor prediction. The vast majority of sheep which did not eat in the feedlot went on to be healthy animals on-board ship.

128. Thus even if the sheep were contained in lower density pens, and lighting improved the likelihood of detecting inanition and successfully treating it, was low.

129. With respect to salmonellosis, Kelly noted that it is generally a rare condition in sheep in Australia however epidemic salmonellosis occurred frequently in the live sheep trade. Large numbers were infected however few died, most sheep recovered after a bout of diarrhoea. He noted that faecal contamination was much reduced on board ship due to feed being supplied via troughs and salmonellosis deaths usually declined in the first week of a voyage. Treatment with antibiotics and fluid replacement was usually effective, he noted, although seldom practised due to cost. Moribund animals were usually euthanized; less severe cases usually recovered without treatment.

130. Was the manner of confinement then likely to cause harm? The evidence suggests that density may be a factor causing stress to the sheep and may play a role in the occurrence and spread of salmonellosis however feed by pellet in a trough has the effect of limiting the spread of salmonellosis.

131. Kelly analysed the pattern of mortality for each of four groups, or classes, of sheep on the ship and concluded that Muscat wethers probably suffered epidemic salmonellosis. The evidence available however does not permit a conclusion to be drawn as to the cause of death for sheep in any of the classes.

132. At its highest, density coupled with poor lighting in parts of the ship had an adverse

impact on capacity to observe a proportion of the sheep, so as to detect inanition, salmonellosis or those sheep suffering both. However, experts agreed inanition was difficult to detect in any event, and treatment may not save the animal. Most shy feeders, around 85%, eventually adapt. With respect to salmonellosis, most sheep recovered without treatment. Kelly agreed there was no consensus about whether treatment had a significant effect on affected sheep.

133. Visibility was the key issue for the state. I am not satisfied that its inadequacy on lower tiers, in some parts, caused more harm than it offset. The evidence does not disclose how many, or the magnitude of scouring sheep missed. The evidence does not permit a conclusion that had they been detected, harm would have been alleviated.

134. Charge 2 is dismissed.

### **Charge 3 - Whether the sheep were provided with proper food**

135. The third charge is that Emanuel and the named directors were cruel to sheep in that it was a person in charge of those animals when they were not provided with proper food.

136. The prosecution case is that sheep suffering from inanition should have been provided with hay or chaff and that no such food was provided.

137. The only feed available for sheep on board the ship was pellet feed.

138. The issue, with respect to charge 3 is whether pellet feed, constituted 'proper food' for sheep suffering inanition on board the ship.

139. There appeared to be agreement between relevant experts on the following points:

- that sheep suffering inanition should be offered hay or chaff;
- once the rumen of a shy feeder has changed the condition is irretrievable and sheep will eat neither hay, chaff nor pellets.
- That it is not practical to offer hay or chaff as the main source of feed for sheep on board ship.

140. Kelly considered that hay or chaff could be carried on board for hospital pen use. However Kelly conceded that he could not say that had hay been provided on the vessel it would have resulted in any lower mortality rate.

141. Kelly said it was difficult to identify sheep suffering inanition and extremely difficult on board ship. Most non feeders become feeders.

142. I am not satisfied, beyond reasonable doubt that pellet feed was not proper food for sheep on board the ship.

### **Constitutional Defence**

143. Emanuel submits that the Animal Welfare Act ("the AWA") is partially invalid under s.109 of the Constitution to the extent that it purports to regulate activities which are clearly authorised by Commonwealth legislation.

144. Section 109 of the Constitution states: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

145. The AWA is a law of the State for the purposes of s. 109.

146. The question is whether the AWA is inconsistent with a law of the Commonwealth.

147. The Defence argues that:

- there is direct inconsistency between the AWA and the AMLI Order 2003 (see D5 para 162) in that the prosecution seek to apply the AWA so as to prohibit the export of older, fatter wethers in the second half of the year which is expressly permitted by the AMLI Order 2003 and therefore the State Act so applied would deter, impair and/or detract from the operation of laws of the Commonwealth;
- there is indirect inconsistency between the AWA and Commonwealth law in that the Commonwealth has evinced an intention to cover the field with respect to minimum requirements for animal welfare in the livestock export industry, that being a field of activity squarely within the trade and commerce head of power, s.51 (i) of the Constitution, and the AWA on the prosecution case, operates to prohibit the export of older, fatter wethers in the second half of the year. The State thereby purports to set additional and more onerous minimum standards of animal welfare for sheep in the livestock export industry.

148. Constitutional inconsistency may result from direct or indirect inconsistency between a Commonwealth and State law. A direct inconsistency arises where simultaneous obedience to both laws is impossible or one law abrogates a right conferred by another. In the absence of a direct inconsistency, a State law will be inconsistent with a Commonwealth law that reflects a Parliamentary intention to "cover the field" the subject of the law. The intention must be for the Commonwealth to completely, exhaustively or exclusively govern the particular conduct or matter to which its attention is directed: *Ex parte McLean* (1930) 43 CLR, 472 at 482 per Dixon J, *Dunne v P* [2004] WASCA 239, per McLure J at [157].

149. In order to consider the Defence submissions, I consider the following issues:

- What is the relevant Commonwealth law?
- Is the AMLI Order 2003 a law of the Commonwealth?
- What is the intended scope and operation of Commonwealth law?
- Does the AWA alter, impair and/or detract from the operation of Commonwealth law?
- Has the Commonwealth evinced an intention to cover the field with respect to minimum standards for animal welfare in the livestock export industry.

### **What is the relevant Commonwealth law?**

150. Three Commonwealth Acts deal with the export of livestock from Australia: the *Australian Meat and Livestock Industry Act* 1977 ("AMLIA"), the *Exports Control Act* 1982 ("Exports Control Act") and the *Navigation Act* ("Navigation Act").

151. The long title of the AMLIA states that it is an Act relating to the Australian meat and livestock industry and for related purposes. Livestock is defined to include sheep (s.3). The Act provides for the control of meat and livestock exports, and in particular the grant of export licences (Part 2). The Act empowers the Secretary of the Department to, inter alia, make written orders and directions with respect of any matter relating to, or incidental to the carriage, handling and storage of meat and livestock (s.17). Any orders made or directions given may prohibit absolutely or subject to compliance with specified conditions, the export, or sale for export of livestock by reference to specified matters, including the standard, grade or class or any other matter the Secretary thinks appropriate (s.17). Section 54(3) makes it an offence for a holder of an export licence to contravene a condition of the licence either intentionally or recklessly.

152. The Secretary is empowered to grant licences to export livestock from Australia (s.10). He/she must not grant a licence unless satisfied, inter alia, that the person is able and likely to comply with the licence. In considering whether to grant a licence the Secretary may have regard to compliance with requirements under the *Export Control Act* (s.12).

153. An export licence is subject to any conditions that are prescribed by the regulations, in addition to the conditions contained in the AMLIA (s. 15).

154. By Regulation 6 of the *Australian Meat and Livestock Industry (Export) Licensing Regulations* 1998 ("the AMLI Regulations") an application for an export licence must be accompanied by a copy of the accreditation certificate issued to the applicant by the relevant standards body, which for livestock is defined as the body responsible for setting standards for livestock for export and specified as the Australian Livestock Export Corporation Ltd (reg.3).

155. In determining whether to grant an export licence the Secretary is required to have regard inter alia to whether the applicant or other relevant person for an export licence has ever been convicted of an offence against the law of the Commonwealth or a State or Territory and whether the applicant has failed to comply with a condition of an export licence, or with an order made or direction given under AMLIA (reg.8).

156. A livestock export licence is issued subject to the condition that the holder must have regard to the mandatory animal welfare requirements prescribed by the relevant standards body at all times until exported animals are unloaded at their destination (reg. 9). The mandatory animal welfare requirements prescribed are the Australian Livestock Exports Standards (ALES). Section 1.3 of the ALES states:

"The animal welfare legislation in each State or Territory specifies the mandatory animal welfare requirements that must be met in that State or Territory. Export preparation must also be in accordance with relevant Codes of Practice."

157. The Secretary has made orders pursuant to the power granted in s.17 of AMLIA to deal with issues including the export of female sheep and goats for slaughter (*Australian Meat and Livestock Industry (Export of Female Sheep and Goats for Slaughter) Order 2002*) and dealing with the export of live sheep and goats to specified Middle East ports during specified months. (*Australian Meat and Livestock Industry (Export of Live Sheep and Goats to the Middle East) Order 2003* and *Australian Meat and Live-stock Industry (Export of Live Sheep*



and Goats to the Middle East) Amendment Order dated 28 October 2003 (No.1) ("AMLI Orders 2003"). The latter instruments provide that an export licence holder must obtain the Secretary's written consent to export live sheep and goats to nominated Middle East ports, and specifies issues the Secretary must consider when determining whether to grant consent including the welfare of the animals (clause 5(4) and establishes minimum floor area according to the average weight per head of live sheep or goats for any consignment exported during specified months, including November.

158. The Australian Livestock Exports Standards (ALES) deal in considerable detail with the requirements for the export of live sheep, for example:

- (i) sheep selected for export are free from clinical signs of disease, external parasites and injury (ALES 7.1.1);
- (ii) lambs of less than 28 Kg may not be exported without written permission from the Secretary (ALES 7.1.3(a));
- (iii) a prohibition on export of sheep in body condition score of 1 or less (on scale 0-5), and reference to "best practice" that over-fat sheep specified as those in body condition score (5) (on scale 0-5) should not be selected for export;
- (iv) a requirement that management procedures on sheep pre-export, are performed competently by an experienced stockperson (ALES 7.3.2);

159. ALES specifies requirements for the care of sheep on board ship, including:

- (a) minimum floor area per head of sheep according to weight and time of year when shipment undertaken, specific additional room per head for horned rams and for those with more than 25mm of wool;
- (b) the type of feed to be provided, specific additional feed to allow for delays, a formula for calculation of the amount of feed and water per head to be carried;
- (c) the role of the stockperson on board.

160. The *Export Control Act* is intended to establish a regime for the control of exports of certain goods, which includes export of live animals.

161. Under the *Export Control Act* regulations may be made prohibiting the export of prescribed foods from Australia absolutely, subject to compliance with specified conditions, or to a specified place (s.7). The *Export Control (Orders) Regulations* 1982 permits the Minister to make orders with respect to any matter for or in relation to which regulation may be made under the *Export Control Act* (Reg 3). The *Export Control (Animals) Orders as amended (Amendment) Export Control Orders No.2 of 1990* ("Export Control Order 2/1990") requires an export permit to be granted where an authorised officer is satisfied of the existence of specified matters, including a veterinary officer has determined that each animal is sufficiently fit to undertake the proposed export journey without any significant impairment of health, and the preparation of the animal for shipment overseas and travel arrangements of the animal

are adequate for the health and welfare of the animal (Order 8(d) and (e)). Notes in the Order, with respect to Order 8(d) and (e) require the veterinarian to have regard to the condition of the animal, the nature of the accommodation for the animal, the number, species, health and general condition of any other animals to be carried on the ship, whether relevant national standards have been complied with, and the risk of injury to the animal by enclosures or ramps it will be exposed to.

162. *Export Control (Animals) Orders as amended (Amendment) No. 15 of 1987* ("Export Control 15/87"), at paragraph 10 empowers the Secretary to direct that an export permit not be granted, or promised subject to conditions where, inter alia, the export permit if granted, would have allowed the carriage of an animal on a ship, the condition of which caused the health or condition of any animal to deteriorate during a previous journey.

163. Marine Orders Part 43 Cargo and Cargo Handling Livestock Issue 5 ("Marine Orders"), in force from 1 January 2002 make provision for the carriage of livestock including sheep on board ships. The orders deal with a range of issues including:

- the maximum number of sheep that may be carried on a ship, and the minimum amount of pen area per head are stated to be as set out ALES;
- requirements for the construction of pens and adjacent passageways;
- minimum requirements for the movement of sheep between decks.

164. The Marine Orders are made pursuant to s.425(IAA) of the *Navigation Act 1912*. S.425(1AA) reads: "The Authority may make orders with respect to any matter in Part II, III, IIIA, IV, V, VA, VB or XB for or in relation to which provision may be made by the regulations, other than matters referred to in paragraph (l)(b)."

165. The specified Parts of the Act deal with topics including masters; seamen and their conditions; pillage, ships and shipping including surveys, loading, pollution, accidents and matters relevant to safety; passengers, off shore industry vessels and mobile units; and tonnage measurements of ships.

166. Section 257, in Part 4 of the Navigation Act provides for regulations for and in relation to the loading, stowing or carriage of cargo or the unloading of cargo from ships.

167. The Marine Orders, so far as they deal with sheep are directed to the carriage and discharge of livestock. There are orders which pertain to the welfare of sheep transported, for example:

- Livestock must not be carried unless contained in pens, stalls, or other similar fittings permitted by the Order (Order 8.6)
- A ship permanently equipped for the carriage of livestock must be fitted with systems and equipment that ensure the maintenance of livestock services (including electrical, ventilation, lighting, fodder and water, drainage from pens) at a level necessary for the welfare of the livestock (Order 12)
- The maximum number of sheep, floor area per head, content of feed, incorporated from the Australian Livestock Export Standards (ALES)
- The master of a ship on which livestock is carried must operate a patrol system to ensure the safety of the ship and welfare of the livestock throughout the voyage (Order

19)

- The operator and master must ensure that a competent stock attendant and sufficient additional persons as necessary to provide satisfactory tending, feeding and working of livestock are on board at all times during the voyage (Order 17)
- Means for the humanely killing of livestock must be carried on the ship, appropriate for use with species transported (Order 18).

168. The question arises whether the Marine Orders to the extent that they deal with animal welfare issues are within the scope of s.257 of the Navigation Act and/or s.425(IAA) of the Navigation Act. The Prosecution contend that to the extent the Marine Orders deal with matters of animal welfare they are not supported by the heads of power in ss 257 and 425(1 AA) and are consequently invalid. The Defence contend that s 257 authorises regulations to make provision inter alia for stowing and carriage of cargo, that s 257 appears in Division 10 entitled "Dangerous goods, livestock, grain, deck and other cargoes", that the grant of power is framed broadly, and that it is self evident that the welfare of the animals is a matter in relation to the stowage and carriage of livestock. In reply the Prosecution say the Marine Orders are concerned with the handling of livestock as cargo rather than animal welfare.

169. In construing the scope of the regulation making power in S.425(1AA) I note the grant is with respect to any matter in, relevantly, Part IV, which deals with ships and shipping and the power is confined to issues specified in s.425(l)(a) - (g), (ha) and (i) which deal with, inter alia, safe navigation and operation of ships, the safety of persons coming and going and on board ship, matters affecting the stability of ships, the protection of the health and security from injury of persons engaged in the loading or unloading of ships. Thus I am satisfied that the power to make regulations is confined to navigation, loading, unloading and carriage of livestock as cargo but is not directed to animal welfare per se, save to the extent that it is directly related to navigation, the safety of persons, loading, unloading engaged in the operation or on board ships.

170. Administrative directions and orders although issued under an Act or regulations do not themselves constitute a law of the Commonwealth for the purposes of s.109 of the Constitution: *Airlines of NSW Pty Ltd v NSW* (1964) 113 CLR, 1, per Taylor J at 31 and Menzies at 46.

171. However the Accused contend that the *Export Control Orders*, the AMLI 2003 Order and the *Marine Orders* are legislative in character, and each is a law of the Commonwealth for the purposes of s. 109.

172. The Prosecution contend that the Orders are conditions on the export licence rather than laws.

173. The *Export Control Orders 2/1990*, particularly, Order 8(d) and (e) which require an authorised officer to be satisfied that a veterinarian, has determined each animal is sufficiently fit to undertake the proposed export journey without any significant impairment of health, and either that preparation of the animals, travel arrangements of animal, or consignment, are adequate for the health and welfare of animal on consignment, introduce a requirement for satisfaction as to animal welfare issues which are not referred to in the Act or regulations. Where the authorised officer is satisfied, inter alia, that a veterinarian has determined that each animal is fit to undertake the proposed export journey without any significant impairment

of health, and that preparation of animals for shipment overseas and travel arrangements are adequate for health and welfare of the animal, there is a mandatory requirement to issue the export permit sought.

174. The *Export Control Order 2/1990* determines the content of the law, applies to those intending to export animals, and is required to be published in the Gazette, binds the Executive and the exporter.

175. The AMLI Orders 2003 set out general requirements for export of livestock, which include nominating countries in Middle East to which export of live sheep not permitted without the written consent of Secretary, the requirement to consider the adequacy of the consignment management plan and welfare of animals and compliance with floor space requirements before re-issuing a visa. These orders are disallowable instruments, so subject to scrutiny by Parliament. I find the AMLI Orders 2003 are legislative in character.

176. The Marine Orders establish detailed requirements for vessels willing to export livestock from Australia, apply to all vessels intended to be used to export live sheep, are subject to scrutiny by Parliament. I find that the Marine Orders are legislative in character.

177. The Export Control Orders, the AMLI Orders 2003, the AMLI Amendment Order 2003 and the Marine Orders are a law of the Commonwealth for the purposes of s. 109.

178. Compliance with ALES is required by s.9 (2) and (3) of the AMLI Regulations. I do not accept the Defence contention that device makes the ALES a law of the Commonwealth. Rather compliance with ALES is a condition of the export licence.

179. The incorporation of ALES 7.9 to 7.11 into Appendix 7 to the Marine Orders do not make them a law of the Commonwealth as they are directed to animal welfare, for example minimum feed requirements and methods for humane destruction, rather than carriage of livestock as cargo per se.

### **What is the intended scope and operation of Commonwealth law?**

180. AMLI is directed to control of meat and livestock exports, regulation of that export industry having regard to policies formulated by prescribed industry bodies, including LiveCorp, the establishment of an industry marketing and research body and conditional funding of such bodies.

181. The Export Control Act is concerned with control of exports more broadly. It provides for the making of regulations to regulate the export of prescribed foods and the conditions upon which that may, or may not be undertaken, and creates offences.

182. The Navigation Act is concerned with regulating shipping, the operation of ships, the conditions, including safety of masters and seamen.

### **Is there direct inconsistency between the AWA and a Commonwealth law?**

183. Emanuel notified the Department of Primary Industries and Energy of their intention to export livestock in or about November 2003. It lodged a consignment management plan with

the Australian Quarantine Inspection Service (AQIS) on a standard form, stated to be for the purposes of the Export Control Act, and attached feed and water calculations. One of the questions required to be answered on the form was as follows:

"Voyage Contingency Plans:

(a) Do you have in place strategies that could be implemented to address the following potential on-board issues?

Shy feeder? Yes."

184. The "Consignment Management Plan" asked the exporter:

"3(b) Are you satisfied that the management plan for the premises will allow the animals to be satisfactorily prepared for export to minimise heat stress and salmonellosis and the animals will be fit to undertake the export journey.

Are you satisfied that the feed rations will be loaded will meet the maintenance requirements of the animals to be loaded."

185. There are questions directed to heat stress, requiring that the risk be identified. It is not. Confirmation of the provision of hospital pens in accordance with the Marine Orders is required. There are also questions directed to air turnover in the pens and contingency plans in the event of extreme temperature variation, mechanical breakdown and pen hygiene.

186. Emanuel caused an AQIS accredited veterinarian, Dr P. Grandison to inspect the sheep before loading. He completed a declaration on 11 November 2003 that he had "inspected/directly supervised the inspection of the animals on 11/11/03 at Fremantle, dockside, and found the animals to be free from clinical signs of infectious and/or contagious diseases, external parasites or any of the conditions specified in Appendix 2 of the AQIS third party program for the pre-export preparation of livestock species. I am satisfied that the animals are healthy and are fit to undertake the export journey." The veterinarian also completed a Record of Rejection of Livestock from an Export Consignment. Reasons for rejection included scabby mouth infection and blindness. Three hundred and fifty-nine (359) sheep were rejected.

187. Robinson didn't recall the relevant shipment but he said the inspection procedure dockside involved trucks backed up onto the wharf with a race from an industrial truck which allows one sheep or sheep to pass down a single file. The inspection team stand on each of the individual races. Over 103,000 sheep were loaded over 10 and 11 November 2003, before departure of the sheep. I infer that Grandison observed the sheep momentarily, as they passed in the race, dockside, on their way on board.

188. The Prosecution contend there is no inconsistency with the *Export Control Act* as none of its provisions concern the integrity or safe-keeping of the cargo. With respect to the *Export Control (Animals) Order* the Prosecution contends the AWA does not contain any provisions which detract from, or impair the operations of the Commonwealth legislation, that the latter does not confer any rights by way of positive authority, does not contain any provisions relating to animal welfare, nor deal exclusively with animal welfare.

189. The Defence point to the case advanced by the Prosecution, that is it is cruel to transport adult, fat sheep in the second half of the year, in this case, November. To the extent that the AWA purports to establish more onerous minimum standards it is contended, the AWA is inconsistent with the Commonwealth legislative regime and therefore invalid.

190. Considered together the AMLI Act, AMLI Regulations, AMLI 2003, AMLI 2002, AMLI Amendment 2003, the *Export Control Act*, Export Regulations, Navigation Act and Marine Orders; these Commonwealth legislative instruments comprise a regime for regulating transport of sheep by sea for the purpose of export.

191. AMLI 2003 (and AMLI Amendment Order 2003) contemplate the shipment of live sheep, between July and November, to Middle Eastern ports but makes the grant of an export licence subject to consideration by the Secretary of, inter alia, the adequacy of the management plan and the welfare of the animals and subject to the provision of minimum floor area per head.

192. There is no evidence that the Commonwealth intends to regulate animal welfare issues per se, or do so exclusively or exhaustively. Certainly it covers issues relevant to animal welfare but that is within the context of export of live cargo such that it relates to the safety of those on board ships and the integrity of cargo exported from Australia.

193. The question is whether there is operational inconsistency between Commonwealth law and the AWA. Certainly the AWA does not in terms prohibit the export of fat sheep in November to the Middle East. Emanuel obtained an export licence and permit from the Commonwealth to do just that. Thus while the State maintains the likelihood of unnecessary harm to fat sheep shipped in November, made the exercise cruel, the relevant Commonwealth Officer was satisfied, inter alia of the adequacy of the consignment management plan and the welfare of the animals. A veterinarian accredited by a Commonwealth Agency, AQIS for the purpose, certified all classes of sheep to be healthy and fit to undertake the export journey. Arguably that certification is not inconsistent with the State's construction of the AWA.

194. The Commonwealth regime contemplated, indeed permitted export of fat sheep by sea, in November. Emanuel complied with the requirements of the Commonwealth and secured an export licence and permit. What was, and is, permitted under Commonwealth law, namely the export of fat, adult sheep in November, is made unlawful under the AWA due to the likelihood of unnecessary harm. The exercise of the right, or authority acquired by Emanuel to export sheep, including fat adult sheep, in November would be made criminal if the AWA is given effect, as argued by the State. This is a case of "operational inconsistency", see *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44 at [201] and *Victoria v Commonwealth ("the Kakariki")* (1937) 58CLR, 618.

195. In *Victoria v The Commonwealth* (1937) 58 CLR, 618 at 630 Dixon J stated two propositions, approved by the Full Court in *Telstra Corporation Limited v Worthing* [1999] HCA, 12 at [28], as follows:

A. "When a State law, if valid, would alter, impair or detract from the operation of the Commonwealth Parliament, then to that extent it is invalid", and

B. "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent."

196. The AWA applied as in this case has the effect of altering, or impairing the right, or authority to export for Emanuel in this case. The effect of the AWA is either that Emanuel may not exercise the right or authority granted by the Commonwealth under the export permit, to export adult, fat wethers in the second half of the year or it impairs the exercise of their right, privilege or authority by making that conduct subject to criminal sanction.

197. The State contends that the Commonwealth law is "supplementary to or cumulative upon" the AWA. It maintains that both Commonwealth law and the AWA may be complied with by adopting a higher standard, in effect meaning that an exporter would voluntarily refrain from transporting adult fat sheep in the second half of the year. However, in this case the AWA imposes a greater obligation than Commonwealth law.

198. Bachsell, CJ in *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR, 253 at 258-9 discussed the concept of direct collision in the context of inconsistency between a determination of a State wages board fixing the lowest weekly rates of pay and an award made under Commonwealth law, and said: "... The case, to my mind, is one of direct collision in which the State law, if allowed to operate, would impose an obligation greater than that which the federal law has provided should be the amount which the employer should be bound by law to pay. Obedience to the one, the award, is disobedience to the other, the determination. Payment by the respondent of wages conforming to the award involved it in disobedience of the State provisions. Of course both may be obeyed by the employer by abandoning the protection of the Act and award and paying the larger sum. But, in my respectful opinion, that they may both be obeyed in that sense indicates their inconsistency."

199. The legislative assumption underpinning the Commonwealth regime is that a person who has complied with the Commonwealth export requirements, and has been granted a licence and permit may ship fat adult sheep to the Middle East in November. The AWA directly collides with that right or authority. To that extent, pursuant to s. 109 it is invalid, that is inoperative.

200. The Defence contends, in the alternative that the Commonwealth has covered the field with respect to minimum requirements for animal welfare in the livestock export industry.

201. The test for indirect inconsistency was stated in *Ex parte McLean* (1930) 43 CLR, 472 at 483 by Dixon J, as follows:

"[Inconsistency] depends upon the intention of the paramount legislation to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal law discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

202. Certainly the Commonwealth regime is fairly detailed with respect to the conditions applicable to live sheep subject to export, however it cannot be said to be comprehensive and makes compliance with State animal welfare law a condition of the grant of a licence. The intention appears to be to regulate the export of livestock, to the extent that it forms part of the nation's export trade, is a significant source of income to the economy, in the exercise of the Commonwealth's trade and commerce power. The Commonwealth regime does however acknowledge the existence of State animal welfare laws and requires compliance with relevant State animal welfare law.

203. In summary, whilst the elements of the offence of cruelty to sheep, in the way of transport were proven, the AWA is invalid, that is inoperative, to the extent of its inconsistency with Commonwealth law due to operational inconsistency. On that basis the Accused are acquitted.

C.P. Crawford  
Magistrate  
8 February 2008  
Endnotes:

1 There were identical charges against Emanuel's directors.



