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O'CONNELL STREET BARRISTERS

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The Chairperson
Primary Production Committee

Submission on Animal Welfare Amendment Bill

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Introduction and summary

1. I am a barrister practising in commercial litigation and public law. I make this submission in my personal capacity, and appreciate this opportunity to comment on the Animal Welfare Amendment Bill (**Bill**).

2. The Bill contains a number of changes designed to enhance the robustness of the Animal Welfare Act 1999 (**Act**), such as the new sections 30A to 30E relating to wild animals and the greater range of enforcement and compliance tools, and I support those changes. Having said that, I also observe that the amount allocated in the Budget for enforcement of animal welfare legislation is

miniscule. Each year "around 50%"[1] of New Zealand's export earnings are attributable to animals and animal products. In 2011/12 this was approximately $20.5 billion.[2] And yet only $3.76 million has been appropriated for animal welfare education and enforcement for 2013/14.[3] No additional funding is proposed to implement the changes in the Bill.[4] With such limited resources (reflected, for example, in the small number of dedicated animal welfare inspectors nationwide) the improvements to the Act may result in little actual change on the ground. This low level of investment also represents a surprising lack of commitment to "Brand New Zealand".

3. However, the main purpose of this submission is not to address the small improvements to the Act contained in the Bill, but rather to focus on, and to oppose, the glaring loopholes contained in the proposed new section 183A. Section 183A(2) contains an 'exception clause', empowering the making of regulations prescribing standards or requirements that "do not fully meet" the welfare obligations in the Act.

4. My principal reasons for opposing section 183A as currently worded are, in summary, as follows:

   (a) Section 183A replaces, and significantly broadens, the existing 'exception clause' (in sections 73(3) & (4)) permitting conduct that would otherwise be a breach of the Act. It will, for example, make it easier to perpetuate and expand intensive farming practices – practices that condemn large numbers of animals to wretched living conditions. In particular:

      (i) The new 'exception clause' in section 183A(2) will now apply to a much wider range of conduct than before. The existing exception applies only to minimum standards in codes of welfare made under Part 5, and only authorises conduct that would otherwise breach specific provisions or constitute specific offences. The new section 183A(2) goes much further than that.

      I submit that the power in section 183A(2) should not cover conduct wider than that covered by the existing 'exception clause' in section 73(3).

      (ii) The existing strict overriding test of "exceptional circumstances" will no longer apply. So it will now be easier to establish an exception.

      I submit that the "exceptional circumstances" test is an important check that should be retained in section 183A(2). The new "transition" power in section 183A(3) should be additional to, not replace, the "exceptional circumstances" test.

      (iii) Whilst section 183A(3) imposes a new requirement for a transition period to be specified, no maximum period is prescribed, and the requirement can too readily be bypassed on the grounds that a transition is not "feasible". And where the requirement *is* bypassed, the non-complying conduct can then continue indefinitely under section 183A(5), with a review only every 10 years.

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1 The Minister for Primary Industries, the Hon Nathan Guy, Animal Welfare Amendment Bill First Reading, 27 August 2013.

2 Cabinet Paper 2 (Final policy approvals for the New Zealand Animal Welfare Strategy and the Animal Welfare Amendment Bill) January 2013, para 13. This represented 46% of New Zealand's export earnings. Fisheries and aquaculture contributed an additional $1.5 billion.

3 Vote Primary Industries, estimates of appropriations 2013/14. In 2012/13 the actual amount was only $3.623 million. Small additional amounts are allocated for "animal welfare policy advice". In 2011/12 $992,000 was budgeted.

4 As the Hon Damien O'Connor noted during the First Reading, the Regulatory Impact Statement ("Options to Amend the Animal Welfare Act 1999"), dated May 2013, states (p 1) that all the proposed changes to the Act will be implemented by the Ministry on a "fiscally neutral basis".

I submit that section 183A(3) should prescribe a maximum transition period, one that adequately reflects the length of time now since the Act came into force.[5] Section 185A(5) should be deleted. Alternatively, section 185A(5) should apply only to the ground specified in subsection (4)(b) (religious and cultural practices), and should prescribe a shorter default review period of, say, 5 years.

(iv) Section 183A(6) gives the Minister a new, seemingly overriding, discretion to "have regard to whether the regulations would be in New Zealand's overall interests (including without limitation, health, social, economic, international, or environmental interests)" in deciding whether to invoke the 'exception clause'. This is an unduly wide test. It is difficult to imagine what it would not cover.

I submit that section 183A(6) should be deleted.

(b) The Bill is being promoted as a measure to enhance the "robustness" of the Act and to "increase transparency". And yet section 183A as worded does neither:

(i) It detracts significantly from the robustness of the Act, for the reasons given above. Indeed, it undermines the Act. What the Bill gives in small measure in its positive new provisions it takes away in much larger measure in section 183A.

(ii) No evidence, research or policy imperative has been advanced to justify this retrograde measure. Why does the Government wish to weaken the Act? The inference is that section 183A is intended more readily to facilitate departure from the Act when that is deemed expedient by MPI or industry sectors.

(iii) There appears to have been no frank acknowledgement by the promoters of the legislation of the scope and effect of section 183A. Very little is said, for example, in the Explanatory Note to the Bill about how widely the new provision will operate.

5. The enactment of section 183A in its present form would, in my submission, be an unacceptable backward step. It would weaken, not strengthen, the Act. Below I develop the submissions summarised in paragraph 4 above, and suggest a number of amendments to section 183A. These suggested amendments are set out in my attached Appendix, which contains a marked-up version of the section.

First submission – section 183A (as drafted) unacceptably broadens the existing 'exception clause'

Section 183A(2)

6. I have real concerns about this provision. First, it covers a wider range of conduct than the existing exception. Currently the exception in section 73 can only apply to the content of minimum standards in codes of welfare.[6] However, section 183A(2) would appear to permit an exception to cover any conduct that may be the subject of regulations under sections 183A(1)(a) and (b). Only (1)(b) relates to any minimum standards that could be established under Part 5. Section 183(1)(a) is broader, and covers "any standards or requirements for the purposes of giving

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[5] The Act came into force on 1 January 2000, nearly 14 years ago. There has been ample time to address non-complying practices, but progress has been unacceptably slow. This is unsurprising given the limited funding and other resources that have been allocated to NAWAC, and the 'industry capture' inherent in the way codes of welfare are developed. More time will elapse before regulations are put in place.

[6] There will now be no power for a code of welfare to contravene the Act, the exception will instead be contained in regulations.

effect to Parts 1 and 2". The exception should not extend to a wider range of conduct than could be covered by minimum standards.

7. Secondly, the inclusion of the words "(without limitation)" is designed to ensure the widest possible interpretation of the exception. It means that (unlike under the existing section 73(3)) standards and requirements may be authorised that would otherwise breach sections of the Act, or constitute offences, additional to those sections expressly listed in subsection (2)(a) and (b). For example, the exception could potentially now extend to additional offences such as wilful or reckless ill-treatment of animals (sections 28 and 28A of the Act). The words "without limitation" mean just that. They should be deleted.

8. Thirdly, the important reference to "exceptional circumstances" has been removed. There are in my submission very good reasons for retaining this test:

   (a) The current overriding test of "exceptional circumstances" is a strict test, as it should be. An exception sanctions non-compliance with the most basic obligations in sections 10 and 11, as well as behaviour that would otherwise constitute an offence and attract significant pecuniary and custodial offences. It requires something quite out of the ordinary;

   (b) Retention in subsection (2) of the test of "exceptional circumstances" would continue to signal very clearly that the factors in subsections (4)(a) to (c) must be of a very significant magnitude and degree, and must clearly outweigh the adverse welfare effects of non-compliance with the obligations of the Act.

   (c) The test of "exceptional circumstances" has over the years been invoked too readily. Without this test there may be even more frequent departures from the Act's basic protections.

   The new "transitions" in section 183A(3) should therefore be additional to, not replace, the "exceptional circumstances" test.

9. I submit that subsection 183A(2) should be amended as follows (as set out in my Appendix):

   (a) Delete the words "under this section" and replace with "under subsection (1)(b)";

   (b) Delete the words "standards or requirements" and replace with "minimum standards";

   (c) Delete the words "(without limitation)"; and

   (d) Add the words "in exceptional circumstances".

Section 183A(4)

10. Again, I have several concerns. The criteria in sections 183A(4)(a) to (c) make no mention of the impact of the exception on the welfare of animals. My suggestion that the overriding test of "exceptional circumstances" be retained would require a balancing and weighing of the criteria in subsections (4)(a) to (c) against the impact on animal welfare.

11. The existing words "requirements of" before "religious or cultural practices" in current section 73(4)(b) should be retained. If this exemption is to remain it should be demonstrated that the religious or cultural practice involves a mandatory requirement.

12. The words "a particular sector" in subsection (4)(c) are imprecise. Presumably they are intended to mean a particular sector of the economy.

13. I submit that section 183A(4) be amended (as set out in the attached Appendix) as follows:

(a) Insert the words "requirements of" before the words "religious or cultural practices"; and

(b) Clarify what is meant by "a particular sector".

Sections 183A(3) and (5).

14. These provisions relate to the transition periods and review periods that are to apply when the subsection (2) 'exception clause' is invoked.

15. The New Zealand Law Society, in its submission dated 1 October 2013, has suggested that a distinction can be drawn between subsections (4)(a) and (c), which are concerned with feasibility/practicality and economics, and subsection (4)(b), which is the religious/cultural ground. Whilst I agree that these grounds can be differentiated, I do not support the Law Society's suggested amendments to subsections (3) and (5), and have suggested alternative options below.

Section 183A(3)

16. In my submission, if an exemption is granted on grounds (4)(a) or (c) – the feasibility/practicality and economic grounds -- a transition period should invariably be stated. If a practice breaches the Act, and therefore causes harm to animals, there should be a transition to an alternative practice, or, if there is no alternative practice, a phase out to an ultimate ban of the practice.

17. A maximum transition time should be prescribed. The transition periods that have so far been recommended by NAWAC, and accepted by the Minister, have been unreasonably long. Here are a few examples:

- Layer hen battery cages – which represent an obvious breach of the Act -- will not finally be phased out until 31 December 2022[7], a period of *23 years* after the Act came into force. And even then these cages will be substituted for colony cages, which, on any common sense view, are only marginally larger battery cages.

- Sow crates will be not be phased out until 3 December 2015, nearly *16 years*[8] after the Act came into force. Even after that, mated sows will be permitted to be confined individually (and indefinitely) in pens that need only provide sufficient space to stand up, lie down, turn around without touching the walls, and have separate lying, dunging and eating areas. There is no requirement that the sow be able to move about.[9] That is not much of an improvement, and surely a breach of the Act. As for the notorious farrowing crates, no date has yet been proposed for their phasing out. These intelligent animals have for far too long been condemned to live in abusive conditions.

- Other practices have been prescribed in codes of welfare that, again on any common sense view, breach the Act, and NAWAC has not even sought to invoke the exception clause in section 73, let alone specify any phase out period. An example is the Animal Welfare (Meat Chickens) Code of Welfare 2012, which makes grim reading.[10]

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7 Animal Welfare (Layer Hens) Code of Welfare 2012, Minimum Standard No 12. The intermediate transition schedule (although not the final deadline) was subsequently pushed back further by NAWAC following industry "concerns".

8 The reference in the Regulatory Impact Statement (p 30) to the "five year phase out period" is misleading. The period was 5 years only from the most recent review of the pigs welfare code in 2010, but 16 years from the coming into force of the Act on 1 January 2000.

9 Animal Welfare (Pigs) Code of Welfare 2010, Minimum Standard No 11(f).

10 For example, stocking densities are still excessively high. The maximum stocking density in sheds (in Minimum Standard No 10) is still 38kg of live weight per sq m of floor space. As Mr Phil Twyford has pointed out (First Reading), this means that 19 birds can be kept per sq m, giving each bird a floor area of less than an A4 piece of paper, which will shrink still further as the birds grow.

The determination of reasonable phase out periods cannot therefore, with any confidence, be left entirely to the Ministry and to NAWAC to prescribe by regulation. The Act should itself impose a 'default' maximum phase out period.

18. A transition period should prima facie apply also to ground (4)(b) cases (religious and cultural practices), but I have also suggested (as an alternative) a change to section 183A(5) to address this ground, discussed in paragraph 22 below.

19. I submit that section 183A(3) be amended (as set out in the Appendix) as follows:

    (a) Specify a default maximum transition period; and

    (b) Add a requirement that the Minister also have regard to the degree to which the existing practice is non-compliant with the Act, and the impact of that on affected animals.

Section 183A(5)

20. Section 185(5) would permit the making of regulations sanctioning non-complying conduct whenever the Minister considers that a transition to a new practice is not "feasible". This is an unacceptably vague and broad test. It denotes something much less than impossibility, or even impracticability, such as ease and convenience. This test will too readily allow a departure from the requirement to specify a transition period. It will make the requirement in section 183(3) rather meaningless.

21. Further, where section 183A(5) is invoked, it will permit an indefinite exemption, with a review period of 10 years (or shorter intervals if specified by regulation). Ten years is far too long to permit to continue, unmonitored, a situation which is acknowledged as non-compliant with obligations of the Act. A review should be conducted more frequently, say at least every 5 years, to assess the impact on animal welfare and whether circumstances have changed. If the Ministry does not have the resources to conduct a review at least every 5 years then it should not grant an exemption.

22. I submit that section 183A(5) should be deleted, as is proposed in SOP 356 dated 17 September 2013. That is my preferred option. Alternatively, I submit that it be amended as follows (as set out in the Appendix):

    (a) Limit the application of section 183(5) to exemptions granted in reliance only on subsection (4)(b), the religious and cultural ground;

    (b) Require a review at 5 yearly intervals (or more frequently); and

    (c) Delete the word "indefinite" and substitute the word "unspecified".

Section 183A(6)

23. I am opposed to the inclusion of this subsection. First, it is unclear precisely how subsection (6) fits in with the criteria in subsection (4). Is subsection (6) meant to set out additional factors that may be taken into account by the Minister in deciding whether he is satisfied of any of the matters in subsection (4)? It is difficult to see how that would work. Or (which seems more likely) is it meant to give the Minister an overriding discretion whether to recommend the making of regulations under subsection (2) solely on the grounds set out in subsection (6)? If so, that would be an unwarranted expansion of the exception power.

24. Secondly, the words "(including without limitation, health, social, economic, international, or environmental interests)" are unduly wide. The inclusion of such a wide "escape clause" in a Bill to improve animal welfare is surprising.

25. I note that the Cabinet Paper 2 suggests (para 106, p 16) that this provision will enable the Minister *not* to grant an exception. However, as drafted, this provision is more likely to be used as justification for an exception. And subsection (7) already enables the Minister to decline to recommend the making of regulations granting an exception.

26. Subsection (6) is unnecessary, unclear, and it would significantly detract from the operation of the Act. I submit that it be deleted.

Second submission – section 183A (as drafted) is contrary to the stated objectives of enhanced robustness and transparency

27. This Bill has been promoted as a measure to enhance the robustness and transparency of the Act. In my submission section 183A, as worded, serves neither of those objectives.

Section 183A detracts from the robustness of the Act.

28. The Minister, during the First Reading, described the Bill as "about making a strong system even stronger", and as "strengthening an already well-performing animal welfare system". He spoke of New Zealanders being "passionate about animal welfare" and stressed that "we care deeply about the way animals are treated". And yet, section 183A represents a significant step backwards, by significantly widening the existing commercial expediency loophole. What the Bill gives in small measure in some of its positive new provisions, it takes away in much larger measure in section 183A. The existing 'exception clause' in sections 73(3) & (4) needs to be *tightened up,* not *expanded*. The amendments I have suggested above to section 183A will do just that. The overriding "exceptional circumstances test" would remain, but with the added control of a maximum transition period. There would still be sufficient flexibility to ensure the system is workable and sensible, but with sufficient controls to ensure that the Act's core obligations are not undermined.

There is no stated justification for the expansion of the 'exception clause'.

29. Along with other members of the public, I expect new legislative measures to be supported by an adequate foundation of evidence, research and reasoning. Quite what the justification is for broadening the existing 'exception clause' is not disclosed. The very brief explanations given in the Regulatory Impact Statement (paras 71 and 72) and Cabinet Paper 2 (paras 97 to108) do not adequately address this. The focus on supposed "transparency" overlooks the obvious *broadening* of the exception clause. It is therefore difficult to resist an inference that the change is intended to make it easier for MPI and the industry to ignore the welfare obligations in the Act when it is expedient to do so, and to insulate the regulations more effectively from the possibility of legal challenge.

The likely impact of section 183A has not been clearly articulated

30. There appears to have been no frank acknowledgement by the promoters of the legislation of the scope and effect of section 183A. Little is said anywhere, including in the Explanatory Note to the Bill, about how *widely* the new section 183A will operate. It warrants rigorous scrutiny.

31. Finally, I note that whereas at present any proposal to invoke the 'exception clause' in section 73 must be publicly notified,[11] and be open to public submissions, it appears that no such requirement will apply to regulations made under the new section 183A. There will only be the limited consultation obligation in section 184. As the Ministry has noted (Cabinet Paper 2, para 104), permitting practices that do not meet the obligations of the Act usually generates a "significant amount of concern and correspondence from the public". All the more reason for careful scrutiny of section 183A at this stage.

Conclusion

32. I submit that section 183A, as worded, detracts from some of the otherwise good work of this Bill. Attached is an Appendix containing a marked up version of section 183A setting out the changes that I submit should be made.

33. I would be happy to appear in support of this submission if that would be of assistance to the Committee.

Gillian Coumbe QC

[11] Currently an exception may only be granted in the context of minimum standards in a welfare code, and draft welfare codes must be publicly notified under section 71.