A Comparative Look at the Treatment of Environmental Activists through Legislation in Australia and the United States

A report drafted for

The Office of Senator the Hon Richard Colbeck

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Executive Summary

The legislation that is currently in place in Australia and the United States differs in many aspects with regards to the way the two countries treat not-for-profit environmental organizations.

The areas of interest for this report include the differing standards that the two countries use to assess tax exemptions to the not-for-profit organizations, as well as the information regarding the board members of such organizations that is made publicly available. Another large difference is how the legislation seeks to provide justice when an environmental activist or organization commits and illegal act.

To further understand these differences in the legislation, the court systems of both countries are looked to for their interpretation of the relevant laws for which they have been presented cases. There is also a unique case that provides a cross-over comparison of what happens when an Australian court denies an Australian environmental not-for-profit the justice it seeks and it therefore turns to the United States to provide justice. When the United States was unable to provide justice because of jurisdiction issues, it highlights that if the organization had been in the United States the court system could have provided help.

It is found that while Australia could benefit from a simplification of its laws regarding which organizations qualify as not-for-profit organizations and how not-for-profits are incorporated, both the United States and Australia need to rethink their stance on the permissibility of illegal actions performed with an environmental purpose. Australia may be able to look at the United States as a model in their tax concessions and in the transparency of board members for not-for-profit organizations. Unfortunately,

both countries will be found to be at opposite ends of an extreme continuum where Australia rewards illegal actions when the offender has performed those actions for the purpose of protecting the environment with essentially a free ride, or an excuse. On the other end the United States seeks to make illegal actions that are performed in defense of the environment carry a stronger penalty than if the same illegal actions were to be committed for different purposes.

Both countries have plenty of room for improvement to their respective legislation regarding not-for-profit organizations and hopefully each will take steps to redefine old, outdated legislation and also keep in mind the restrictions to which this can be done, namely for the United States in regards to Freedom of Speech rights.

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List of Symbols, Abbreviations and Nomenclature

Symbol	Definition
ALF	Animal Liberation Front
ASIC	Australian Securities and Investments Commission
ELF	Earth Liberation Front
FBI	Federal Bureau of Investigation
IRS	Internal Revenue Service
NEPA	National Environmental Policy Act
TNC	Tarkine National Coalition

CHAPTER 1: INTRODUCTION

The legislation that is responsible for the guidelines by which all citizens live holds great power, but this legislation may become outdated and changes are not always a bad thing. Human behavior is unpredictable, but in a civilized democracy, of which the two countries of interest, Australia and the United States, are, the expectation is that people will abide by the laws set forth by their respective governments.

While this paper will look at the actions of environmental organizations and activists, it does not attempt to completely explain why these individuals take the actions they do in order to bring about the change they see as necessary to further their cause. However, the legislation in Australia and the United States does differ substantially from one another regarding how environmental organizations receive benefits beyond those granted to the ordinary citizen as well as how the legal system views criminal actions executed in the name of environmental protection.

The legislation that has been passed in multiple states in the United States will reveal, when compared to that of the Commonwealth of Australia, that Australia and the United States could both benefit from a reassessment of the treatment of illegal actions performed in the name of environmental protection. In one case an outdated act from 1974 will cause ambiguity when Australian judges try to interpret the law. On the other hand, the United States examination will show that First Amendment rights are at risk of being infringed upon because of statutes that are too narrow.

Australia may benefit from a look to the United States in modeling their tax exemptions and transparency of board members, but both countries need to reassess, in

different ways, their legislation regarding criminally punishable actions that are for the defense of the environment.

CHAPTER 2: LEGISLATION

Tax Exemptions and Charity Status

On 23 August, 2012, in the House a Representatives of Australia a bill was presented to pass an act to amend the law relating to taxation of not-for-profit organizations. The proposed *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Cwlth)* sets out to add into section 30-18 "Fund, authority or institution must operate in Australia, etc." It goes on to state that this would be satisfied if the fund, authority or institution:

> *"(a) it is established in Australia; and*
>
> *(b) it operates solely in Australia; and*
>
> *(c) it pursues its purposes solely in Australia" (30-18(1)).*

If the government is to provide not-for-profit concessions, it seems logical and good policy to make those organizations limit their establishment, operations and activity to within the country. By doing so the concessions provided go toward groups who have been helping to benefit the same people that the government seeks to assist. Yet, if one reads further into the amendment, section 30-18(7) sets out that Environmental organizations could potentially be held to a different (lower) standard than all other affected institutions. It allows the "Environment Secretary" who is appointed by the Prime Minister and held accountable to the Environment Minister, to "make a determination" as to which Environmental organizations meet a standard in order to be exempted from the provision drafted above. This would allow an environmental organization to be considered for a not-for-profit tax concessions without having to satisfy that the organization was established in, operates in or pursues its purpose solely

in Australia. The rationale behind this exemption is that it is necessary for environmental organizations to carry out overseas activities, sometimes in conjunction with Australian based organizations, in order to effectively bring about change that the group is seeking as its purpose. (*Tax Laws Amendment* Explanatory Memorandum, 2012).

Within the United States the Internal Revenue Service has a code that puts forth the types of organizations that can file for tax exempt status. The section of code pertaining to not-for-profit tax exemptions is section 501(c) and therefore most not-for-profit organizations that fall into this category are referred to as 501(c) organizations. There is a long list of organizations that can fall under this code: corporations, cooperating associations or foundations, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, as well as to foster national or international amateur sports competition, to promote the arts, or for the prevention of cruelty to children or animals. There are not specific requirements that single out Environmental organizations, however, there are many steps that must be followed in order to obtain and preserve 501(c) status. One of the ones that would stand out for an environmental organization is that "it may not be an *action organization*, *i.e.*, it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates" (Exemption Requirements 2012). Environmental movements are toothless without government legislation to enforce their purpose. If the organization were to have 501(c) status then it would not be able to influence the change of legislation that most environmental organizations seek.

Disclosure of Board Members for Not-for-Profit Organizations

On 21 September, 2012 The Advocate writer Sean Ford revealed that the Tarkine National Coalition (TNC), a not-for-profit group fighting to make the north-western part of Tasmania into a national park and stop the mining in the area, were refusing to name their board members. The appropriately titled article, "Board kept secret," quoted TNC spokesperson, Scott Jordan, as saying, "not all the public response is polite and civilised." Jordan was referring to the reasoning behind the group's refusal to bring the identities of its board members into the public light. After much attention from the press, the board members were "revealed" on 28 September, 2012. Sean Ford's article in The Advocate for that day revealed that the president of the TNC was Lynn Jordan, the wife of Scott Jordan. It was further revealed that the treasurer was Nigel Burch, a former ministerial adviser and whistle-blower. The director of Environment Tasmania, Phil Pullinger, and his parents, Peter and Leonie, were revealed to also be members of the board. Adam Brooks, the Shadow Minister for Hospitality, Mining, Small Business and Veterans Affairs in the Parliament of Tasmania, is the one who was pressuring the reveal of the TNC board members. Ford quoted Brooks as saying,

> "*It's clear the TNC is a tale of two families, the Jordans and the Pullingers, with a few green mates added in to make up the numbers.*
>
> *It is hardly a group representative of the Tasmanian community."*

How is it that the board was kept secret?

In Australia, not-for-profit organizations can be incorporated in many ways. The main differences are if they are incorporated under the Commonwealth and thus abide by the *Corporations Act 2001* or if they are incorporated under the state or territory that they

reside in. In the latter case each state or territory has their own legislation. Table 1 below, adapted from "Enhancing not-for-profit annual and financial reporting" (2011), outlines the different legislation according to each state or territory.

Table 2.1: Incorporated association legislation

State or Territory	Title of Legislation	Regulation	Supporting Material
Australian Capital Territory	*Associations Incorporation Act 1991*	Associations Incorporation Regulation 1991 (Effective 1 December 2010)	www.ors.act.gov.au/BIL/WebPages/Assocns/associations.html
Northern Territory	*Associations Act*	Associations Regulations Associations (Model Constitution) Regulation	www.nt.gov.au/justice/licenreg/baal/club_ assoc.shtml
New South Wales	*Associations Incorporation Act 2009*	Associations Incorporation Regulation 2010	www.fairtrading.nsw.gov.au/Cooperatives_and_associations/Associations.html
Queensland	*Associations Incorporation Act 1981*	Associations Incorporation Regulation 1999 (Effective 1 July 2010)	www.fairtrading.qld.gov.au/incorporated-associations.htm
South Australia	*Associations Incorporation Act 1985*	Associations Incorporation Regulations 2008	www.ocba.sa.gov.au/Associations
Tasmania	*Associations Incorporation Act 1964*	Associations Incorporation Regulations 2007 Associations Incorporation (Model Rules) Regulations 2007 Associations Incorporations Direction 1999	www.consumer.tas.gov.au/business_affairs/incorporated_associations
Victoria	*Associations Incorporation Act 1981*	Associations Incorporation Regulations 2009	www.consumer.vic.gov.au Incorporated Associations

Western Australia	*Associations Incorporation Act 1987*	Associations Incorporation Regulations 1988	www.commerce.wa.gov.au/ ConsumerProtection/Content/Business/ Associations/index.htm www.commerce.wa.gov.au/ associationsguide/

In the case that an organisation is incorporated under the Commonwealth, the *Corporations Act 2001* sets out the guidelines that are to be followed. The *Corporations Act 2001* Section 57A (1) and (2) defines a corporation, for the meaning of this act, as:

"(a) a company; and

(b) any body corporate (whether incorporated in this jurisdiction or elsewhere); and

(c) an unincorporated body that under the law of its place of origin, may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose."

And the act excludes the following as a corporation:

"(a) an exempt public authority;

(b) a corporation sole."

All of the organizations that fall under the purview of the *Corporations Act 2001* must apply with the Australian Securities and Investments Commission (ASIC) to become incorporated. The application must include the given and family names (and any past aliases), addresses, and date and place of birth of directors, board members, secretaries and any members that the organisation has at the time of incorporation (Section 117). Further, if an organisation decides to change or add a board member or secretary, they have 28 days to lodge the personal details of the person with the ASIC (Section 205B). Once lodged with the ASIC this information is publicly available.

However, if the corporation was incorporated under the state or territory, then it must simply report the personal details of its board members and secretaries to the Fair Trading Office or the equivalent in their state or territory. The information is not made public.

The Tarkine National Coalition avoided the disclosure of its board members because of the way that it was incorporated.

In the United States it is a much simpler process to figure out who the board members of not-for-profit organizations are. When an organization wishes to become a not-for-profit, tax exempt (or better known as a 501(c) organization as discussed in the Tax Exemptions section of this report) organization the Internal Revenue Service (IRS) requires that each such organization annually submit what is called a Form 990. This form contains a section that is entitled “Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees.” This section must be completed whether or not the members subsequently listed were compensated or not. This form is then publicly searchable right on the Internal Revenue Service’s online site. There are then even services that convert the Internal Revenue Service’s data into PDF documents and catalogue a database of “more than 5 million” Form 990s (GuideStar n.d.). The simplicity of the United States’ model of disclosure makes it quite attractive. There is no hiding and complete transparency, if the procedures are followed, that allows the public complete access to whatever information they desire on not-for-profit organizations and their internal make-up.

The Tarkine National Coalition was able to hide its board members’ identities because of a complicated process within Australia whose legislation enables even not-

for-profit organizations to remain anonymous depending on how they are incorporated. This is in contrast to the tax exemptions that are granted no matter how an organization is incorporated. There seems to be a convoluted process in order to figure out the policies surrounding the governance of not-for-profits in Australia.

Eco Terrorism in the United States

The United States has many active environmental groups who have influenced legislation at the state level in as many as 30 different states. However, they have not acquired the results they aim for, broadly speaking. The most prominent of these groups are the sister organizations Animal Liberation Front (ALF) and Earth Liberation Front (ELF).

What is eco terrorism? It can vary, but generally it has the definition of "crimes committed against companies or government agencies and intended to prevent or to interfere with activities allegedly harmful to the environment" (Lovitz 2007). However, there are some times when the definition is expanded to included crimes committed in the name of animal rights. It is clear from the United States Federal Bureau of Investigation's (FBI) definition that they do include the latter in their interpretation of the word "eco terrorism." At a Hearing before the United States Subcommittee on Crime of the Committee on the Judiciary, Ron Arnold, the author of the book: *Ecoterror-The Violent Agenda to Save Nature,* gave the government this statement:

> *"There is no difference between ecoterrorism and animal rights terrorism, and there evidently has been some dispute about that difference. The perpetrators are, in large part, the same people; and the solidarity of action between them is openly declared."*

The United States Federal Bureau of Investigation divides "terrorism" into two broad categories: domestic and international. The international terrorism category would include the violent acts that occur by "individuals or groups under some form of foreign direction" (Lewis, 2004). In contrast, the domestic terrorism category involves acts of violence that "appear to be intended to intimidate or coerce a civilian population, or influence the policy of a government by intimidation or coercion" (Lewis, 2004). There is a fine line in the United States on the actions that the government can take to combat the terrorist activities of such domestic individuals and groups. "Extremist groups engage in much activity that is protected by constitutional guarantees of free speech and assembly," therefore making it hard for law enforcement officials to effectively intercept the actions of these types of organizations. “Ecoterror cells remain extremely difficult to identify and infiltrate” (Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements, 2005). The Federal Bureau of Investigation specifically names the Animal Liberation Front and Earth Liberation Front as two such domestic terrorist groups.

Simply put, the Animal Liberation Front operates with the goal to "save as many animals as possible and directly disrupt the practice of animal abuse" by means of "rescuing animals and causing financial loss to animal exploiters, usually through the damage and destruction of property" (The Animal Liberation Front). The Animal Liberation Front’s website makes it clear that the postings of articles and information on their site are to educate the public about the group's goals and actions, but that the "owner and operators" of the site do not commit illegal acts, nor do they explicitly have ties to the membership of the Animal Liberation Front. The members are all anonymous individuals or cohorts of individuals who share the same beliefs and goals as the

manifesto for the Animal Liberation Front sets forth. The website does not hide the fact that the acts that its members commit in order to save animals from torture are illegal and often endanger the people who work at the laboratories, fur businesses and wherever other places the activists decide to target. Further, they boast that they cause substantial amounts of financial damage to companies and often damage structures as well as goods.

Similarly, the Earth Liberation Front involves itself in illegal acts, mainly arson, in order to politically take a stance against those it sees as harming the environment. Much like the Animal Liberation Front, Earth Liberation Front is a composition of anonymous activists who partake in extremist actions. As Arnold told the United States Subcommittee on Crime, it is obvious that these two organizations are at least modelled after one another in their similar styles, if not completely linked in their activism and events.

There are several concerns about the use of the word "terrorism" to describe the activities of these two groups and other extremist activist groups and individuals like them. This is the very concern of the documentary "If a Tree Falls." It follows one former activist, Daniel McGowan, who says he now regrets his actions which were illegal. McGowan is now at the end of his seven year sentence after being arrested in 2005 for his actions of arson while still with the Earth Liberation Front. The Federal Bureau of Investigation conducted an extensive investigation, known as "Operation Backfire," in order to bring these criminals to light and punish them for their actions, bringing justice to the forefront. In this case it was several years after McGowan had distanced himself from the group. (Holden, 2011). McGowan's sentence came with a “terrorism enhancement" that allowed the "judge to apply a harsher standard if the crime fits the

traditional concept of 'terrorism.'" Another concern is voiced by author R.R. Baxter, "due to its imprecision and ambiguity, the term 'terrorism,' serves 'no operative legal purpose.'" (Lovitz 2007).

In order to combat this problem of violent and radical activism in the United States, many states have passed legislation that effectively states that:

> *No person shall, without the effective consent of the owner of an animal facility....disrupt or damage the enterprise conducted at the animal facility*.

However, the limiting factor in these such eco terrorism bills is that the word "disrupt" is "vague and overbroad" and as such causes concern for the ability of the bills to be upheld in a court of law based on First Amendment rights. These First Amendment issues as well as other concerns will be discussed in depth in the following section of this paper.

There is special interest being paid to one state's eco terrorism bill. The state of Pennsylvania seems to have created a bill whose text provides a proviso that would bypass the concerns of the First Amendment rights that the other eco terrorism bills present. In April 2006 Governor Ed Rendell signed into law HB 213, which is entitled "Ecoterrorism" and provides in pertinent part:

> *§3311. Ecoterrorism*
>
> *(a) General rule - A person is guilty of ecoterrorism if the person commits a specified offense against property intending to do any of the following:*
>
> *(1) Intimidate or coerce an individual lawfully:*
>
> *(i) Participating in an activity involving animals, plants or activity involving natural resources; or*

(ii) Using an animal, plant or natural resource facility.

(2) Prevent or obstruct an individual from lawfully:

(i) Participating in an activity involving animals, plants, or an activity involving natural resources; or

(ii) Using an animal, plant or natural resource facility.....

(c.1) Immunity - A person who exercises the right of petition or free speech under the United States Constitution or the Constitution of Pennsylvania on public property or with the permission of the landowners where the person is peaceably demonstrating or peaceably pursuing his constitutional rights shall be immune from prosecution for these actions under this section or from civil liability under 42 Pa. C.S. §8319 (relating to ecoterrorism.)

It is the final "immunity" section that sets this bill apart from those eco terrorism bills passed in other states. It highlights that the state is not trying to deny First Amendment rights to any United States or Pennsylvania citizens. Among the arguments by animal and environmental activists as to their reasoning why this bill still is not satisfactory was the included use of the term "terrorism" in the title of the bill and the adverb "peaceably" that is in the immunity clause. There were advocates that petitioned for the bill's name to be changed to "eco-intimidation" in order to avoid the term "terrorism." (Lovitz 2007). The fear was voiced that when a defendant would seek to invoke the immunity clause of this bill, the term “peaceably” could be open to interpretation by the court and thus leads to unpredictable and inconsistent rulings. (Lovitz 2007).

First Amendment Rights in the United States

The foundations of the United States of America rest upon its Constitution that was set forth by the founding fathers. The first ten amendments to this doctrine are known as the Bill of Rights. Ratified on 15 December, 1791, the Bill of Rights began by including the First Amendment which states in whole:

"*Amendment I*

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" (United States Bill of Rights).*

It is the matter of freedom of speech that distinguishes the United States most starkly from Australia. Of the eco terrorism bills that have been passed at state level in the United States, almost all have First Amendment concerns. The courts have found that the Freedom of Speech is "'almost absolute' and vital to bring about political, social, and economic change," and this is exactly what environmental groups, including extremist groups such as the Earth Liberation Front, aim to achieve. (Lovitz 2007). Yet, even so there are limits on the Freedom of Speech which include "yelling ‘fire’ in a crowded theatre, child pornography, fighting words, and, to a limited extent, libel." In short, the government should refrain from enacting any laws which infringe upon the free expression of ideas which enhances politics and culture. (Lovitz 2007).

There are arguments that the vast majority of eco terrorism bills that have been passed are overbroad and stifle not only unprotected speech, but also protected speech.

As pointed out in the previous section, these eco terrorism bills use the term "disrupt." The definition of disrupt is "to interrupt the usual course of a process or activity" (Lovitz 2007). Lovitz takes the hypothetical situations to an extreme and posits that "a person walking by the window with a brightly colored tee-shirt" could "disrupt" the facility. While this may be juvenile, it is valid that the term disrupt is overbroad in its use. More realistically, a peaceful protest out the front of a facility "during which protesters pass out leaflets to passersby, which describe the acts that are taking place within the facility" (Lovitz 2007) would most surely be categorized as disruptive to the facility's workers and owners. Even without the ambiguity of the term disrupt, there is an overlap in the legislation. "The states that have passed ecoterrorism bills all have criminal codes that already proscribe most, if not all, of the criminal acts in the ecoterrorism bills, such as penal

statutes proscribing harassment, placing another in fear of imminent physical injury, danger or damage to another's real property, vandalism, and criminal trespass" (Lovitz 2007). Thus the need for eco terrorism bills is redundant and overbroad because of the fact that they are "already proscribed in narrower statutes already in effect" (Lovitz 2007).

Even if one were to ignore the First Amendment infringements, the eco terrorism bills could still be criticized as vague. If a statute is found to be vague it contains a "lack of explicit standards for those who have to enforce them [and] might result in arbitrary or discriminatory enforcement." (Lovitz 2007). Arbitrary implementation of the law is the last thing that minorities in the population, such as environmental activists, want. "Police and other personnel should not be left to make those subjective determinations of who is

and is not disrupting conduct at an animal facility [or other target of environmental activists] lest they should be influenced by public intolerance or animosity towards animal activists, which is clearly prohibited as an abridgement of constitutional freedoms" (Lovitz 2007).

Continuing with the flaws in the eco terrorism bills brings the discussion to view-point discrimination. "It is well established that when the speaker's views differ from what the government perceives to be the larger societal view, that speaker's ideas deserve paramount constitutional protection." (Lovitz 2007). The First Amendment right to Freedom of Speech was to cultivate differing opinions and to protect minority views from being drowned by the majority. At this time in our society, the views of environmental and animal rights activist divulge from that of the government and the eco terrorism bills are placed in order to bring about an end that is satisfactorily aligned with the government's beliefs. As an example of where the government's interests lie, the Kentucky criminal code contains a section on "Offenses Against Public Peace-Conspiracies-Protection of Animal Facilities" in which the justification of the law is preceded by a finding of the General Assembly:

> *"The General Assembly finds that the caring, rearing, feeding, breeding, and sale of animals and animal products, and the use of animals in research, testing, and education, represents vital segments of the economy of the state, that producers and others involved in the production and sale of animals and animal products and the use of animals in research and education have a vested interest in protecting the health and welfare of animals and the physical and intellectual property rights which they have*

> *in animals, and that there has been an increasing number of illegal acts committed against farm animal and research facilities. The General Assembly further finds that these illegal acts threaten the production of agricultural products, and jeopardize crucial scientific, biomedical, or agricultural research, and finally, the General Assembly finds that these illegal acts threaten the public safety by exposing communities to contagious diseases and damage research." (*Lovitz 2007*).*

This finding of the general assembly exemplifies that the economy of the state is ranked higher by the government than the welfare of the animals in testing facilities. The view point of the state is being put forth as the proper view and neglecting the minority view of the animal rights activists. This is a clear Constitutional violation.

Competition and Consumer Act 2010

Australia's legislation regarding the treatment of environmental activists and organizations is quite contrasted to that of the United States' eco terrorism bills. In fact, it is almost the opposite end of the spectrum.

The *Competition and Consumer Act 2010* in Australia amended the *Trade Practices Act 1974*. The pertinent parts of these acts for this discussion are sections 45D, 45DA, 45DB and 45DD. Section 45DD(3) reads:

> *A person does not contravene, and is not involved in a contravention of, subsection 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if:*
>
> *(a) the dominant purpose for which the conduct is engaged in is substantially related to environmental protection or consumer protection.*

Sections 45D and 45DA both essentially state that one must not "hinder or prevent" the supply or acquisition of goods or services or engage in actions that would cause "substantial loss or damage to" a business of another. Section 45DB goes on to specify that a person must also not hinder another "from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia."

This explicit exemption of environmental activists and organizations' actions as permissible when for any other citizen it would be criminal is in stark contrast with the stance that many of the states in the United States have taken.

Even though this act was amended in 2010, this section was left untouched. When an act is introduced into law there is usually an Explanatory Memorandum to accompany it. In 1974 there was no such document for the *Trade Practices Act*. As such, there is no way of knowing the justification for the inclusion of the exemption for an "environmental purpose."

Even so, this piece of legislation could be seen in the same manner as the eco terrorism bills. Would it hold up in court? From the interpretation of the eco terrorism bills it could be criticized in the same way as being vague and overbroad. Australia does not have the same constraints, or lack thereof, upon speech as in the United States so that issue can be ignored. However, the use of the word "substantially" is cause for concern. This could be interpreted in different ways be different people. And as evidenced in the eco terrorism bills of the United States, ambiguity in interpretation is the last thing that environmentalists want. The law should be clear to the average person and leave no room for uncertainty. The following section will reveal how Australia's court system dealt with

this section of legislation being used as a defense for an action that the defendant claimed to be of a substantial “environmental purpose.”

CHAPTER 3: LEGISLATION IN PRACTICE

Rural Export and Trading (WA) Pty Ltd v. Hanhauser

The unique and unquestionably specific Section 44DD of *The Trade Practices Act 1974* (the now amended *Competition and Consumer Act 2010* discussed previously), was put to the test by the Federal Court of Australia when on the night of 18 November, 2003, Ralph Hanhauser, along with others, entered a holding facility in Portland, Victoria, for sheep which were to be subsequently transported to the Middle East on 21 November, 2003, alive. Hanhauser went about depositing ham into the feed and water of the sheep. The following day Hanhauser came forward to publicize his actions, claiming that the adding of ham to the feed and water of the sheep "was designed to prevent it meeting Halal requirements for the preparation of food suitable for the consumption of Muslims in Middle Eastern destinations" (2007 FCA 1535).

This was the first time that Section 45DD would be enacted as a defense, and as such attracted large amounts of media attention for the hope that it would clarify the meaning of "environmental purpose" (Pro Bono Legal Services). The primary judge on the case in 2007 found that the dominant purpose of Hanhauser's activities was "substantially related to environmental protection." This purpose was "to protect the sheep from the suffering that [Hanhauser] perceived they would undergo if they were shipped to the Middle East" (2008 FCAFC 156). This judge did however recognize that Hanhauser's actions stopped the export of 1,694 sheep that were in the holding facility the night Hanhauser spread ham into the feed and water, and that this was a contravention of Section 45DB(1) of the *Trade Practices Act 1974*. But because of the exemption for Hanhauser's purpose as granted in Section 45DD, the judge found Hanhauser was not

guilty of contravening Section 45DB(1) as the applicants, Rural Export and Trading (WA) Pty Ltd, had claimed. The judge further found that the burden of proving that the respondent's, Hanhauser's, actions were not exempted by Section 45DD lay with the applicant, Rural Export and Trading (WA) Pty Ltd.

This was a victory for animal rights and environmental activists in Australia. This is starkly contrasted to the legislation in the United States that specifically names illegal actions done for environmental purposes are still illegal. Australia's legislation, granted it is legislation from 1974, extends extra rights to those people acting with the environment in mind that are not granted to other citizens.

Yet, the case was not over. Rural Export and Trading (WA) Pty Ltd appealed the decision. The three judges on appeal found that they did not agree with the primary judge's interpretation of "environmental purpose." The three appellate judges found that:

> *…the "environment" referred to in the expression ordinarily will be a particular location, thing or habitat in which a particular individual instance or aggregation of flora or fauna or artifice exists. And the "protection" is to preserve the existence and or characteristics of that environment being that location, thing or habitat which may include, or consist only of, that individual instance or aggregation."*

The appellate judges came to the conclusion that Hanhauser's actions did not relate to the environment the sheep were placed in, but to the conditions that the sheep would be subjected to on board the ship for transport to the Middle East. "…[I]t is contrary to commonsense to suggest that, simply because the sheep may at one time or other have been part of a particular environment, …[that] protection of the sheep from a perceived

harm in a different environment on the vessel is related to environmental protection within the meaning of 45DD(3).” Preventing the sheep from being placed in the environment on board the vessel does not constitute “environmental protection.” Hanhauser was not protecting the environment that the sheep were currently in, or where to be in in the future. On the contrary, he was preventing the sheep from being moved into the environment of the ship. The judges made a distinction between flora and fauna that exist in nature and flora and fauna that exist with human interaction. Because the sheep were being bred for human consumption it became a different matter than if the sheep had existed undisturbed in nature. If “some human activity was occurring which was causing a threat to the continued existence of a species…, an activity directed to prevent the operation of the threat would” fall into the exemption provided by Section 45DD. Animals bred for human consumption are part of an environment that “has been created for a particular purpose from which it does not need protection.”

The appellate judges remitted the matter to the primary judge “for the determination of the questions of damages.” They indicated that the appeal should be accepted and that a new declaration made that indicates Hanhauser did in fact contravene Section 45DB(1).

State of Oregon v. Jeffrey Michael Luers

In 2000 Jeffrey Michael Luers was arrested for his actions that he claimed were in protest to excessive consumption and global warming. On 27 May, 2000, a truck driver for Tyree Oil, a petroleum product supplier, discovered a device that had been attached near the gas tank of his truck. "The device consisted of a one-gallon plastic milk jug, filled with gasoline, that had a yellow sponge inserted under the handle; protruding from

the sponge was an incense stick with wooden matches attached." The driver also then discovered a similar device placed under the wheels of another truck (Media Release 2006). A few weeks after this discovery, Luers was pulled over by Oregon police officers after having been spotted running from Joe Romania Chevrolet Car Dealership. The officers pulled Luers' vehicle over after having learned that an intentional fire had been set at the Romania car dealership which caused $50,000 in damage to three trucks. Upon investigation, police found milk jugs and sponges similar to those that the Tyree Oil truck driver had found attached to his truck in the weeks prior. After obtaining a warrant, police found other devices similar to the once at Tyree Oil and the Romania car dealership in a storage unit belonging to Luers.

Luers was convicted of “multiple counts of first-degree arson, ORS 164.325; first-degree attempted arson, ORS 161.405, ORS 164.325; unlawful possession, and unlawful manufacture, of a destructive device, ORS 166.382, ORS 166.384; first-degree criminal mischief, ORS 164.365; and first-degree attempted criminal mischief, ORS 161.405, ORS 164.365"(state of oregon). Lurs' total prison sentence equalled 266 months followed by 36 months of post-prison supervision (State of Oregon v. Luers 2005).

Despite the fact that the state of Oregon has an eco terrorism bill, it was, interestingly, not used to convict Luers. Speculations about the reasoning behind this fact will be discussed in the following chapter.

Much like the Hanhauser case in Australia, Luers filed for an appeal. Luers brought many appeals, but the only one that the appeals court agreed with was the fact that "his counts for arson and attempted arson should merge because those convictions represented no more than different theories under the statute that did not address separate

legislative concerns" (Media Release 2006). Luers' three convictions of arson and attempted arson were then merged into one conviction and thus substantially lessening the length of his total sentence. (Media Release 2006).

Conservation Council of Western Australia, Inc. v. Aluminium Company of America and Reynolds Metals Co.

Stepping back and looking generally at the environmental protection acts that exist in the United States and Australia, there is little difference between the two countries. "Both statutes [the Environment Protection (Impact of Proposals) Act 1974 in Australia and the National Environmental Policy Act in the United States] explicitly state that matters of environmental concern are to be expressly considered before actions which will affect the environment are undertaken by government (chiefly executive and administrative) agencies" (Bronstein, 1982).

Dr. Daniel A. Bronstein presents an interesting case that arose in 1981. The Conservation Council of Western Australia filed a suit against the Aluminium Company of America and Reynolds Metals Co. in the United States after failing to obtain a safeguard in its home country of Australia "to prevent the development of bauxite mining and subsequent aluminium refining and smelting in the Darling Range outside Perth" (Bronstein, 1982, Conservation Council, etc.. v. Aluminium Co., etc. 518 F.Supp. 270 (1981)).

Bronstein points out that it was not completely illogical to sue the two companies in the United States being that Aluminium Company of America is based in Pennsylvania and Reynolds Metals Co. is based in Delaware (Bronstein, 1982, Conservation Council, etc.. v. Aluminium Co., etc. 518 F.Supp. 270 (1981)). The problem arose when the court

found that it lacked “subject matter jurisdiction over this action, and accordingly dismiss[ed] the complaint pursuant to Fed.R. Civ.P. 12(b)(1)” (Conservation Council, etc.. v. Aluminium Co., etc. 518 F.Supp. 270 (1981)). The court went on to discuss that “even if this court had subject matter jurisdiction over this action, plaintiff fails to state a claim upon which relief can be granted and accordingly, we would dismiss the case pursuant to Fed.R. Civ.P. 12(b)(6) (Conservation Council, etc.. v. Aluminium Co., etc. 518 F.Supp. 270 (1981)). Fed.R. Civ.P. 12(b)(1) provides that a party may move to dismiss because of lack of jurisdiction over the subject matter; Fed.R.Civ.P. 12(b)(6) allows such a motion for failure to state a claim upon which relief can be granted (Conservation Council, etc.. v. Aluminium Co., etc. 518 F.Supp. 270 (1981)).

Conservation Council of Western Australia foresaw this jurisdictional problem and sought to claim “that the actions of ALCOA and Reynolds Metals violated the anti-trust laws, which are among the few United States statutes regularly interpreted as having extraterritorial effect (Bronstein, 1982-1983). However, the defendants’ motion to dismiss under the Federal Rules previously mentioned won out in the view of the court.

It is Bronstein’s view that this case exemplifies a flaw in the Environment Protection (Impact of Proposals) Act of Australia. Bronstein feels that if the companies had tried to perform these actions “in the United States the matter would have gone to court” (Bronstein, 1982-1983).

This rare cross over between the two countries’ legal systems provides an interesting look into how each country handles environmental concerns. In the next chapter this case will be compared to the Hanhauser case and the differences that exist in

the Australian stance between legal and illegal methods of protest by environmental activists.

CHAPTER 4: WHAT CAN EACH COUNTRY LEARN?

The legislation and the way the courts have dealt with environmental activists have shown great differences between the perspectives of Australia and the United States. This section will highlight the differences and provide commentary on which country's legislation and implementation provides a more complete and fair set of circumstances in regards to environmental activists and their relation to the rest of society.

First, both countries provide tax exemptions for environmental not-for-profits who meet the requirements set out by the legislation surrounding the issue in each country. The requirements are what differ. In Australia the ability of a not-for-profit organization to be placed on the Environmental Register which grants them tax exempt status is left up to the discretion of a single person, the Environment Secretary. The new bill that was introduced into the House of Representatives in late August 2012 grants environmental organizations a further exemption that allows them to evade the fact that all other organizations must be "in Australia" in order to receive a tax exempt status. While an explanation is provided, there is a glaring double standard that the United States handles in a better way.

The United States allows tax exemptions to not-for-profit organizations, but takes a more holistic approach and does not single out specific regulations or provide exemptions for environmental organizations. There are guidelines that must be followed, but the fact that they apply to all who seek a tax exemption makes the legislation fair and equal for all citizens. There is no double standard.

A second place where the United States seems to have a fairer system in place is in regards to the disclosure of board members for not-for-profit organizations. The

transparency of the fact that all tax exempt not-for-profit organizations must file the same forms annually and all forms are easily made public online is a much less complicated system than that which is in place in Australia. The Australian system's complications come in the form that there are multiple ways to register as a not-for-profit organization including a level that divides the procedures into differing ways based upon state and each state has its own, slightly different, legislation that goes along with it. It is further complicated by the fact that when registering at the state level the information regarding the organization does not become public. This lack of transparency is disheartening in such a free society as Australia.

Thirdly, Australia and the United States have taken widely diverging paths in regards to the response the government takes when an activist performs an already illegal act in the name of environmental protection. Both countries seem to go to extremes that do not work. Australia is too lenient when the legislation is solely looked at. But if one considers the legislation in conjunction with the Hanhauser case, it becomes uncertain and discretionary. Whether or not a certain action qualifies as an "environmental purpose" depends on who it is that is reading the legislation. The Hanhauser case was decided before the changes to the *Competition and Consumer Act 2010* were made, yet the legislators made no effort to clarify the exemption provided by section 45DD for an "environmental purpose." The original act is dated from 1974 and as such is in need of a review. The environmentalism movement has changed greatly with the times and the legislation should reflect the update in times, especially after the courts found section 45DD to be ambiguous and different judges capable of ruling in different ways on what constituted an exemption under it.

Yet, the United States has gone too far in the opposite direction. The eco terrorism bills of many individual states provide harsher punishments under the law for illegal acts committed in the name of environmentalism. The bills have not been used in order to convict eco terrorists because there are severe First Amendment issues with these bills and they would most likely fail in court for this reason. Australia does not have a constitutional protection for free speech, as set out in the United States' First Amendment, and as such could possibly invoke these sorts of bills with more ease than the United States. However, this is an instance where the United States' example should not be followed. Both countries already have laws regarding the impermissibility of arson, trespassing and other such acts that environmental activist commit in the name of environmental protection. There is no need to specify the illegality of such actions in regards to the intentions of the perpetrator. If an act is illegal it should be illegal for all, no matter the purpose of the individual. As such, Australia's exemption in the *Competition and Consumer Act 2010* is not necessary.

Finally, the unique case highlighted by Bronstein, *Conservation Council of Western Australia v. Aluminium Company of America*, brings to the attention that Australia denied the legal means for Conservation Council of Western Australia to block the actions they deemed harmful to the environment, while the United States would have at least heard them out if they had had jurisdiction. This may be the most complicated section to borrow from country to country. But as Bronstein pointed out, Australia looks to the United States on these matters because of the United States' long history in precedence for environmental cases and Australia's lack thereof. Whether or not Australia was right in denying the Conservation Council a hearing, Australia should

recognize that there is a subset of citizens that are unhappy with their legal options in regards to environmental protection. The United States courts rightfully decided that they did not have jurisdiction. The United States is in no position as to tell Australia what their laws should be.

CHAPTER 5: CONCLUSIONS

Overall, Australia's legislation is complicated and ambiguous. While the United States by no means has a perfect structure, their simplified tax exemptions that are equal for all not-for-profit organizations and the transparency of not-for-profit board members provides sound models for Australia to learn from.

Australia and the United States have much to improve upon in terms of the prosecution of those environmentalists that cross the line of protesting into illegal activities. Australia needs to update their legislation that dates back to 1974 to reflect the radical extremes that environmentalists are now using as forms of protest. The United States on the other hand needs to reign in the creation of overbroad bills by the states that infringe upon the Free Speech rights of its citizens. Because of the institutional differences between the two countries there may not be an easy comparison on what is the best option for each country to adopt. What is obvious is that changes need to be made to the legislation of both countries.

Australia's court system even had internal difficulties in determining what was meant by the legislation in the *Competition and Consumer Act 2010*. That should be an obvious red flag that the legislation should be reviewed and more precise language enacted.

Further recommendations are made to consider the fairness of any legislation that provides any individual or group of individuals exemptions or special privileges beyond what an ordinary citizen would be entitled to. There must be a reasonable purpose in providing a legal framework for double standards in a society.

REFERENCES

Animal Liberation Front, viewed 05 October 2012, http://www.animalliberationfront.com/index.html.

Bill of Rights, The Charters of Freedom, viewed 09 October 2012, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

Bronstein, DA 1982 "An American Perspective on Australian Conservation Foundation Incorporated v Commonwealth of Australia and the Status of Environmental Law in Australia", Federal Law Review, vol. 13, pp.76-89, viewed 20 August 2012, Hein Online.

Case Study: Do Sheep Like Ham?, herbertgeer Pro Bono Legal Services, viewed 12 October 2012 < http://www.herbertgeer.com.au/content_common/pg-pro-bono-do-sheep-like-ham.seo>.

Competition and Consumer Act 2010 (Commonwealth of Australia) Section 45, viewed 05 August 2012, http://www.comlaw.gov.au/Details/C2011C00003.

Conservation Council etc. v. Aluminium Co., etc. (1981) 518 F.Supp. 270.

Corporations Act 2001, s. 57A, s. 117, s.205B, viewed 15 September 2012, http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/

Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movement, Anti-Defamation League, 2005, viewed 04 October 2012, http://www.adl.org/learn/ext_us/ecoterrorism.asp?learn_cat=extremism&learn_subcat=extremism_in_america&xpicked=4&item=eco#foot1.

Ford, S 2012, 'Board kept secret', The Advocate, 21 September, viewed 03 October 2012.

Ford, S 2012, 'Despite abuse concerns and death threat…Tarkine group board revealed', The Advocate, 28 September, p. 9.

Guide Star n.d., viewed 29 September 2012, http://www.guidestar.org/Home.aspx.

Holden, S, 2011, Crimes against property, as protest, The New York Times, 21 June, viewed 07 October 2012.

Internal Revenue Service 2012, Exemption Requirements 501(c)(3) Organizations, viewed 02 October 2012, http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exemption-Requirements---Section-501(c)(3)-Organizations.

Lewis, JE, 2004, Testimony: Animal Rights Extremism and Ecoterrorism, The Federal Bureau of Investigation, viewed 04 October 2012, http://www.fbi.gov/news/testimony/animal-rights-extremism-and-ecoterrorism.

Lovitz, D 2007 “Animal Lovers and Tree Huggers are the New Cold-Blooded Criminals?: Examining the Flaws of Ecoterrorism Bills”, Journal of Animal Law, vol. 3, no. 1, pp. 79-98, viewed 12 August 2012, Hein Online.

Rural Export and Trading (WA) Pty Ltd v. Hanhauser (2007) FCA 1535.

Rural Export and Trading (WA) Pty Ltd v. Hanhauser (2008) FCAFC 156.

State of Oregon Court of Appeals, Media Release 2007, viewed 23 September 2012. < http://www.ojd.state.or.us/sca/WebMediaRel.nsf/Files/Press_21407.pdf/$File/Press_21407.pdf>.

State of Oregon v. Luers (2005) A115208.

Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 (Commonwealth of Australia) Subdivision 30-A, viewed 12 September 2012, http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4872_first-reps/toc_pdf/12144b01.pdf;fileType=application%2Fpdf#search=%22legislation/bills/r4872_first-reps/0000%22.

Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, Explanatory Memorandum, Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP, Canberra.

The Institute of Chartered Accountants in Australia 2011, Enhancing not-for-profit annual and financial reporting, viewed 15 September 2012, http://www.google.com.au/url?sa=t&rct=j&q=the%20australian%20non%20profit%20annual%20report&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.charteredaccountants.com.au%2F~%2Fmedia%2FFiles%2FIndustry%2520topics%2FReporting%2FNot%2520for%2520profit%2FNFP%2520Report%2520March%25202011.ashx&ei=JD1-UPDTHOSfiAfBk4GgCA&usg=AFQjCNG2NbdTuAATZ_4bhkGKhwx_Nr7imw

APENDIX A

Form 990

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