

**Submission
No 18**

INQUIRY INTO THE RSPCA VICTORIA

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Date Received: 22 February 2017

Our Ref: EJM: 80306

22 February 2017

The Secretary
Standing Committee on Economy and Infrastructure
Parliament House, Spring Street
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INQUIRY INTO THE RSPCA VICTORIA

We refer to the public inquiry into RSPCA Victoria's funding and use of its powers under the *Prevention of Cruelty to Animals Act 1986* ['POCTA']. We enclose for the attention of the committee the submissions lodged on behalf of this firm.

Our firm's contact with and knowledge of the RSPCA has arisen through our retention by various members of the public, primarily persons in rural areas who have been subjected to the actions of the RSPCA in an adversarial/ litigation context.

***Prevention of Cruelty to Animals Act 1986* ['POCTA']**

The POCTA was enacted to prevent cruelty to animals, to encourage the considerate treatment of animals, and to improve the level of community awareness about the prevention of cruelty to animals¹.

The RSPCA enjoys a special relationship with the State of Victoria for the enforcement of the POCTA, in particular, section 18(1)(b)(ii) provides that a full time or part time officer of the RSPCA may be appointed as a POCTA inspector or a specialist inspector². Further, the RSPCA has been empowered to enforce the POCTA on behalf of the State of Victoria pursuant to a special agreement or MOU.

The writer has sighted the MOU, and although the RSPCA has pleaded its existence as a basis for its defence in a Supreme Court action brought against it³, the RSPCA objects to its disclosure.

The POCTA has undergone numerous amendments since its re-enactment in 1986. The second reading speech for the Prevention of Cruelty to Animals (Amendment) Bill on 7 September 1995⁴ introduced what was described by the Minister for Agriculture, Mr W D McGrath, as "three tiers of inspection" by amending section 21 of the POCTA as follows:

¹ Section 1, POCTA.

² Section 18A, POCTA.

³ *Weisheit v State of Victoria and RSPCA* SCI 2016 00628.

⁴ Second Reading of Prevention of Cruelty to Animals Amendments Bill, Hansard-Assembly pp. 157-159, 358-367, 7 September 1995 and 4 October 1995.



First Category:

“to extend the powers of inspectors so that there will be general enforcement by the current inspectors, who include stock inspectors, RSPCA inspectors, police and local government officers.”

Second Category:

“special enforcement, in which specialist inspectors are to operate. These will be persons with appropriate qualifications and they will have less restrictive powers of entry to investigate specifically technical matters of animals welfare on highly specialised animal-use premises wherever the minister agrees that particular investigative action is necessary. It is important to note that that can occur only with the approval of the minister. The provision will allow specialist inspectors to visit premises and investigate highly technical issues, particularly in pig and poultry premises where some expertise is required”.

Third Category:

“is the ministerial one, in which the resolution of a serious welfare problem is authorised by the minister using procedures which the act will empower him or her to use. This provision would be used in very specific circumstances where the minister has the power to appoint somebody with special expertise in that area to look at the premises and the keeping of animals in those premises and to take appropriate action.”

Enforcement

In the second reading speech⁵ the Minister said:

“Enforcement should be the very last resort after counsel, advice and education have been tried. The time for enforcement has arrived when the producers or others involved in the care of the animals do not respond to those initiatives.

Penalties have been considerably increased in the bill to deal with recalcitrant people who do not respond to counsel, advice and help.”

It is clear from the second reading speech that enforcement should be the very last resort and is only to be implemented after counselling, advice and education have been tried.

Regrettably, in our experience, the reality is that in practice, the RSPCA, acting either on its own accord⁶ or in conjunction with the State of Victoria⁷ aggressively apply enforcement without providing counselling, advice or education as required by the second reading speech, and in all instances in which our firm has been retained, the action taken by the RSPCA has been taken without giving the person affected by the enforcement a reasonable (if any) opportunity to be heard

Further, we have received numerous complaints about RSPCA officers entering premises without authority or a warrant and refusing to leave when properly requested to do so.

⁵ Hansard-Assembly for October 1995 at page 363.

⁶ As was the case in *Holdsworth and Ellison v RSPCA* [2014] VCC 1186; [2015] VCC 653.

⁷ As is the case in *Weisheit v State of Victoria and RSPCA* SCI 2016 00628.

Sections 23 and 24 of the POCTA confer emergency powers on POCTA inspectors to deal with animals which are abandoned, distressed or disabled. These emergency powers are strictly limited to the provisions contained in division 2 of part 2A of the POCTA, which allow emergency powers of entry to a POCTA inspector only on the conditions provided in the section for the purpose. In any other case a search warrant issued pursuant to sections 24G and/ or 24K of the POCTA is required.

Although no reasonable person would deny a POCTA inspector the emergency powers conferred in sections 23 and 24 of the POCTA, objection must be taken in relation to the purported exercise of the powers of entry by RSPCA officers in circumstances where the conditions to invoke the emergency powers do not exist and/or where a warrant pursuant to section 24G and/ or 24K of the POCTA has been improperly obtained, i.e. on the basis of inaccurate or false information.

Regrettably it has been our experience that many of our clients have complained that RSPCA employees have entered their properties without warrants or other authorisation, and in cases where warrants have been obtained, the RSPCA officers have seized animals which do not fit the description of animals that may be seized pursuant to a warrant issued under section 24G of the POCTA, namely animals that are distressed, abandoned or disabled, but rather the RSPCA officers have seized all animals regardless of condition and they have refused to return the animals.

It is also been our experience that the RSPCA will not negotiate for the return of animals seized either pursuant to a warrant issued under section 24G of the POCTA or pursuant to section 24F of the POCTA, which authorises the Minister to seize animals at the expiry of a notice issued pursuant to section 24E of the POCTA.

The difficulty for a person subjected to actions carried out by the RSPCA is that invariably the only remedy is to make an application to the Court, wherein the RSPCA will run each and every point to defend its action regardless, with the result that both the RSPCA and the complainant are faced with massive legal bills⁸ which could have been avoided if the RSPCA acted reasonably.

In cases where the RSPCA defends its action on the basis that it is merely acting as an agent for the State of Victoria, as is the case where the Minister has issued a notice of intention to seize pursuant to section 24E of the POCTA, it is submitted that the RSPCA should in such circumstances be obliged to act as a "model litigant". The expectation that the Government and its agencies will act as a model litigant has been recognised by the Courts⁹.

The obligation to act as a model litigant requires the Government and its agencies to act honestly and fairly, and to endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution before initiating legal proceedings and by participating in alternative dispute resolution processes where appropriate. Where it is not possible to avoid litigation the model litigant must endeavour to keep the costs of litigation to a minimum, to refrain from taking advantage of a claimant who lacks the resources to litigate a legitimate claim, not to rely on technical defences unless the Government or agency interests would be prejudice by the failure to comply with the particular requirement and not undertaking and pursuing appeals unless there are reasonable prospects for success or the appeal is otherwise justified in the public interest¹⁰.

⁸ In the case of *Holdsworth and Ellison v RSPCA* *ibid*, the legal fees for each party exceeded \$1 million.

⁹ See, e.g. *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133 at 342; *Kenny v State of South Australia* (1987) 46 SASR 268 at 273; *Young Jun Qin v The Minister for Immigration and Ethnic Affairs* (1997) 75 FCR 155.

¹⁰ See, e.g. Legal Services Directions pursuant to Section 55ZF of the *Judiciary Act* 1903.

In our experience the RSPCA does not act as a model litigant. Examples abound, including the recent “cattle case” which ran for over 68 days¹¹, at the conclusion of which the RSPCA commenced an appeal which was doomed to fail and did fail¹², resulting with an order that the RSPCA pay further costs. In another case the person who had her animals seized by the RSPCA pleaded with its officers for the opportunity to present her case for the return of the animals without the need to litigate. The RSPCA refused to negotiate at all and referred the matter to its very aggressive law firm at further cost. In yet another case the RSPCA entered a property without a warrant but returned a few days later with a warrant and seized animals. The State Government said that the RSPCA had acted on its own accord in this particular matter however, the RSPCA later claimed it was an agent of the State.

The difficulty for the general public is that there is no code of practice and no express procedures in the POCTA or the RSPCA Act which provides any mechanism for redress of unauthorised conduct by the RSPCA or its employees, or for a structured application for the return of animals without recourse to litigation. Further, although the POCTA refers to a procedure for the return of “things” seized under the POCTA which provides that the person seeking the return of the “thing” may apply to the Magistrates Court for an order that the “thing” be returned¹³, there is no corresponding procedure in the POCTA for the return of animals. Rather it has been our experience that when animals have been seized by the RSPCA the defence to a claim that the animals were unjustifiably seized is often made by the RSPCA to the effect that it merely acts as the agent of the State and for this reason any claim should be made against the State (which would be akin to the nature of a prerogative writ).

The complaints received by my firm are that the RSPCA officers often act in an aggressive bullying manner and that the officers have been heard to say to the owner of the animals that “they have the right to remain silent” in a manner akin to a Police Officer. The RSPCA is a society. Its employees are not Policemen albeit those RSPCA employees who are appointed as POCTA inspectors under section 18 of the POCTA do have the limited powers conferred on them by the POCTA. The problem facing the ordinary person who is confronted with RSPCA officers (who are normally accompanied by Police) is that there is no real avenue of redress without recourse to the Supreme Court.

In one case a person was served with a section 24E notice of intention to seize her animals by an officer of the RSPCA. The section 24E notice contained requirements drafted by officers of the RSPCA. In the particular circumstances of this case, the requirements could not all be satisfied within the 7 day period provided by the notice, which on its face purported to be authorised by the Minister. When the person subject of the notice, after substantial compliance with the notice had been effected, contacted the officer referred to on the notice (a POCTA inspector and RSPCA employee) to ask for more time, the RSPCA inspector said she wasn’t interested in the request.

In another case the RSPCA seized animals purportedly on behalf of the Minister pursuant to section 24F of the POCTA at the expiry of a section 24E notice, and gave the animals to third parties for what was described as “rehomeing” before any order was made by the Court in relation to the owner’s claim for the return of the animals on the basis that they were not abandoned, injured or distressed.

¹¹ *Holdsworth and Ellison v RSPCA*, *ibid*.

¹² *RSPCA v Holdsworth & Anor* [2015] VSCA 243.

¹³ Section 24ZL, POCTA.

Conclusions

The RSPCA is a society and yet it purports to act, and does act as a policing entity under the cloak of respectability and by authority supposedly granted to it by the Executive pursuant to an MOU or pursuant to the powers conferred on POCTA inspectors under the POCTA.

In our experience the RSPCA invariably denies any accountability for the conduct of its officers and in most cases the RSPCA defends its conduct on the basis that's it's merely an agent of the State and accordingly not directly responsible for the conduct of its officers, notwithstanding.

In the second reading speech for the Prevention of Cruelty to Animals Amendment Bill the Minister emphasised¹⁴ that the special enforcement in the higher tiers of inspection can only occur with the approval of the Minister. The second reading speech does not refer to a person who may be appointed by the Minister who may appoint another person to do the job of the Minister to supervise and oversee the procedures where special enforcement is deemed to be necessary. s 38 of the POCTA states:

- (1) *"The Minister may by instrument of delegation delegate to any person any power, duty or function of the Minister under this Act or regulations under this Act other than this power of delegation.*
- (2) *The Department Head may by instrument of delegation delegate to any person any power, duty or function of the Department Head under this Act or regulations under this Act other than its power of delegation."*

An instrument of delegation executed by the acting Minister for Agriculture on 31 December 2014 purported to delegate the power to serve a notice under section 24E(1) of the POCTA of an intention to seize an animal and to authorise a specialist inspector to seize an animal and determine the manner of disposal to "Chief Veterinary Officer".

Although section 38(1) of the POCTA authorises the Minister to "delegate to any person any power, duty or function of the Minister under this Act", a purposive interpretation of the POCTA read in light of the Minister's Second Reading Speech indicates that it was intended that the Minister would exercise a supervisory role in relation to the issue of warrants and Notices of intention to seize and Notices to seize animals. The delegation purportedly given by the Executive on 31 December 2014 was in direct conflict with this legislative intent.

In short, the supervisory power of the Minister responsible under the POCTA has been purportedly delegated to the very body which the Minister is supposed to supervise! In this instance it is akin to putting Dracula in charge of the blood bank. This should not be allowed to happen.

It is our submission that the RSPCA should not be permitted to engage in the enforcement provisions of the POCTA unless protective measures against unwarranted and unlawful intrusions by the RSPCA are introduced into the POCTA by way of specific legislative provisions and a code of conduct that will enable a person adversely affected by the enforcement provisions to seek redress and/ or accountability of the actions taken by RSPCA officers either as the purported Government agent or in respect of its own actions, in an orderly manner and subject to the code of practice.

¹⁴ Hansard-Assembly 4 October 1995 at page 364.

Further, the RSPCA should be made accountable for its spending of any tax payer's money given to it, particularly in light of the very substantial costs of litigation which the RSPCA appeared to be happy to incur, despite a history of incurring an adverse costs order, in addition to its own very substantial legal costs, which compelled it to pay the plaintiffs' costs in one proceeding alone which amounted to well over \$1 million¹⁵.

Any grant of taxpayers' money made to the RSCPA should be subject to a review of RSPCA practices to ensure that any such grant of taxpayers' money is not wasted by extravagance on its legal fees.

For the above reasons, it is our submission that protective measures including a code of conduct should be incorporated into legislative provisions that will bind the RSPCA, either as a government agent or when acting on its own accord, and unless and until this occur, all persons appointed as POCTA inspectors under sections 18 and/ or 18A of the POCTA should be an employee of the relevant Government Department and not an employee of the RSPCA. Section 18(1)(b)(ii) should be repealed to give effect to this submission.

Yours faithfully
MAITLAND LAWYERS



E. JOHN MAITLAND

¹⁵ *Holdsworth & Ellison v RSPCA* Supreme Court Costs Court No. S CI 2016/731