

## CHAPTER 4

# Live Export

### *Summary and Overview*

**4.1** The live export of animals by sea<sup>1</sup> has been recognised for some time as an intrinsically risky and cruel practice. In 1890, *The Farming World* of Edinburgh had this to say about import to Scotland of cattle from North America:<sup>2</sup>

*...Such heavy losses of cattle should surely lead those concerned to make fuller enquiry into the whole system of cattle shipping. And if they cannot summon sufficient interest to cause an enquiry, steps should be taken from different quarters to have the matter thoroughly investigated. If the loss to the owners is not sufficient to arouse interest in the subject, surely sympathy for the poor animals in their immense and prolonged sufferings is. We trust Mr Plimsoll, who has so heartily taken up the case to alleviate all this pain and cruelty to animals, will be strongly supported in his humane work. Shippers are certainly not accountable for the rough weather, but they undoubtedly are to a great extent responsible for the suffering to the animals...*

**4.2** The 2003 Keniry Report, commissioned by the federal government in response to the *Cormo Express* disaster said “the livestock export industry is uniquely and inherently risky...”<sup>3</sup>

### *Plus ça change.*

**4.3** Likewise, the live export of animals from Australia has a long history - the first export of live animals was in 1885 from the Northern Territory to Hong Kong.<sup>4</sup>

**4.4** Australia is the world's largest exporter of live animals, accounting for 33% of global exports of sheep and 10% of global cattle exports in 2003.<sup>5</sup> At its peak in

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1 This discussion deals only with the export of live animals by sea. Specific provisions relating to export of live animals by air are in Division 2.2 of the *Export Control (Animals) Order 2004*

2 See T Harris (2001) The history and development of European and North American transport regulations and international trade issues *Journal of Animal Science* 79, E73-E85.

3 J Keniry (2003) *Livestock Export Review*, 34 (see [http://www.daff.gov.au\\_data/assets/pdf\\_file/0008/146708/keniry\\_review\\_jan\\_04.pdf](http://www.daff.gov.au_data/assets/pdf_file/0008/146708/keniry_review_jan_04.pdf))

4 Keniry (2003), 10 Footnote 3

5 Productivity Commission (2005) *Trends in Australian Agriculture*

1987, the live export trade exported over 7.2 million sheep, while cattle exports peaked at over 970,000 in 2002.<sup>6</sup> In the year ending June 2007, a total of 4.14 million sheep and 638,000 cattle were exported.<sup>7</sup> A large number of the sheep go to Middle Eastern markets (of which Saudi Arabia is the main importer, taking 29% of the sheep in 2006),<sup>8</sup> while the bulk of cattle exported go to nearer countries such as Indonesia.<sup>9</sup> There are also exports of smaller numbers of other species, being goats, buffalo and camels. The voyages carrying cattle tend to be relatively short in duration (less than 5 days), while the voyages carrying sheep are lengthy (up to 3 weeks or more). During the 2006/07 voyages 37,428 sheep and 1,101 cattle died.<sup>10</sup> However, the figures reported by the industry and tabled in the federal Parliament represent deaths during the voyage and in all probability under-report deaths caused by the voyage, in that there are suggestions that in many instances animals die shortly after being offloaded.<sup>11</sup> The focus by regulators and reporters on mortalities under-emphasises the extent of the animal welfare problem, as it is evident that many more animals suffer in many respects while on board ship, yet survive.<sup>12</sup>

**4.5** Sheep are sourced mainly from Western Australia, while cattle come predominantly from northern Australia (northern Western Australia and the Northern Territory). To put live export in perspective, live cattle exports accounted for about 7% of total cattle slaughtered in 2006/07, while live sheep exports accounted for about 12% of sheep and lambs slaughtered in the same period.<sup>13</sup> Many of the sheep exported are essentially by-products of the wool industry, being animals which have ceased to have utility as sources of wool.

**4.6** The role of an exporter is to purchase animals in order to fill orders from importers and then assemble the purchased animals at a feedlot. The importer will specify characteristics such as the weight and class of animal. The exporter will often use purchasing agents to acquire the animals on their behalf. The purposes of assembling animals at the feedlot are to allow checking and segregation (according to type, weight, etc) and (importantly) to attempt to acclimatise the animals to the pelleted food which they will receive aboard ship.<sup>14</sup>

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6 <http://www.livecorp.com.au>

7 Australian Bureau of Statistics (2007) *Livestock Products June Quarter 2007*.

8 with some sheep going to other regions including South-East Asia and Mexico: RT Norris & GJ Norman (2007) *National livestock exports mortality summary 2006* published by Meat and Livestock Australia

9 Cattle are also exported to China (mainly dairy cattle), the Middle East, North Africa, Mexico and South East Asia: Footnote 8

10 Reports tabled in Federal Parliament.

11 For example, the AQIS investigation report on the voyage of the *Maysara* from Portland and Fremantle to the Middle East commencing in October 2006 indicates that significant numbers of cattle died in "post arrival quarantine" in Eilat, Israel (see the Animals Australia website at <http://www.AnimalsAustralia.org>).

12 Keniry (2003) 17 Footnote 3

13 Australian Bureau of Statistics (2007) *Livestock Products Australia* (Series 7215.0)

14 S More (2002) *Salmonellosis control and best-practice in live sheep export feedlots – final report* LIVE.112, Meat & Livestock Australia; *State Solicitors Office v Daws & Ors* 2007 Magistrates Court of Western Australia FR9975-7/05; FR10225-7/05, transcript pages 41-42 (the "*Al Kuwait case*")

**4.7** The live export industry usually operates on a “free on board” basis - essentially the animals become the property of the importer once they are loaded on board ship.<sup>15</sup> This means in practical terms that the exporter has little direct control over the animals once they are loaded.<sup>16</sup> Even though the “exporter” does not in actuality “export” the animals from Australia to the importing country (given that it almost invariably does not own either them or the ship on which they are transported), it has been said that such a person is regarded as the “exporter” for the purposes of the relevant statute.<sup>17</sup> On some occasions the importer will acquire the animals “free alongside”, whereby the ownership transfers to the importer at the wharf.<sup>18</sup>

**4.8** Since its growth in significance in the 1970s it has been evident from the rising toll of disasters that the shipping of live food animals from Australia is inherently risky for the animals concerned.<sup>19</sup> Notable incidents include:<sup>20</sup>

- the drowning of 1,592 cattle in 1996 when the *Guernsey Express* sank en route to Osaka;
- the deaths of over 67,488 sheep aboard the *Uniceb* in 1996 after the ship caught fire and sank in the Indian Ocean;
- the deaths of 570 cattle (half of those on board) on the *Charolais Express* in 1998;
- in 1999 829 cattle died by suffocation when ventilation failed aboard the *Temburong* on its way to Indonesia;
- the deaths of over 300 cattle from injuries sustained during a cyclone encountered by the *Kalymnian Express* in 1998 on its voyage to Indonesia;
- the deaths in 2002 of 880 cattle (half of those aboard) and 1,400 sheep on the maiden voyage of the *Becrux* as a result of overheating (despite the *Becrux* being a purpose-built live animal carrier);
- the deaths of over 5,500 sheep aboard the *Cormo Express* in 2003 when the Saudi Arabian importer rejected the shipload of 57,000 sheep on the grounds they were infected with scabby mouth. This tragic episode only came to an end after 3 months, when the Australian government persuaded Eritrea to take the sheep (at no cost to that country).

Animal welfare issues arise at various stages of the live export process.

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15 *Re: Fares Rural Meat and Livestock Corporation Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153

16 Keniry (2003), 14 Footnote 3

17 Footnote 15

18 Al Kuwait case, transcript page 50

19 Keniry (2003), 17 Footnote 3

20 see the websites of Animals Australia at <http://www.liveexport-indefensible.com/facts/litany.php> and of RSPCA Australia at [http://www.rspca.org.au/campaign/livexport\\_history.asp](http://www.rspca.org.au/campaign/livexport_history.asp)

**4.9** The first stage of the process (after transport from the farm of origin) is the gathering of animals at a feedlot prior to loading on board ship. Concentrating animals at a feedlot is associated with a range of potential problems. There can be outbreaks of disease, such as salmonellosis. Animals (particularly sheep) can refuse to eat the pelleted feed (inanition).<sup>21</sup>

Transport of animals from the feedlot to the ship and the loading process itself can cause problems, particularly injuries incurred during these movements.

**4.10** Typical cruelty issues which can arise during the voyage are:

- Failure of sheep to eat the pelleted feed (ie inanition or inappetance (the affected animals are referred to as “shy feeders”) – which itself can increase the susceptibility of animals to infections);
- Outbreaks of disease (typically salmonellosis, or pneumonia in cattle);
- Trauma injuries, often caused by slippery decks;
- Heat stress, which itself predisposes the animals to disease.<sup>22</sup>

**4.11** Finally, on arrival, animals can suffer trauma injuries on offloading, can suffer from outbreaks of disease at holding facilities at the destination country and will inevitably be subjected to cruel practices during transport, holding and slaughter, given that the importing countries have no effective animal cruelty legislation. The treatment which Australian animals are subjected to in importing countries is an enormous issue. It is trite to say that if an animal such as a sheep was subjected to a journey across Australia of equivalent duration (often over 20 days) and conditions to a live export voyage to the Middle East and on its arrival was treated in the same way as it inevitably will be treated in an importing country, then whoever was responsible for that transport and treatment would certainly be in breach of the relevant state or territory animal cruelty law.

**4.12** It is an enormous moral question whether it is acceptable to consign animals to this fate. In the view of the author, it is morally inconsistent to seek to regulate the treatment of animals within Australia, such as transport and slaughter, but then ignore the treatment meted out to Australian animals on arrival in an importing country.

**4.13** In recent times the Commonwealth government has claimed it is addressing this latter issue by entering into Memorandums of Understanding with the governments of recipient countries in the Middle East (UAE, Kuwait, Saudi Arabia, Jordan, Eritrea and Egypt).<sup>23</sup> The effect of these MOUs is to seek to ensure

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21 More (2002) Footnote 14

22 See RT Norris (2005) Transport of Animals by Sea *Revue Scientifique et technique Office International des Epizooties* 24, 673-681

23 See, for example, the media release by Minister McGauran on 7 May 2007 at

that animals do not get “stranded” aboard ship, but are offloaded into a receiving country. There is also a MOU with the Egyptian government seeking to bring about implementation of the OIE standards relating to handling, transport and slaughter of Australian cattle in Egypt.

**4.14** The government claims these documents bring about an improvement of the welfare of Australian animals exported to those countries. This appears unlikely, given they have no legal force in the importing countries concerned.<sup>24</sup> Investigations by Animals Australia in Egypt have indicated that OIE standards on handling, transport and slaughter are probably not being observed. A query from the Australian Minister for Agriculture to his Egyptian counterpart as to why this is the case has, so far as Animals Australia is aware, not been answered. The Australian government has also sought to improve the welfare of Australian animals in importing countries by investing \$4 million over 4 years in programmes in those countries (which includes countries outside of the Middle East such as China and the Phillipines) to “enhance live animal exporting technical capabilities”.<sup>25</sup> To put this into perspective, this represents an expenditure of about one quarter of one cent per sheep exported in that period. The author's view is that this expenditure is little more than political window dressing.

**4.15** While the Australian federal government continues to be enthusiastic about live export, other governments have been more sanguine. In December 2007 the New Zealand government announced that “the export of livestock for slaughter will be prohibited unless the risks to New Zealand's reputation as a responsible exporter can be adequately managed.”<sup>26</sup>

**4.16** Because of the minimal impact of measures taken by the Australian government to affect the fate of Australian animals in importing countries, the subsequent discussion will focus on the relevant Australian legislation as it impacts on the sourcing, preparation and transport of animals during the live export process.

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<http://www.maff.gov.au/releases/07/07056pm.html> and the *Australian Position Statement on the Export of Livestock* published in November 2006 and available at [www.daff.gov.au/livestockexportstandards](http://www.daff.gov.au/livestockexportstandards)

24 A recent ABARE report on live export said “while the cultural and religious differences between Australia and the countries to which it exports live animals can perhaps be influenced by Australia – for example, in terms of its preferences for the handling of livestock – they are unlikely to be changed.” F Drum & C Gunning-Trant (2008) *Live Animal Exports* ABARE Research Report 08.1

25 Department of Agriculture Fisheries and Forestry *Annual Report 2006-07*

26 Exemptions may be granted; factors which must be taken into account in considering applications for an exemption include that the export is for slaughter in commercial slaughterhouses; the importing country meets OIE guidelines for slaughter and transport and government inspectors must conduct a pre-slaughter audit of slaughter facilities: see <http://www.biosecurity.govt.nz/commercial-exports/animal-exports/export-requirements>

## *The Law - Detail*

### **Commonwealth Law**

#### *Overview of the relevant Commonwealth legislation*

**4.17** The live export industry is regulated by the Commonwealth Government, which has enacted legislation under the trade and commerce power of the Commonwealth *Constitution*. The two major acts in this area are the *Australian Meat and Live-stock Industry Act 1997* (AMLI Act) and the *Export Control Act 1982* (EC Act). Both of these acts are administered by the Australian Quarantine and Inspection Service (AQIS), which is part of the Department of Agriculture Food and Forestry (DAFF). Relevant regulations are the *Australian Meat and Live-stock Industry (Export Licensing) Regulations 1998* (AMLI Regulations) and the *Export Control (Orders) Regulations 1982* (EC Orders Regulations)<sup>27</sup>. Section 17 of the AMLI Act provides that the Secretary of DAFF may make orders not inconsistent with the regulations and the *Australian Meat and Live-Stock Industry (Standards) Order 2005* (AMLI Order) is the main relevant Order made under that section. The *Export Control (Animals) Order 2004* (EC Animals Order) and the *Export Control (Prescribed Goods– General) Order 2005* (EC (General) Order) are the relevant orders with general application to live exports, made under regulation 3 of the EC Orders Regulations.<sup>28</sup> Section 7 of the EC Act says that the regulations (which are defined by section 3 of the Act to include Orders) may prohibit the export of prescribed goods from Australia and may make provision for matters including the granting of a licence or permission to export prescribed goods subject to compliance with conditions or restrictions.

Most of the powers referred to in the EC Act and the AMLI Act are exercised by the Secretary of DAFF or that person's delegate.<sup>29</sup>

**4.18** It should be noted that aspects of ship safety, relating for example to penning requirements, loading densities, ventilation and so on, are dealt with by subsidiary legislation of the *Navigation Act 1912* (being the *Marine Orders Part 43*

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<sup>27</sup> the regulation making power under the EC Act is in section 25, which says the Governor-General may make regulations not inconsistent with the Act prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. the regulations may (without limitation) make provision for or in relation to empowering the Minister or the Secretary to make orders not inconsistent with the regulations

<sup>28</sup> There are also more specific orders made under section 17 of the AMLI Act: *Australian Meat and Live-Stock Industry (Live Cattle Exports to Republic of Korea) Order 2002* and the *Australian Meat and Live-stock Industry (Export of Live-stock to Saudi Arabia) Order 2005*

<sup>29</sup> Under section 19 of the EC Act the Secretary may by writing delegate to an authorised officer all or any of the Secretary's powers other than the power of delegation; the equivalent section in the AMLI Act is section 70. Authorised officers are appointed under section 20 of the EC Act and section 49 of the AMLI Act

(MO43)),<sup>30</sup> which are administered by the Australian Maritime Safety Authority.

#### *Evolution of the Commonwealth legislative scheme*

**4.19** The *Export Control Act* 1982 was introduced as part of the Commonwealth government's response to the scandal surrounding the introduction of kangaroo meat into beef exported to the US.<sup>31</sup> It followed the Woodward Royal Commission into the scandal and was primarily concerned to ensure that the reputation of Australian exports was not tarnished by inappropriate actions. In 1996 the then government set up a task force<sup>32</sup> to review operational and regulatory arrangements for the meat and livestock industry (which it regarded as including live export of animals). It presented a report in October 1996 which espoused self-regulation for the industry. A legislative framework was put in place in 1998 with the aim and the effect of decreasing government regulation of the live export industry. The basis of the whole system was the export licence. Under the AMLI Act (section 54) it was an offence to export animals without a licence.

**4.20** LiveCorp (Australian Livestock Export Corporation Limited) was a body set up by live exporters which was given responsibility at that time by statute to carry out various activities. Crucially, part of those responsibilities included the development and administration of industry standards and the accreditation of livestock exporters against those standards. The accreditation programme was the Livestock Export Accreditation Program (LEAP). Relevant standards developed by LiveCorp were the *Australian Livestock Export Standards* (ALES).

**4.21** The AMLI Regulations established LiveCorp as the body responsible for setting standards for the export of livestock (Regulation 3 and 5). The live exporters were responsible for persuading government to introduce the industry-formulated accreditation programme (LEAP).<sup>33</sup>

**4.22** During the time when LiveCorp had responsibility for standard-setting, a committee made up of exporters (with the Australian Livestock Exporters' Council as their representative), AQIS, DAFF, the Commonwealth Minister's National Consultative Committee on Animal Welfare and Meat & Livestock Australia developed the ALES. ALES were said to be regarded by the industry "primarily as practicable standards set by and for industry".<sup>34</sup> Compliance with ALES was assessed by LiveCorp under LEAP.

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30 Made pursuant to subsection 425(1AA) of the *Navigation Act* 1912 (Cth); the most current version of the Orders (Issue 6) came into effect on 1 December 2006

31 See Federal Parliamentary Library (2006) *Bills Digest* No 4, 2006-07; T Nicholls & K Reed (1992) *Fraudulent frozen meat – DNA in action* in 'DNA and criminal justice: proceedings of a conference held 30-31 October 1989' J Vernon & B Selinger (eds); Canberra: Australian Institute of Criminology

32 The Meat and Livestock Industry Reform Steering Committee and Task Force

33 Explanatory Statement *Australian Meat and Live-stock industry Export Licensing Regulations* 1998

34 Keniry (2003), 24 Footnote 3

**4.23** The close-interdependence between government and industry in the live export process was illustrated by the fact that, in granting an export licence the responsible person (the Secretary of DAFF) had to take into account “...broad policies formulated by prescribed industry bodies...” (section 9 AMLI Act) – and prescribed industry bodies included LiveCorp. Also, under Regulation 9 of the AMLI Regulations, licensed exporters could only export animals in accordance with Livecorp's quality assurance programme and had to allow LiveCorp to carry out audits of their activities. The involvement of government in these regulatory activities was reflected in a Memorandum of Understanding between Livecorp and AQIS, whereby LiveCorp was obliged to inform AQIS of various information, including information which would assist the Secretary to determine whether licence conditions had been complied with.<sup>35</sup>

**4.24** The practical effect of all of this was that a live exporter would not be granted an export licence by the Secretary until they had (amongst other things) been accredited by LiveCorp. LiveCorp, in effect, had responsibility for monitoring compliance with ALES and applying sanctions, by virtue of being able to withdraw or downgrade an exporter's accreditation.

**4.25** A series of incidents in the last 10 years or so has resulted in the Commonwealth Minister for Agriculture, Fisheries and Forestry instigating 3 reviews of the live export industry. In July 1999 the Minister established an Independent Reference Group to report on the industry after several incidents relating to live cattle export. After further incidents in 2002, the Minister reconvened the Independent Reference Group, which produced a further report. The outcome of all this activity was the establishment of a working group made up of industry representatives and representatives of relevant Commonwealth government departments, which developed an “action plan” (APLEI).<sup>36</sup> The coordination of the “action plan” implementation was done by another committee consisting of government and industry representatives, but including some members who could arguably be said to independently represent “animal welfare” interests (such as the Australian Veterinary Association), although recognised animal welfare bodies were not involved. The major issues identified by APLEI were high mortalities associated with outbreaks of salmonellosis in sheep, particularly those exported from Portland (Victoria) during winter months (ie the northern hemisphere summer months), together with the risk of mortalities associated with heat stress in general. Perhaps the most important outcome of the APLEI process was the development and implementation of the so-called “heat-stress model”. This is a computer-based risk assessment tool which employs relevant data (eg climatic predictions for the time of year for the voyage, whether

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35 *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Bill 2004 Explanatory Memorandum.*

36 *The Action Plan for the Live Export Industry (2002).*



sheep have been shorn or not, body condition score, etc). Some of the data incorporated in this model originate from scientific work which measured the effect of increased temperature on physiological parameters of sheep and cattle.<sup>37</sup> Other parameters of the model are based on guesses. The risk associated with increased heat stress (as predicted by the model) is dealt with by increasing the amount of on-board space nominally allocated to each animal, by way of decreasing loading density.

**4.26** In 2002 several live export shipments resulted in high mortality levels. The vessels concerned were the *Becrux*, the *Corriedale Express*, the *Al Shuwaikh* (2 shipments), the *Al Messilah* and the *Cormo Express*<sup>38</sup> Between October 2002 and October 2003 AQIS investigated 13 exporters and audited 6 exporters. As a consequence, AQIS cancelled the licence of one exporter and suspended the licence of another exporter.

**4.27** At this point, LiveCorp was still in effect policing the industry. AQIS and the Commonwealth government were reluctant to respond to any of the criticism being leveled against the regulatory system as it stood. For example, Senator Kerry O'Brien pointed out in exchanges during the Senate Rural and Regional Affairs and Transport Legislation Committee hearings in February 2003 that at the time, 3 directors of LiveCorp were involved in companies which had been responsible for shipments with high mortalities. Senator O'Brien noted the undesirability of that situation.<sup>39</sup>

**4.28** In August 2003 the *Cormo Express* sailed to the Middle East from Fremantle carrying 57,937 sheep to Saudi Arabia. On arrival, the Saudi Arabian authorities rejected the entire shipment on the grounds that 6% of the sheep were said to be infected with contagious pustular dermatitis ("scabby mouth"). By the time the Australian government had negotiated receipt of the animals by Eritrea, the sheep had been on board ship for 80 days and 5,691 (nearly 10%) had died. The Australian government suspended the trade to Saudi Arabia on 28 August 2003.

**4.29** This disaster and the attendant public outcry was the stimulus for a discussion in October 2003 by the Primary Industries Ministerial Council of community concerns, which led to the federal Minister for Agriculture, Fisheries and Forestry commissioning a further review of the legislative and regulatory arrangements relating to live export.<sup>40</sup> Dr John Keniry headed an expert panel

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37 See for example A Barnes et al (2004) *Physiology of heat stress in cattle and sheep* Project LIVE.209. LiveCorp / Meat & Livestock Australia

38 See the presentation by Livecorp to the Independent Reference Group (2002) at [http://www.daffa.gov.au/\\_data/assets/pdf\\_file/0010/146953/IRG\\_report\\_Att\\_D.pdf](http://www.daffa.gov.au/_data/assets/pdf_file/0010/146953/IRG_report_Att_D.pdf).

39 Commonwealth Parliament Hansard 10 February 2003, 51.

40 *Agriculture Fisheries and Forestry Legislation Amendment (Export Control) Bill 2004* Explanatory Memorandum

which in 2004 produced a report which was critical of the involvement of industry self-regulation in the live export process. It regarded the industry's approach to regulation as “in the main reactive and based on incremental improvements to the current arrangements rather than rigorously analysing the underlying cause of the problems and seeking to address them.”<sup>41</sup> It noted that breaches of the live export standards did not necessarily attract any sanction unless LiveCorp withdrew accreditation from the exporter and this rarely occurred.<sup>42</sup> The Report considered that “...the current legislative and administrative framework for the operation of the livestock export industry is inadequate...”<sup>43</sup>

The key change recommended by Keniry was the removal from LiveCorp of responsibility for standard setting.

**4.30** At the time of the *Cormo Express* disaster, the determination of whether animals for export met criteria for export (as set out in the EC (Animals) Order) was largely based on documentation presented to AQIS by a “third party” veterinarian. This person was employed by the exporter (although accredited by AQIS) and was responsible for preparing animals for export and presenting relevant documentation to the responsible AQIS veterinarian. Neither the “third party veterinarian” or any provision for regulation of his or her activities featured in any of the relevant legislation.<sup>44</sup> The Report identified the conflict of interest for these persons, who were responsible to their employer and obliged to act under the employer's direction, but were also responsible for performing regulatory functions.<sup>45</sup> It recommended that veterinarians filling this role should be contracted by AQIS and report directly to it, although exporters should be responsible for the full cost associated with the appointment of these veterinarians.<sup>46</sup>

#### *The current Commonwealth legislative scheme*

**4.31** In 2004 the Commonwealth government responded to the recommendations of the Keniry Report and passed the *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Act*. The Second Reading Speech for the relevant Bill<sup>47</sup> noted that its main aim was to improve animal welfare by “moving from a co-regulatory environment”. This was reflected by the removal of LiveCorp from any role in monitoring compliance with standards or in accreditation of exporters. The Speech also mentioned that the Keniry Report had identified a need for nationally consistent standards focused on the health and

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41 Keniry (2003), 33 Footnote 3

42 Keniry (2003), 35 Footnote 3

43 Keniry (2003), 35 Footnote 3

44 Keniry (2003), 22 Footnote 3

45 Keniry (2003), 39 Footnote 3

46 Keniry (2003), 39 Footnote 3

47 House of Representatives Hansard 2 June 2004, 29821.

welfare of the animals concerned. Reference was made to the Bill giving power to the Minister to determine principles, to be known as the *Australian Code for the Export of Livestock*. Interestingly, emphasis was given to a “loophole” of the legislation identified in the Keniry Report, which was that if an exporter's licence was revoked, an exporter could “simply rely on the licence of an associate”. There was also reference to the introduction of provisions relating to veterinarians engaged by exporters, such that their accreditation by AQIS was referenced in the legislation.

**4.32** The *Marine Orders Part 43* are made under sections 190B and subsections 425(1) and 425(1AA) of the *Navigation Act 1912 (Cth)*. They make provision for the certification of ships involved in live export, which includes specifying requirements for the containment and carriage of animals aboard ship. Issue 6 of the Orders was made in 2006. It removed requirements relating to animal welfare which were to be covered by ASEL.

**4.33** The EC (Animals) Order gives some indication of the administrative steps in the process of exporting live animals by sea.<sup>48</sup> They are said to be:

- the exporter gives the Secretary of DAFF a notice of intention to export ("NOI") and a consignment risk management plan ("CRMP") for the export;
- the Secretary decides whether to approve the NOI and CRMP;
- the exporter sources the animals;
- the animals are treated and tested in accordance with the Australian Standards for the Export of Live-stock and the importing country's requirements;
- the animals are held in pre-export quarantine or isolation at registered premises in the way that, and for as long as, the importing country requires;
- before, during or after treatment and testing, the animals are assembled at registered premises;
- after the animals are assembled at the registered premises and before they leave, the exporter arranges for them to be inspected by an AQIS authorised officer (a health certificate is prepared if required by the importing country, but is not issued until an export permit is issued);
- the animals are loaded in accordance with the approved travel and loading plan and the health certificate and export permit is issued.

These steps (and some others not mentioned in this outline) are considered in detail in the following paragraphs, by reference to the persons responsible for carrying out each of the relevant actions (and liable in the event of non-compliance with requirements).

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<sup>48</sup> EC (Animals) Order "Reader's Guide", pages 5-6

*Persons who are potentially liable under the Commonwealth law – the exporter*

Export is prohibited unless conditions are complied with

**4.34** The legislation does not grant a right to export animals. Rather, it relieves a prohibition. It is an offence to export live animals contrary to a prohibition.<sup>49</sup> Order 2.02 of the EC (Animals) Order lists the prohibitions, which include that the exporter holds a licence.<sup>50</sup> A person wishing to export animals (ie the exporter) is prohibited from doing so without a licence.<sup>51</sup> The Secretary of DAFF may grant a licence for the export of animals.<sup>52</sup> Requirements for the grant of a licence include that the Secretary must be satisfied the applicant is a person or a body corporate of integrity, is competent to hold the licence and is (and is likely to continue to be) able to comply with licence conditions. The Secretary, in determining his or her satisfaction concerning the suitability of the applicant, may have regard to the extent to which the applicant has complied with any requirements under the EC Act.<sup>53</sup> Application for renewal of a licence must be made in the same way as an application for a new licence.<sup>54</sup>

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49 Section 8(3) of the AMLI Act says: "Where under the regulations the export of prescribed goods is prohibited unless specified conditions or restrictions are complied with: (a) a person who exports the prescribed goods in contravention of the conditions or restrictions is guilty of an offence; and (b) a person who conveys or has in his or her possession the prescribed goods is guilty of an offence if: (i) the person intends to export the goods in circumstances that would constitute a contravention of the conditions or restrictions; or (ii) the goods are intended to be exported in circumstances that would constitute a contravention of the conditions or restrictions. "Prescribed goods" is defined to include live animals (EC (Animals) Order 1.04 and regulations includes orders (EC Act s3). An offence against the section is punishable on conviction by imprisonment for a period not exceeding 5 years.

50 Order 2.02 says export of live-stock is prohibited unless: (a) the exporter holds a live-stock export licence under the AMLI Act; (b) subject to subsection 2.43(2), before the exporter begins sourcing, transporting or preparing the live-stock for export, the Secretary has approved a NOI and CRMP for the export; (c) the live-stock are held before export and assembled for export, in registered premises; (d) before the live-stock leave the registered premises, the exporter has the live-stock and related documents inspected, and obtains a permission to leave for loading, in accordance with Division 2.4; (e) the exporter complies with the approved NOI and CRMP; (f) the exporter complies with any condition of the permission to leave for loading; (g) the exporter has obtained an export permit for the export, and that permit is in force; (h) the live-stock are exported to the place, and on the ship, specified in the export permit (i) and the exporter complies with any condition of the export permit

51 section 54(2) AMLI Act (see also order 2.02(a) of the EC (Animals) Order)

52 section 10 AMLI Act; an export licence must be for at least one year: section 21 AMLI Act; it may be renewed: section 22 AMLI Act; applications for a licence must be as set out in regulation 14 of the AMLI (Export Licensing) Regulations (see also section 11 AMLI Act). An application must be accompanied by an operations and governance manual setting out (amongst other things) how the operations of the business will comply with ASEL

53 section 12 AMLI Act; and the Secretary must have regard to matters including whether the applicant or any person in management and control of the live-stock export business has ever been convicted of an offence against a law of the Commonwealth or a State or Territory for which the maximum penalty is a period of imprisonment or a fine of at least \$1,000, whether that person has been charged with an offence (with the same penalties), if information in the application or any accompanying document is false or misleading in a material detail, whether the applicant or any person in management and control knew or should have known the information was false and misleading; whether the application or any person in management and control of the business has failed to comply with a condition of an export licence or with an order made or direction given under the Act; whether the applicant has demonstrated, including in the operations and governance manual, an ability to comply with ASEL

54 section 22 AMLI Act; regulation 21 AMLI (Export Licensing) Regulations

## Export Licence Conditions

**4.35** An export licence is subject to conditions prescribed by the regulations.<sup>55</sup> The AMLI (Export Licensing Regulations)<sup>56</sup> prescribe that a licence holder must have an approved operations and governance manual, which must be updated and otherwise dealt with according to the regulations,<sup>57</sup> must permit an authorised officer<sup>58</sup> to audit the holder's operations and governance system and must inform the Secretary of any event set out in regulation 20(2). These events are: the licence holder ceases to carry on the business to which the licence relates; the licence holder or a person in management and control of the business is convicted of an offence against a law of the Commonwealth, a State or Territory (for which the maximum penalty is a period of imprisonment or a fine of at least \$1,000); the licence holder receives notice that he she or it is no longer regarded as an approved supplier of live-stock by a foreign government importing authority, instrumentality or organisation; a change in the licence holder's name; (for a body corporate) a court order for winding-up, or a resolution passed that the body corporate be wound up voluntarily; (for a natural person) he or she becomes bankrupt, or executes a Part X deed of assignment under the *Bankruptcy Act* 1996 (Cth) or a deed of arrangement, or if the business is operated in partnership, the partnership is dissolved.

**4.36** Perhaps the most important licence condition is that imposed by Section 17(1)(a) of the AMLI Act. That section provides that the Secretary may make written orders (or give written directions: sub-section (b)), not inconsistent with the regulations, to be complied with by the holders of export licences. Orders made under the section may make provision for matters relating to or incidental to (relevantly) the quality or standard of livestock and the carriage, handling and storage (sic) of livestock. Section 17(5)(a) of the AMLI Act says that the licence is subject to the condition that the holder of the licence must comply with orders made under the section, as well as any directions given from time to time to the holder under the section. Orders made under the section are in effect legislative instruments under the *Legislative Instruments Act* 2003 (Cth).<sup>59</sup> The key condition is expressed in the AMLI Standards Order (which came into effect on 1 February 2008), and was made under section 17 of the AMLI Act. It provides in Order 3(1) that the holder of a licence must not export live-stock except in accordance with the *Australian Standards for the Export of Livestock* (Version 2.2, December 2008) (ASEL).<sup>60</sup>

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55 section 15 AMLI Act

56 regulation 18 AMLI (Export Licensing) Regulations

57 which includes updating the manual by variation of the licence under regulation 19 if there is a change to how the operations of the live export business to which the licence relates comply with ASEL: regulation 18 AMLI (Export Licensing) Regulations

58 nominated by the Secretary of DAFF; see also section 49 AMLI Act for the definition of "authorised officer"

59 By virtue of section 19 AMLI Act – see the discussion under the heading "ASEL".

60 <http://www.daff.gov.au/livestockexportstandards>

Compliance with ASEL is a condition of the Export Licence

**4.37** Compliance by the export licence holder (ie the exporter) with ASEL is a critical condition of an export licence. An application for an export licence must be accompanied by a copy of an operations and governance manual which sets out how the operations of the live export business will comply with ASEL.<sup>61</sup> Note that ASEL is not the *Australian Code for the Export of Live-stock* which was mentioned in the Second Reading Speech of the Bill related to the *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Act 2004*. This latter Code is in fact the subject of section 57A of the AMLI Act, which provides that the Minister may determine principles relating to the export of live animals. Apart from that mention, there is no such Code. Perhaps this is because those responsible for introducing new standards in response to the Keniry Report did not wish to subject those standards to parliamentary scrutiny. Section 57A(5) of the AMLI Act says that a determination under the section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. That section was repealed in 2003, but transitional provisions in that Act (Table A, Schedule 1, clause 4) say in effect that the Ministerial determination under section 57A of the AMLI Act is an instrument referred to in section 6(d)(1) of the *Legislative Instruments Act 2003*, that is, a legislative instrument. The net effect of this is that the provisions of that Act apply to any Ministerial determination. The obligations thereby imposed are not inconsiderable, and include supervision by the Attorney-General's Department, which is obliged to "cause steps to be taken to promote the legal effectiveness, clarity and intelligibility..." of instruments. Further requirements are that the instrument be lodged with the Attorney-General's Department and registered. An important requirement (in section 38 of the *Legislative Instruments Act 2003*) is that a legislative instrument must be tabled in each House of Parliament within six sitting days of its registration. Either House can move to disallow the legislative instrument (section 42).

**4.38** Note that section 19 of the AMLI Act says that Orders made under section 17 or 18 (which include the AMLI Standards Order) are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. This means (given the argument in the previous paragraph) that the AMLI Standards Order is a legislative instrument pursuant to the *Legislative Instruments Act 2003*.

**4.39** The Keniry Report specifically recommended (Recommendation 1) that new national standards for live animal export be developed and in place by the end of 2004 and that those standards be directly referenced in the AMLI Act and the EC Act. The Explanatory Memorandum for the *Agriculture, Fisheries and Forestry*

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61 regulation 14(4)(a)(i) of the AMLI (Export Licensing) Regulations

*Legislation Amendment (Export Control) Bill 2004* specifically states that this recommendation was accepted (Appendix A). It was not.

**4.40** Instead of developing standards which could be reviewed by Parliament and which would meet the drafting requirements of the *Legislative Instruments Act 2003*, DAFF set up a Livestock Export Standards Advisory Committee (LESAC), which provided advice on six draft initial standards, which had been prepared by industry representatives. The outcome of this was the first version of ASEL, which was endorsed by the Primary Industries Ministerial Council in April 2005. LESAC was reconvened in 2005 to reconsider the Standards, and after some further deliberation, Version 2.1 (the current version) of ASEL was incorporated into legislation (through the AMLI (Standards) Order 2005). It deals with standards applicable to the export of sheep, goats, cattle, buffalo, camels and deer.

**4.41** The 6 ASEL Standards<sup>62</sup> are available on the DAFF website, together with a document entitled “Further information on livestock export standards”. This document provides some background information on the development of the Standards, but is noticeably deficient in important details, including the membership and representation of LESAC.

**4.42** While the AMLI Order (which makes reference to the requirement for an export licence holder to comply with ASEL) must be tabled in Parliament (because of the effect of section 19 of the AMLI Act), there is no requirement that ASEL itself must be in any way reviewed by Parliament, although a House of Parliament may require any document incorporated by reference in a legislative instrument to be made available for inspection by the House.<sup>63</sup> In the author's opinion this is an unsatisfactory state of affairs; ASEL should be subject to direct parliamentary review.

**4.43** What then is the legal status of ASEL and the position concerning breaches of ASEL? Because the AMLI Standards Order is a legislative instrument, the effect of section 14 of the *Legislative Instruments Act 2003* (Cth) is that the Order may validly adopt any matter contained in any other instrument in force at the time the Order came into effect. Because ASEL is essentially determined by DAFF (albeit in consultation with other bodies such as LESAC and PIMC), it is arguable that the incorporation of ASEL by reference into the AMLI Standards Order is in effect subdelegation of law-making power. However, because ASEL was “in force” at the time the Order came into effect, and the Order does not adopt ASEL as amended from time to time, it is unlikely a court would regard the incorporation of ASEL as

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62 Standard 6 concerns air transport of animals and will not be discussed here

63 Section 41 *Legislative Instruments Act 2003*: the document may be required to be made available at any time when the legislative instrument is subject to disallowance

an illegal subdelegation of law-making power.<sup>64</sup>

**4.44** There is something of a mess concerning earlier versions of the ASEL Standards as applying at various times in 2006 prior to 14 December 2006, when ASEL version 2.1 was adopted pursuant to the AMLI Standards Order as amended with effect from that date. The *Australian Meat and Live-stock Industry (Standards) Amendment Order 2006 (No1)* amended the AMLI Standards Order so that, in effect, the applicable ASEL version with effect from 25 September 2006 was Version 2. The *Australian Meat and Live-stock Industry (Standards) Amendment Order 2006 (No2)* revoked *Amendment Order No1* (for various reasons to do with special provisions applicable to the Northern Territory) and again amended the AMLI Standards Order such that, from 25 September 2006, the applicable ASEL was Version 2. With effect from 28 September 2006 the *Australian Meat and Live-stock Industry (Standards) Amendment Order 2006 (No 3)* revoked the *Australian Meat and Live-stock Industry (Standards) Amendment Order 2006 (No 2)* in its entirety. The net result of all of this, by virtue of the effect of section 15 of the *Legislative Instruments Act 2003*<sup>65</sup> is that the revocation of *Amendment No1* (by *Amendment No2*) was reversed, such that Version 2 was adopted from 25 September 2006.

**4.45** Section 54(3) of the AMLI Act says the holder of an export licence must not contravene a condition of the licence either intentionally or being reckless as to the condition. The penalty is imprisonment for 5 years, or an appropriate fine imposed instead of or in addition: subsection 4B(2) *Crimes Act 1914*.<sup>66</sup>

**4.46** The legislation determining the limitation period for commencement of an action in these circumstances is:

*Crimes Act 1914 (Cth) section 15B:*

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64 D Pearce & S Argument (2005) *Delegated Legislation in Australia* 3rd Edition. Chatswood: LexisNexis Butterworths, p 307.

65 Relevantly: "The repeal of any legislative instrument...does not, unless the contrary intention appears in the...legislative instrument effecting the repeal...(a) revive anything not in force or existing at the time at which the repeal takes effect..."

66 Chapter 2 of the *Criminal Code* applies to all offences under the AMLI Act: section 6 AMLI Act. Section 5.2 *Criminal Code* ("Intention") says: (1) A person has intention with respect to conduct if he or she means to engage in that conduct (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. Section 5.4 *Criminal Code* ("Recklessness") says: (1) A person is reckless with respect to a circumstance if (a) he or she is aware of a substantial risk that the circumstance exists or will exist and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. (2) A person is reckless with respect to a result if (a) he or she is aware of a substantial risk that the result will occur and (b) having regard to the circumstances known to him or her it is unjustifiable to take the risk. (3) The question whether taking a risk is unjustifiable is one of fact. (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.



*(1) Subject to subsection (1B), a prosecution of an individual for an offence against any law of the Commonwealth may be commenced as follows:*

*(a) if the maximum penalty which may be imposed for the offence in respect of an individual is or includes a term of imprisonment of more than 6 months in the case of a first conviction - at any time;*

*(b) in any other case - at any time within one year after the commission of the offence.*

*(1A) A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced as follows:*

*(a) if the maximum penalty which may be imposed for the offence in respect of a body corporate is, or includes a fine of more than 150 penalty units in the case of a first conviction - at any time;*

*(b) in any other case - at any time within one year after the commission of the offence.*

#### **Crimes Act 1914 (Cth) section 4B**

*(1) A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.*

*(2) Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:*

$$\text{Term of Imprisonment} \times 5$$

*where Term of Imprisonment is the maximum term of imprisonment expressed in months by which the offence is punishable.*

*(3) Where a body corporate is convicted of an offence against a law of the Commonwealth, the Court may, if the contrary intention does not appear and the Court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the Court on a natural person convicted of the same offence.*

Because the maximum penalty for breach of section 54(3) of the AMLI Act is 5 years, the deemed pecuniary penalty for a body corporate breaching that section is:

$$5 \times 5 \times 12 \times 5 = 1500 \text{ penalty units.}$$

Therefore, a prosecution for an offence of a breach of section 54(3) of the AMLI

Act may be commenced at any time where the licence holder is either a natural person or a body corporate.

**4.47** A significant omission is that the Standards themselves do not indicate in detail which of them must be complied with by the exporter. However, each of the Standards contains the statement that further details regarding roles and responsibilities are to be found in the *Australian Position Statement on the Export of Livestock*<sup>67</sup>. This document says in this regard that the exporter must source suitable livestock, must ensure sufficient livestock services are maintained throughout the voyage and on-board care and management of the livestock is adequate to maintain animal health and welfare. It appears from the wording of the Standards that the exporter can be held responsible for any failure to comply with the requirements in the Standards, even where the exporter is not directly responsible for the animals at the relevant stage of the live export process.

**4.48** *Standard 1* (sourcing and on-farm preparation of livestock) says “exporters must source suitable livestock that meet consignment specifications such as...condition and animal health status”. Some relevant standards are:

1.2: animals must be identified to the property of source, which must be verified by a declaration by the exporter;

1.5: fat *Bos taurus* cattle must not be sourced for export from the ports of Darwin, Weipa or Wyndham from 1 October to 31 December (this is a response to the observation by Barnes and colleagues at Murdoch University that *Bostaurus* animals – as opposed to *Bos indicus* – suffer particularly from heat stress);

1.5A: *Bos taurus* cattle bred in an area of Australia south of latitude 26 degrees south must not be sourced for export to the Middle East from May to October unless an agreed livestock heat stress risk assessment indicates that the risk is less than a 2% risk of 5% mortality (there is no definition of “agreed livestock heat stress risk assessment”) (this is an extension of the observation in 1.5 and is based on problems experienced by this sort of animal when exported to the northern hemisphere during the northern hemisphere summer);

Note that the “agreed livestock heat stress risk assessment” is probably the “heat stress risk management model” developed in 2003 by Maunsell Australia Pty Ltd for Meat & Livestock Australia and LiveCorp.<sup>68</sup> This is based on a computer program which estimates the risk of mortality due to heat stress in

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67 <http://www.daff.gov.au/livestockexportstandards>

68 LIVE.116 Development of a heat stress risk management model; Milestone 4 Report – Delivery of model and software (2003). Meat & Livestock Australia/ LiveCorp

closed livestock decks on voyages from Australia to the Middle East. The variables which can be entered and which the model uses in its calculations are based on weather at destination and en route, animal weight, animal acclimatisation, coat and condition and ventilation characteristics of ships. Data were also obtained on animal physiological responses to elevated temperatures both from actual voyages and laboratory studies. Although the computer model is not publicly available, it appears that the “output” of the computer algorithm relates to the stocking density of animals aboard ship. In other words, the model is premised on the assumption that harmful physiological effects of elevated body core temperature can be reduced by allowing animals more space, which in turn allows animals to dissipate heat more effectively.

1.7: there are many criteria for rejection (Appendix 1), including inappetance (inanition), lameness, profuse diarrhoea, aggressive behaviour, blindness in one or both eyes, pink eye and respiratory distress. The Standard says "livestock sourced for export must be inspected on-farm...", although it does not specify who is to carry out the inspection;

1.9: cattle for slaughter and feeder animals must have been determined not to be pregnant by pregnancy testing during the thirty day period before export;

1.27: animals that become sick or injured during on-farm preparation must be excluded.

**4.49** *Standard 2* (Land transport of livestock). This Standard states that exporters are responsible for the general health and welfare of the livestock until they are loaded. The Standard says exporters must ensure that livestock selected are fit to travel and that “...transport of the livestock complies with these Standards...and any relevant risk mitigation measures documented or referred to in the approved consignment risk management plan”. The Standard is quite prescriptive and includes requirements for the preparation of a detailed travel plan, water supply and feed curfews (prior to loading), the rejection of any animal exhibiting any of the rejection criteria in Standard 1, loading and penning densities, checking during the journey, rest intervals, etc. According to Standard 2.11, animals must be "inspected" before loading for transport and any animals meeting the rejection criteria of Standard 1.7 must be rejected. Again, there is no specification of the person who is to carry out the inspection.

There is an odd Standard (2.21) which says livestock must be unloaded into registered premises “to rest and adapt for their export journey” if the duration of the land transport journey is more than 14 hours. This could arguably be interpreted as meaning that there is no need for animals which had a land transport journey of

under 14 hours to be held in registered premises. However, this conflicts with EC (Animals) Order 2.02(c), which prohibits the export of live-stock unless they are held and assembled before export in registered premises. A better reading of the Standard is that it has the intention that animals having a journey longer than 14 hours must be "spelled" or rested in registered premises before resuming (when?) their onward journey to the "final" registered premises.

While the Standard notes that transport operators, livestock handlers and vehicle drivers have responsibility for the welfare of transported livestock, those persons are not in any way responsible by virtue of any provisions of the AMLI Act, the EC Act or any delegated legislation associated with those Acts. Consequently, for those persons, any responsibility or liability arises only under the relevant State or Territory animal cruelty legislation. Standard 2 of ASEL is not referred to in any of that legislation. At the time of writing, only the *Animal Welfare Act* 1985 (SA) and its associated regulations<sup>69</sup> requires compliance with codes of practice relating to the land transport of animals.<sup>70</sup>

**4.50** *Standard 3* (Management of livestock in registered premises) says that “the exporter must be able to demonstrate to the Australian Government that the management of the livestock at the registered premises accords with the specifications set out in the risk management plan for the consignment, and the importing country requirements for registered premises”. Otherwise, the Standards in Standard 3 apply to the person who is the holder of the registration for the premises. That person may or may not be the exporter.

**4.51** *Standard 4* (Vessel preparation and loading) refers to several other persons apart from the exporter which it says have responsibilities. Thus, the Standard says that the master of the vessel is responsible for the loading configuration of the vessel and for ensuring the safety of the cargo during loading, and that the master of the vessel assumes responsibility for the management and care of the livestock to the point of disembarkation.<sup>71</sup> It also says that the vessel owner is responsible for ensuring that the vessel is appropriately designed, constructed, equipped, maintained and certified to carry the cargo of livestock. Neither of those persons is responsible pursuant to the provisions of either the AMLI Act or the EC Act. The responsibilities of the exporter under the Standard are providing competent

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69 *Animal Welfare Regulations* 2000, regulation 10 and Schedule 2

70 *Model Code of Practice for the Welfare of Animals, Land Transport of Horses* (1997), *Australian Model Code of Practice for the Welfare of Animals, Road Transport of Livestock* (note that the original version of this code was published in 1983 and does not appear to have been amended or updated), *Model Code of Practice for the Welfare of Animals, Land Transport of Pigs* (1998), *Model Code of Practice for the Welfare of Animals, Land Transport of Cattle* (2000). All of these documents (apart from *Road Transport of Livestock*) are available at the CSIRO website at [www.publish.cisro.au](http://www.publish.cisro.au).

71 Standard 4.16 specifically states that responsibility for the livestock transfers to the master of the vessel after loading.

animal handlers to ensure that livestock are loaded in a manner that prevents injury and minimises stress, ensuring that suitable loading facilities are provided, that stocking densities meet all legislative requirements, that there is adequate provisioning of the vessel before departure (including feed, water and veterinary supplies), that accredited stock persons and when required an accredited veterinarian have been engaged (although the Standard does not state by whom), and demonstrating that the loading of livestock has been conducted with the approved loading plan, any importing country requirements and relevant requirements of the Australian Government for loading of livestock.

Assuming (as is usually the case) that the ownership of the animals to be shipped passes at the point of loading from the exporter to the importer, it is remarkable that the owner of the animals has no responsibility under this Standard or any other part of the relevant legislation.

Some relevant Standards are:

**4.52** 4.3: a loading plan must be prepared. This plan must include matters such as treatment of animals during the voyage, requirements for pen cleaning, the grant of authority (presumably by the owner and possibly also the master) to destroy any animal that is “seriously ill or injured”, provision of hospital pens, restraint facilities and veterinary equipment;

**4.53** 4.5: an accredited stockperson who is employed or contracted by the exporter and who is not ordinarily a member of the crew must be appointed to accompany each consignment of animals to its destination;

**4.54** 4.8: the exporter must arrange for the livestock to be inspected for health and welfare and fitness to travel immediately before they are loaded onto the vessel and only those animals which are healthy and fit to travel can be loaded. There is no indication who is to carry out that inspection;

It is difficult to see how in practice this standard can be complied with. A live export voyage on which sheep are carried may often involve over 100,000 animals. Inspections (when required) are carried out by the accredited veterinarian (ie one person).

The latest version of ASEL (December 2008) appears to acknowledge the problems associated with respiratory disease in cattle exported live. It requires supplies of appropriate antibiotics to be carried on live cattle export voyages.

**4.54** 4.12: stocking densities must be in accordance with the specifications set out in the Standard and with heat stress assessment using an “agreed heat stress risk

assessment” (that is not defined). Note that cattle stocking densities are lower for export from southern ports during the northern hemisphere summer.<sup>72</sup>

**4.55** 4.14 feed and water (with specified reserves) must be loaded in the quantities specified.

**4.56** *Standard 5* (Onboard management of livestock) repeats the statement that the master of the vessel has responsibility for the management and care of the animals during the voyage. The accredited stock person (who must be employed by the exporter) is said by the Standard to be responsible for providing “appropriate care and management of the livestock” during the voyage. The Standard notes that LiveCorp is the body which grants accreditation for the stock person. Relevant standards are:

**4.57** 5.1: an accredited stock person must accompany each consignment through the voyage until the vessel has completed discharging animals at the final port of discharge and an accredited veterinarian must accompany each consignment where required by AQIS, again until the completion of discharge at the final port of discharge;

**4.58** 5.2: any livestock identified after loading as being “sick or injured” (that is not further defined) must be given immediate treatment and be euthanased where necessary;

**4.59** 5.5: all animals must have access to adequate water supplies;

**4.60** 5.6: animals must be “systematically inspected” to assess their health and welfare;

**4.61** 5.7: any animals identified as being sick or injured must be treated promptly or transferred to a hospital pen if required or euthanased if necessary (presumably this is intended to refer to animals becoming sick or injured during the voyage, as opposed to after loading – see 5.2 above);

The reality of a voyage where many thousands of animals are carried (often over 100,000 in the case of sheep) is that it is in practical terms impossible for the available staff (ie the stockperson, accredited veterinarian and whichever crew members are available) to inspect every single animal and thereby identify and treat those which are sick or injured. The sheer numbers of animals in a pen preclude adequate inspection in the available time and this problem is exacerbated by the likelihood that the available lighting does not adequately illuminate the centre of

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<sup>72</sup> south of latitude 26 degrees south from 1 May to 31 October

the pen.

**4.62** 5.11: AQIS must be advised as soon as possible and in any case within 12 hours of a notifiable incident. Notifiable incidents include a shipboard mortality rate equal to or greater than a reportable level (ie sheep and goats: 2%; cattle and buffalo: 1% for voyages  $\geq$  10 days, 0.5% for voyages  $<$  10 days; camels and deer:  $>$  3 deaths);

**4.63** It is not clear why these mortality numbers have been chosen. These figures are often described as “acceptable” mortality. To put this into context, on-farm mortality for sheep is between about 5% and 8% per annum, depending on the type of farm.<sup>73</sup> Death rates almost double during drought years, and the figures quoted included figures for the drought of 2002-03.<sup>74</sup> The annualised mortality rate for a 20 day live export voyage to the Middle East (which is probably about the average duration), based on 2% mortality, is 36.5%. This represents deaths in a population of animals which is probably quite young, fit and should (if the pre-embarkation inspection procedures have eliminated sick and injured animals, as they should) have a high health status. Clearly the “acceptable” (annualised equivalent) mortality during live export voyages of about 37% is significantly higher than the actual mortality of all types of sheep on the farm.

As has already been stated, mortality alone can not be regarded as an adequate measure of animal welfare. It is apparent from AQIS reports on “high mortality” voyages that many animals which do not die nevertheless suffer from severe conditions which do not kill them, including pneumonia, salmonellosis, heat stress and traumatic injury.

Note that the definition of “shipboard mortality rate” in the Standard is, by reference to the relevant species, “...the percentage determined by dividing the number of deaths of that species occurring while on the vessel (including during loading and unloading) by the total number of that species loaded...” AQIS has in recent years been instigating investigations of consignments (there can be more than one consignment on a voyage) which exceed the relevant rate. However, given the definition of “shipboard mortality rate”, such events in relation to a consignment would not require notification to AQIS as a “notifiable incident” under Standard 5.11.

**4.64** 5.12: for journeys longer than 10 days, the accredited stock person (or the accredited veterinarian where there is one ) must provide to AQIS a daily report on the health and welfare of the animals.

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73 Australian Bureau of Agricultural and Resource Economics (2006) *Australian Wool 06.1: Financial performance of wool producing farms to 2004-05*

74 Australian Bureau of Agricultural and Resource Economics (2004) *Wool Industry 04.20*

Sanctions available against an exporter which breaches export licence conditions

**4.65** The AMLI Act provides a number of sanctions against an exporter who breaches any of the conditions of an export licence. The Secretary may give the exporter a “show cause” notice<sup>75</sup> where he or she has reasonable grounds for believing (for example) a person who participates in the management of the live export business has ceased to be “a person of integrity”, a false declaration has been made,<sup>76</sup> or the holder of the licence has contravened a condition of the licence.<sup>77</sup> The Secretary may suspend the licence and a show cause notice may state that the licence is so suspended.<sup>78</sup> If a show cause notice has been issued to the licence holder, the Secretary may, after considering the licence holder's response, deal with the licence under section 24 AMLI Act. By this section, the Secretary may cancel the licence, determine the licence not be renewed (if it is about to expire), suspend the licence (if it is not already suspended) or reprimand the licence holder.<sup>79</sup> If the show cause notice included a statement that the licence was suspended and the Secretary does not deal with the licence under section 24 within 60 days after the day on which the licence is suspended, the suspension lapses at the end of that period.

**4.66** The Keniry Report specifically mentioned that sanctions against the holder of an export licence could in effect be circumvented by the holder using “alternative companies in which they have an interest to avoid the consequences of the regulatory sanctions”.<sup>80</sup> Minutes of a LiveCorp board meeting similarly refer to “use of another exporter's licence”.<sup>81</sup> In the hearing of a prosecution of exporter Emanuel Exports Pty Ltd and two of its directors (the *Al Kuwait* case), the export manager for Emanuel Exports Pty Ltd made the interesting comment that in view of the fact the importer did not have an export licence at the relevant time “Emanuel Exports' name is used for documentary purposes to that effect to facilitate that export.”<sup>82</sup> This perhaps indicates that compliance with the letter of the law is not all it should be.

**4.67** Section 25A of the AMLI Act seeks to prevent exploitation of the “loophole” whereby an exporter whose licence was suspended or revoked could rely

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75 s23

76 where the declaration is “of a kind mentioned in subsection 7(3B) of the EC Act as a condition subject to which a licence or permission to export under that Act was granted”.

77 The licence holder may give a written statement why the licence should not be dealt with under subsection 24(1) of the AMLI Act

78 if it appears to the Secretary to be necessary or desirable in the interests of the industry; the licence holder can appeal the decision to suspend the licence to the Administrative Appeals Tribunal: section 23(8) AMLI Act

79 The licence holder can appeal any of these decisions to the Administrative Appeals Tribunal: section 24(4) AMLI Act

80 Keniry (2003), 38 Footnote 3

81 LiveCorp Board Minutes 19 June 2003

82 *State Solicitors Office v Daws & Ors* (2007) Perth Magistrates Court case number FR9975-7/05; FR10225-7/05; transcript, page 81



on the licence of an associate.<sup>83</sup> The section gives the Secretary of DAFF the power, where an exporter has a licence application refused, or an application for renewal of a licence refused, or a licence suspended, to refuse to grant a licence to an “associate” of the exporter. There is a lengthy definition of “associate”:<sup>84</sup> It is sufficiently wide to catch the situation where the exporter which has had its licence suspended has an officer who then becomes an officer of another corporation which then applies for a licence.

**4.68** Section 54 of the AMLI Act provides that a person who is not the holder of an export licence but who exports animals from Australia may be imprisoned for 5 years.<sup>85</sup> That section also provides the same penalty for the holder of an export licence who contravenes a condition of the licence either intentionally or being reckless as to the condition.

**4.69** There are also significant penalties for making false declarations or giving information, a return or a document to the Secretary, either knowing they are false or misleading in a material particular,<sup>86</sup> or regarding those declarations, information, returns or documents, makes or gives them recklessly as to whether they are false or misleading in a material particular.<sup>87</sup>

**4.70** There are penalties for a person who falsely represents themselves as holder of an export licence, or representing that they can export animals from Australia and for a person who, not being the holder of an export licence or an agent of the holder, makes a contract for carriage of animals to a place outside Australia (unless the contract is with the holder of an export licence).<sup>88</sup>

**4.71** The exporter also has liability under the EC Act in relation to the relevant activities of an accredited veterinarian or an authorised officer. Thus, an exporter commits an offence:<sup>89</sup>

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83 *Agriculture Fisheries and Forestry Amendment (Export Control) Bill* Second Reading Speech, House of Representatives Hansard 2 June 2004, pages 29821-2

84 Section 3 of the AMLI Act defines an “associate” of the exporter (“subject person”) to include (a) a consultant, adviser, partner, representative or retainer, employer or employee of (i) the subject person, or (ii) of any corporation of which the subject person is an officer or employee or in which the subject person holds shares; (b) the spouse or de facto spouse of the subject person; and (c) any other person (not mentioned in (a) or (b)) who is or was (i) directly or indirectly concerned in, or (ii) in a position to control or influence the conduct of a business or undertaking of (iii) the subject person or (iv) a corporation (i) of which the subject person is an officer or employee, or in which the subject person holds shares and (d) a corporation of which the subject person (or any of the other persons mentioned in paragraph (a), (b) and (c), is an officer or employee; or (ii) in which the subject person, or any of those other persons, holds shares

85 Subsection 4B(2) of the *Crimes Act* 1914 (Cth) allows a court to impose an appropriate fine instead of or in addition to a term of imprisonment

86 section 55(1) AMLI Act: penalty; imprisonment for 12 months or 60 penalty units or both

87 section 55(2) AMLI Act: penalty; imprisonment for 6 months, or 30 penalty units or both

88 section 56 AMLI Act

89 and the extended geographical jurisdiction of the *Criminal Code* applies to these offences: section 9 MEC Act;

- where they are reckless as to whether an approved export program applies to the export and do not ensure that at all times the program applies an accredited veterinarian is engaged to undertake the activities in the program (other than those that an authorised officer is required to undertake) commits an offence;<sup>90</sup>
- where under the regulations a person is required to allow an accredited veterinarian or an authorised officer to accompany animals during export in connection with an approved export program;<sup>91</sup>
- where they obstruct or hinder an accredited veterinarian or an authorised officer in their undertaking of activities in an approved export program;<sup>92</sup>
- where they fail to provide all reasonable facilities and assistance necessary to allow an accredited veterinarian or authorised officer to undertake their activities in an approved export program.<sup>93</sup>

#### Notice of intention to export (NOI)

**4.72** A person intending to export animals<sup>94</sup> must give notice to the Secretary or an authorised officer<sup>95</sup> of the person's intention to export the animals.<sup>96</sup> It is an offence to export animals without the Secretary having approved a NOI, or failing to comply with an approved NOI.<sup>97</sup>

**4.73** A NOI must set out various details, including information relating to the importer, descriptions of the animals to be exported, details of the relevant registered premises, details of the proposed transport and relevant dates of arrival at and departure from the registered premises, departure from the port of departure and arrival at the destination.<sup>98</sup>

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90 section 9I EC Act; penalty imprisonment for 12 months

91 section 9J EC Act; penalty 50 penalty units (strict liability offence)

92 section 9K EC Act; penalty 50 penalty units (strict liability offence)

93 section 9L EC Act; penalty 50 penalty units (strict liability offence)

94 section 6 EC Act refers to the export of “prescribed goods”, which section 3 of that Act says means goods declared by the regulations (which that section defines to include Orders) to be prescribed goods for the purpose of the Act; the EC (Animals) Order 1.04 says that live animals are prescribed goods

95 appointed by the Secretary under section 20 EC Act

96 section 6 EC Act: the notice must be in accordance with the regulations (which includes Orders: section 3 EC Act); failure to give a NOI is punishable by imprisonment for 12 months (strict liability offence). Order 2.02(b) prohibits the export of livestock unless the Secretary has approved a NOI, before the exporter begins sourcing, transporting or preparing the live-stock for the export (none of these terms are defined); the exporter must comply with the approved NOI: Order 2.02(e). “Sourcing” means specifically identifying animals to be exported in a particular consignment: EC (Animals) Order 2.01. See also Order 2.43, which further provides that the Secretary may accept a NOI after the exporter has begun sourcing animals or preparing them for export if the Secretary thinks it reasonable to do so

97 section 8 EC Act: punishable by imprisonment for a period not exceeding 5 years, or where proceedings in respect of the offence are heard by a court of summary jurisdiction (with the consent of the defendant and the prosecutor to the hearing) and on conviction, imprisonment for a period not exceeding 12 months: section 17 EC Act

98 EC (Animals) Order 2.41

**4.74** The Secretary may direct that a NOI be amended in a specified way.<sup>99</sup>

**4.75** The criterion for approval of a NOI is whether the proposed export complies with the requirements of Order 2.45 of the EC (Animals) Order, the AMLI Act and its regulations, orders or directions under that Act, the exporter's export licence conditions and ASEL.<sup>100</sup> The Secretary may approve a NOI (or a CRMP – see below) subject to a condition, although there is no further definition of the limitations on any such condition.<sup>101</sup>

**4.76** It appears that the NOI / CRMP conditions are being used by AQIS to compel sheep exporters to provide additional space for animals on voyages to the Middle East. An “Export Advisory Notice” issued in May 2008 imposes space requirements beyond those in ASEL on sheep exports to the Middle East by way of imposing conditions on the relevant Notice of Intention and Consignment Risk Management Plan.<sup>102</sup> The Notice says the conditions are imposed “to assist with the management of heat stress in sheep exported to the Middle East” and refers to open two-tiered deck ships. Voyages of those ships via the Persian Gulf (with destinations of Oman, UAE, Bahrain, Qatar and Kuwait) must provide 15% more space for sheep over and above the space requirements in ASEL. Moreover, sheep transported via the Red Sea (to Saudi Arabia, Libya, Israel and Jordan) must be provided with an additional 10% space. These conditions will be in place for vessels departing up to 31 October 2008. What this means, of course, is that AQIS is impliedly acknowledging that the existing “heat stress model” is inadequate.

Sanctions against an exporter which does not comply with the conditions of a NOI

**4.77** Section 9 of the EC Act provides that where a licence or permission granted under the regulations (which is defined by section 3 of that Act to include Orders) is subject to a condition or restriction to be complied with and the relevant person fails to comply with the condition or restriction, that person is guilty of an offence.<sup>103</sup> This provision applies to the permissions which can be granted under the EC Orders and the Act, that is a NOI, a CRMP and registration of registered premises.

Consignment risk management plan (CRMP)

**4.78** An exporter can not begin sourcing, transporting or preparing animals for export until the Secretary has approved a CRMP for the export.<sup>104</sup> A CRMP must

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<sup>99</sup> EC (Animals) Order 2.44(1)(b)

<sup>100</sup> EC (Animals) Order 2.44(2)

<sup>101</sup> EC (Animals) Order 2.44(4)

<sup>102</sup> see the DAFF website at [http://www.daff.gov.au\\_data/assets/pdf\\_file/0007/740086/EAN-2008-06.pdf](http://www.daff.gov.au_data/assets/pdf_file/0007/740086/EAN-2008-06.pdf)

<sup>103</sup> This is a strict liability offence, punishable on conviction by a fine not exceeding \$50,000

<sup>104</sup> EC (Animals) Order 2.02(b); see also Order 2.43, which also provides that the Secretary may accept a CRMP after the exporter has begun sourcing animals or preparing them for export if the Secretary thinks it reasonable to do so

set out importing country requirements relating to sourcing, pre-export quarantine, treatment and testing and the exporter's plans to meet those requirements. It must include declarations that the exporter has risk-management plans for events such as mechanical breakdown of the vessel to be used, an outbreak of disease during the voyage, extreme weather during the voyage and rejection of the consign by the overseas market.<sup>105</sup>

**4.79** The criterion for approval of a CRMP is the same as for approval of a NOI.<sup>106</sup> Sanctions for not complying with the conditions of a CRMP are as set out for a NOI.

**4.80** Approval of the NOI and CRMP is approval for the exporter to prepare to export the specified number and kind of animals from the specified Australian port on the specified day on board the specified ship in compliance with the approved NOI and CRMP.<sup>107</sup> The exporter must inform the Secretary in writing if there is a relevant change in any circumstance of the export and where the Secretary has (by any means) become aware of a change relevant to the approved export, he or she may cancel any approval already granted of a NOI or CRMP, direct that those documents be varied as specified or require the export to submit a new NOI or CRMP (or both).<sup>108</sup> Approval of a NOI or a CRMP does not oblige the Secretary to grant an export permit for the export.<sup>109</sup>

Animals must be held at registered premises

**4.81** Order 2.02 (a) of the EC (Animals) Order says that the export of live-stock is prohibited unless (relevantly) the live-stock are held before export, and assembled for export, in registered premises.

Health certificate and permission to leave for loading

**4.82** Once the live-stock have been held and assembled in accordance with the relevant approved NOI and CRMP, an exporter may apply to the Secretary for a health certificate and a permission to leave for loading for the relevant animals.<sup>110</sup>

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105 EC (Animals) Order 2.42; the CRMP must also set out the relevant ASEL Standards and the exporter's plans to meet the standards and the legislative requirements in orders under the AMLI Act and the exporter's plans to meet those requirements. The exporter must also declare that it has reviewed the required risk-management plans and the CRMP must set out any other risk management plan the exporter considers necessary

106 Which includes that the Secretary may approve a NOI and a CRMP subject to a condition: EC (Animals) Order 2.44(4)

107 EC (Animals) Order 2.45

108 EC (Animals) Order 2.46

109 EC (Animals) Order 2.45(2)

110 EC (Animals) Order 2.52; the application must include travel and loading plans describing how the animals will be transported to the loading place, loaded and carried on the export voyage, including feed and water requirements, space or crate requirements and personnel required on the voyage. This plan can be varied: EC (Animals) Order 2.55. The application must include a declaration by the exporter that the live-stock have been held and assembled in accordance with the approved NOI and CRMP and ASEL and that all importing country requirements relating to the consignment that the exporter has become obliged to comply with at or

The export of animals is prohibited unless the exporter has the animals and related documents inspected and obtains a permission to leave for loading in accordance with Division 2.4.<sup>111</sup> The reference to Division 2.4 appears to be an error. This Division deals with "Notice of intention to export and related matters". Division 2.5 is entitled "Inspection of live-stock before export and grant of export permit"; it deals with inspection of the animals before they leave registered premises and grant of permission to leave for loading. Division 2.5 therefore appears to be the Division which must be complied with pursuant to EC (Animals) Order 2.02(d).

**4.83** A health certificate is issued by an authorised officer, and certifies that the relevant animals meet the requirements of a specified importing country relating to the health of the animals.<sup>112</sup> Before issuing the certificate, the officer must inspect the animals before they leave the relevant registered premises.<sup>113</sup> It must be prepared by the officer as soon as possible after the inspection but not to be issued to the exporter until after the animals have been loaded for export but before the export permit is issued.<sup>114</sup> Note that possession of a health certificate is not listed as one of the criteria for relieving the prohibition on export of animals,<sup>115</sup> although an authorised officer may not issue a permission to leave for loading unless a health certificate has been issued.<sup>116</sup> Because an exporter can not export animals without permission to leave for loading,<sup>117</sup> in practical terms the possession of the relevant health certificate by an exporter (if required by the importing country) is an essential pre-requisite for the relevant export of animals.

**4.84** It is interesting to note that the pre-2004 legislative scheme required that an authorised officer must be satisfied that (amongst other things) a veterinary officer (defined as an officer authorised by and employed by the Australian Public Service, a State or Territory) has determined that each animal is sufficiently fit to undertake the proposed export journey without any significant impairment of health, when the authorised officer must issue an export permit.<sup>118</sup> The current

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before that time has been complied with and a declaration by an accredited veterinarian (in the event the export is covered by an approved export program) that the live-stock have been prepared for export in accordance with the program. The application must be accompanied by evidence supporting those declarations

111 EC (Animals) Order 2.02(d)

112 EC (Animals) Order 2.53.

113 The officer may consider any evidence including the declarations mentioned in Orders 2.52(2)(c) (i) and (ii) (which related to compliance with an approved export program and with an approved NOI and CRMP and ASEL and that all relevant importing country requirements have been complied with; the officer may take into account any undertaking accepted by an officer under Order 2.54(3A) (which amounts to an exemption from a minor requirement for a treatment, which has not been complied with, but whereby the officer may issue a permit to leave for loading)

114 EC (Animals) Order 2.53(4)

115 see EC (Animals) Order 2.02

116 EC (Animals) Order 2.54(3)(f)

117 EC (Animals) Order 2.02(d)

118 *Export Control (Animals) Orders as amended (Amendment)* (Export Control Orders No 2 of 1990), Order 8(d)

legislative scheme does not require that a veterinarian inspects animals before export. That is only a requirement in the event it is required by the importing country or if it is required by an “approved export program”.<sup>119</sup> Similarly, inspection by an “authorised officer”<sup>120</sup> is contingent on an importing country requiring a health certificate.<sup>121</sup> So far as ASEL is concerned, Standard 3.16 requires “investigation by a registered veterinarian” where mortalities in a registered premises exceed defined levels.<sup>122</sup> Standard 4.8 (dealing with “vessel preparation”) says (relevantly) “to ensure that only fit and healthy livestock are transported and are loaded on board...the exporter must arrange for the livestock to be inspected for health and welfare and fitness to travel, immediately before they are loaded onto the vessel.” The Standard does not say who is to carry out the inspection.

**4.85** A permission to leave for loading authorises the relevant exporter to move the animals from the registered premises at which they have been held and assembled and load them onto the ship on which they are to be exported.<sup>123</sup> It is valid for 5 days after the day it is issued.<sup>124</sup> An authorised officer may grant the permission if: he or she is satisfied the exporter has complied with the relevant NOI and CRMP, holds an export licence, has complied with the requirements of the AMLI Act and regulations and any orders made or directions given under the Act, has complied with any conditions of the export licence; a health certificate can be issued if required; each of the animals is fit to undertake the proposed export voyage without any significant impairment of its health; the relevant travel and loading plans comply with ASEL and importing country requirements have been complied with (subject to the proviso in Order 2.54(3A)).<sup>125</sup> The requirement for each of the animals to be fit to undertake the proposed export voyage without any significant impairment of its health may in effect be rendered nugatory by the qualification that “an authorised officer may be satisfied live-stock are fit to undertake a proposed export voyage without needing to be assured of the fitness of every animal in a herd”,<sup>126</sup> although the word “herd” is not defined. Does this perhaps refer to the “herd” on the farm from which the animal is sourced? Notwithstanding that, an

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119 See EC (Animals) Order 2.10(d) (regarding registered premises); Order 2.47 (regarding “approved export program”);

120 who is not required to have a veterinary qualification: see section 20 EC Act

121 See Orders 2.52 and 2.53 EC (Animals) Order

122 where mortalities in any one paddock or shed exceed 0.1% or 3 deaths, whichever is the greater, on any one day for cattle and buffalo, or 0.25% or 3 deaths, whichever is the greater on any one day for any other species

123 EC (Animals) Order 2.54; the grant of permission is also approval of the relevant travel and loading plan.

124 EC (Animals) Order 2.56(2); the Secretary may extend the period of validity if he or she is satisfied exceptional circumstances exist that justify the extension and may, before granting the extension, require the exporter to allow an authorised officer to inspect the animals: sub-orders (3) and (4)

125 EC (Animals) Order 2.54(3); despite the requirement relating to importing country requirements, an authorised officer may issue a permit (sic) to leave for loading even though a minor requirement for a treatment has not been complied with if the treatment can be given after the permission to leave for loading is granted but before the animals commence boarding the ship, the exporter undertakes to give the required treatment before the animals commence boarding the ship and in the circumstances it is reasonable for the authorised officer to accept the undertaking

126 EC (Animals) Order 2.54(3B)

authorised officer, in assessing the fitness of the animals to travel on the ship, must have regard to: the animals' (note the plural) general condition, the risk of them being injured by the enclosures or ramps used for loading onto the ship, the nature of the accommodation for them on the ship, the number, species, health and general condition of any other animal to be carried on the same ship and the conditions the animals are likely to encounter during the export voyage.<sup>127</sup>

**4.86** An authorised officer may impose a condition on a permission to leave for loading,<sup>128</sup> although the legislation does not set any limitations as to what such a condition may be. A permission is subject to the conditions that the exporter complies with the relevant travel and loading plans and the livestock remain fit to travel.<sup>129</sup> The Secretary may cancel or suspend the permission if there are reasonable grounds to believe that there has been a relevant change in any circumstance relating to the export.<sup>130</sup>

#### Export Permit

**4.87** Export of animals is prohibited unless the exporter has obtained an export permit for the export and the permit is in force, the relevant animals are exported to the place and on the ship specified in the permit and the exporter complies with any condition of the permit.<sup>131</sup> An exporter may apply to the Secretary for a permit once the animals are loaded on board ship.<sup>132</sup> The application must include declarations that the animals were transported to the port of loading and loaded in accordance with the relevant travel and loading plans, that no relevant circumstances have changed since the animals were inspected for the purposes of the issue of the relevant health certificate, that the exporter has complied with the relevant approved NOI and CRMP and has complied with importing country requirements in relation to the animals.<sup>133</sup> The Secretary may grant an export permit if various criteria are met, including: a relevant permission to leave for loading is in effect, the exporter has an export licence,<sup>134</sup> he or she is satisfied that the animals were transported to the port of loading and loaded in accordance with approved travel and loading plans, the exporter has complied with importing country requirements in relation to the animals and the exporter has complied with the approved NOI and CRMP.<sup>135</sup> In deciding whether to grant an export permit,

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127 EC (Animals) Order 2.54(6)

128 EC (Animals) Order 2.54(5)

129 EC (Animals) Order 2.56(1)

130 EC (Animals) Order 2.57(1) and if there is no reasonable possibility that the exporter will be able to continue the export in the changed circumstances the Secretary may cancel the permission: sub-Order (2)

131 EC (Animals) Orders 2.02(g), (h) and (i)

132 EC (Animals) Order 2.58(1)

133 EC (Animals) Order 2.58(2)

134 and if the relevant importing country requirements so require, a health certificate has been issued for the animals: EC (Animals) Order 2.59(1)(d)

135 EC (Animals) Order 2.59; the Secretary must also be satisfied that no relevant circumstances have changed since the animals were inspected for the purposes of the issue of the health certificate

the Secretary must take into account whether the exporter has complied with any conditions to which an export licence was subject and any other relevant requirements under the AMLI Act.<sup>136</sup> Matters specified in the export permit include the number, kind and class of animals authorised to be exported and the ship on which they are to be transported.<sup>137</sup> Before the permit is granted, the exporter must make a declaration that the exporter has complied with any conditions to which the relevant export licence is subject and any requirements under the AMLI Act that otherwise relate to the export of live-stock.<sup>138</sup> Other conditions of an export permit are that the animals to which it applies must leave Australia within 72 hours after it is granted, unless the Secretary approves otherwise, and such other conditions as the Secretary thinks fit.<sup>139</sup>

**4.88** The Secretary may refuse to grant a permit where that grant would allow the animals concerned: to be carried on a ship the condition of which there is reason to believe caused the health or condition of live-stock to deteriorate during an export voyage, to be consigned to a person whose actions there is reason to believe have caused the health or condition of live-stock to deteriorate during export or to be exported by a person whose actions there is reason to believe have caused the health or condition of live-stock to deteriorate during export.<sup>140</sup> This provision is interesting, because it effectively gives the Secretary a right to veto an export where there is a question about the capacity of a person, other than a person who can be subject to sanctions under the legislative regime, and on the basis of past performance, to properly carry out or be involved in the export. Those other persons might include the master of a ship, the owner of a ship, the owner of the animals when they are on board the ship (ie the importer who has purchased the animals from the exporter), the accredited stockman and other members of the ships crew.

There are various circumstances under which the Secretary may revoke a permit, including that the exporter has not complied with conditions of an export permit or export licence.<sup>141</sup>

#### Other Orders currently in force concerning live export

**4.89** Two orders made under section 17 of the AMLI Act currently apply to live

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136 EC (Animals) Order 2.59(2)

137 EC (Animals) Order 2.59(3)

138 EC (Animals) Order 2.59(4); see also section 7(3C) of the AMLI Act

139 EC (Animals) Order 2.59(6) and (7)

140 EC (Animals) Order 2.60(1); the Secretary may also refuse to grant the export permit if there is reason to believe that the intended country of destination will not permit the animals to enter: sub-Order (2)

141 EC (Animals) Order 2.61; other reasons for revocation are reasons to believe that a relevant circumstance has changed or that an exporter has not complied with any requirements under the AMLI Act (other than export licence conditions) relating to the export of animals. The Secretary may, but is not obliged to, grant another export permit subject to a different condition or an additional condition or authorising export to a different destination: sub-Orders (6) and (7)



animal export. They are the *Australian Meat and Live-stock Industry (Export of Live-stock to Saudi Arabia) Order 2005* and the *Australian Meat and Live-stock Industry (Live Cattle Exports to Republic of Korea) Order 2002*. The first of these orders provides for matters including that sheep and goats exported to Saudi Arabia must have received vaccinations for scabby mouth as set out, feral goats may not be exported to Saudi Arabia and chaff must be provided for sheep (hay for goats). The second of these orders makes provision for matters including that an export consignment must only include steers and each animal must be individually identified using a radio tracking device.

*Persons who are potentially liable under the Commonwealth law – the holder of registration for registered premises*

#### Registration of premises

**4.90** Premises used for holding and assembling animals prior to export (ie feedlots) must be registered.<sup>142</sup> An application for registration must be to the Secretary of DAFF and must include details of the premises and the facilities, the species of animals which are proposed to be held (and the greatest number proposed to be held) and a copy of an operations manual.<sup>143</sup> There are specified criteria for registration of premises and the Secretary in deciding whether to register premises may take into account the extent to which the premises' operations manual<sup>144</sup> and facilities comply with ASEL (presumably a reference to ASEL Standard 3 – Management of livestock in registered premises) and any other matters that may have adverse health or welfare consequences for animals or that make the premises unsuitable for holding and assembling animals for export.<sup>145</sup> Premises are registered subject to the conditions in EC (Animals) Order 2.10 (and

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142 The export of live-stock is prohibited unless the live-stock are held before export and assembled for export in registered premises: EC (Animals) Order 2.02(c); Order 2.12 deals with renewal of registration and Order 2.13 deals with variation of the details of registration

143 EC (Animals) Order 2.04, which includes that the application must specify the months during which the premises are to be used and evidence that there is adequate shelter during those months; details of what must be included in the operations manual are set out in Order 2.05 and include details of arrangements such as supply of feed and water, monitoring of health and mortality and a plan for managing a disease outbreak; registration has effect for 1 year from the date of the Secretary giving to the applicant a notice of registration, unless a shorter period is specified in that notice: EC (Animals) Order 2.08 and 2.09. Registration of premises ceases to have effect if the premises are transferred to a new owner or the operator ceases to have day to day control of the operations at the premises: Order 2.09(3)

144 There is provision for approval of an application to alter the operations manual: EC (Animals) Order 2.11

145 EC (Animals) Order 2.07 sets out the criteria, which include whether the applicant has the capacity to comply with the conditions of registration, whether the operations manual is adequate, whether the location of the premises is appropriate, and whether there is adequate shelter to protect animals from adverse weather

any additional condition imposed by the Secretary<sup>146</sup>;<sup>147</sup> oddly, the EC (Animals) Order which was in effect from 10 January 2006 to 1 August 2006 included a condition that the operator of the premises must comply with ASEL. The subsequent Order removed that requirement, which is not in the Order in effect at the time of writing. Compliance with ASEL therefore appears to be discretionary under the current regime, as while the operations at the premises must be carried out in accordance with the approved operations manual,<sup>148</sup> the extent of compliance of that manual (and facilities at the premises) with ASEL is a matter that the Secretary may (not must) take into account in deciding whether or not to register premises.<sup>149</sup>

**4.91** The exporter is obliged, after the approval of the relevant NOI and CRMP, to give the operator of the relevant registered premises information extracted from the NOI and CRMP, including details of the animals to be exported, details of the international transport, the date and port of departure and importing country requirements relating to sourcing, pre-export quarantine or isolation, treatment and testing and the exporter's plans to meet those requirements.<sup>150</sup>

#### Sanctions against the holder of registration for registered premises

**4.92** The Secretary may give a show cause notice if “there is reason to believe that grounds may exist for the cancellation of the registration of the premises” and may suspend the registration for reasons including to protect the health or welfare of animals to be exported.<sup>151</sup> The Secretary may cancel the registration of the premises if a condition of registration has been contravened, to protect Australia's trading relationship with an importing country or to protect the health or welfare of animals to be exported, provided the Secretary has given the operator a show-

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146 Which may relate (without limitation) to number of animals that may be held at the premises at a time, the kind of animals that may be held or assembled, the types of operation that may be carried out at the premises, the countries to which animals held or assembled at the premises may be exported, that animals may not be held or assembled at the premises during a specified month or months for export to a specified place or places and the frequency and intensity of audits for the premises. The Secretary may by notice in writing unilaterally vary the conditions of registration if he or she is satisfied the variation is necessary to protect Australia's trading relationship with an importing country or protect the health or welfare of animals to be exported

147 These include that: the operator must not accept an animal for holding and assembling for export except in accordance with the registration, operations must be in accordance with the operations manual (although if a requirement of an approved NOI or CRMP is inconsistent with the approved manual, the requirement of the NOI or CRMP prevails to the extent of the inconsistency), that the operator must consent to entry (at a reasonable time and on reasonable notice) by an authorised officer in order to enable that person to perform an audit or exercise his or her powers under the EC Act or the Order), that the operator must consent to entry by an accredited veterinarian to enable that person to undertake veterinary work in accordance with an approved export program, that the operator must not cause live-stock to leave the premises for export unless a permission to leave for loading has been issued to the relevant exporter

148 EC (Animals) Order 2.10(b)

149 EC (Animals) Order 2.07(2)(a)

150 EC (Animals) Order 2.45(3)

151 EC (Animals) Order 2.14; the other reason for suspension is to protect Australia's trading relationship with an importing country. the holder of the registration is given 14 days in which to show cause in writing why the registration should not be cancelled

cause notice.<sup>152</sup> In deciding whether to cancel the registration the Secretary must consider any submission made by the operator in response to the show-cause notice and if the Secretary makes not decision within 60 days after the end of the period allowed for submissions the Secretary is taken to have decided (at the end of that period) not to cancel the registration.<sup>153</sup>

*Persons who are potentially liable under the Commonwealth law – the accredited veterinarian*

**4.93** The Keniry Report made particular mention of the unsatisfactory state of affairs regarding “third party veterinarians” and recommended that those persons “must be directly contracted and accountable to AQIS in the performance of their duties” and that “livestock exporters should be allocated a “third party” veterinarian by AQIS at the time they advise AQIS that they intend to export”.<sup>154</sup> The recommendation was intended to deal with the potential conflict of interest for a veterinarian employed by and acting under the direction of an exporter, who nevertheless had regulatory obligations. It is interesting in this context to note that the UK government recently acknowledged that those who carry out examinations of animals prior to export should be independent of exporters, which view was endorsed by the author of the seminal text on animal welfare law in Britain.<sup>155</sup> This recommendation of the Keniry Report was not accepted by government, as it was “not supported by third party veterinarians or the industry body who raised concerns that the costs of administering the employment of an allocation of veterinarians across Australia would be high and of little benefit”.<sup>156</sup>

An alternative view is that by not following this recommendation of the Keniry Report, the government has entrenched a situation where there are no independent parties observing what happens to animals during a live export voyage and that all reporting to AQIS is done by persons who owe their primary obligations to the exporter or other persons.

**4.94** Instead of following the recommendation of the Keniry Report regarding the independence of accredited veterinarians, the federal government chose to impose a significant number of obligations on accredited veterinarians, with some subsidiary obligations on exporters relating to the activities of the veterinarians.<sup>157</sup>

**4.95** The obligation on an exporter to appoint an accredited veterinarian is at

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152 EC (Animals) Order 2.41; and the period allowed the operator to show cause why the registration should not be cancelled has ended

153 EC (Animals) Order 2.41(4)

154 Keniry (2003) Recommendation 4, 40 Footnote 3

155 see M Radford (2001) *Animal Law in Britain* Oxford: Oxford University Press, 367

156 *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Bill 2004* (Cth) Second Reading Speech

157 The EC Act has a regulation-making power relating to the accreditation of veterinarians in section 9B

the discretion of the Secretary of DAFF, who may impose the obligation as a condition “of the approval of an export program”.<sup>158</sup> Once more, this represents a failure to implement a recommendation of the Keniry Report, namely that a veterinarian should be on board all livestock export ships where the journey would take over 10 days.<sup>159</sup>

#### *The “Approved Export Program”*

**4.96** The “Approved Export Program” features in several parts of both the EC Act and the EC (Animals) Orders. Presumably this is what is referred to in EC (Animals) Order 2.48(1). However, there is a major shortcoming in the legislation regarding this program, in that it does not define when an approved export program is necessary, who may or must prepare a program, who may apply for approval for a program (if indeed anyone can apply) and the effect of approval of a program. In any case, it does not appear that approval of a program is necessary to allow export of animals to occur.<sup>160</sup> However, Order 2.41 of the EC (Animals) Order (which concerns NOIs) says that a NOI must set out matters including the name of the accredited veterinarian nominated by the exporter “if an approved export program is required for the preparation of the live-stock for export”.

This situation is clearly unsatisfactory.

**4.97** The first substantive mention of the program is in Part IIA of the EC Act, which is headed “Accreditation of veterinarians for purposes of approved export programs in relation to eligible live animals etc.”. Section 9A of that Part defines an “approved export program” as “a program of activities to be undertaken by an accredited veterinarian or an authorised officer for the purpose of ensuring the health and welfare of eligible live animals...in the course of export activities”. It does not say what the program is or what must be contained in the program. “Export activities” is defined to mean “the preparation of the eligible live animals...for export and while being transported to their overseas destination and any other activity involving the eligible live animals...occurring at any stage in the export process, from the planning of the export until the delivery of the eligible live animals...at their overseas destination”.<sup>161</sup> Section 9A of the EC Act also provides (subsection (1)) that the regulations may provide for the preparation (etc) of approved export programs and section 9B says that the regulations may provide for the accreditation

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158 EC (Animals) Order 2.48(1); in deciding whether or not to impose the requirement, the Secretary may take into account any relevant matter including the relevant importing country requirements, the exporter's record as an exporter of live-stock, the condition of the vessel on which the live-stock are to travel, the weather and time of year, the kind of live-stock being exported and market considerations

159 Keniry (2003), 6 Footnote 3

160 EC (Animals) Order 2.02 says that export of live-stock is prohibited unless certain criteria are fulfilled and approvals given – the list does not refer to an “approved export program”

161 Section 3 EC Act

of veterinarians “for the purposes of undertaking approved export programs...”<sup>162</sup> The Orders say the Secretary may approve an export program based on the information in the relevant NOI and CRMP and any other information the Secretary has regarding the importing country requirements and ASEL.<sup>163</sup> It may include requirements about matters including pre-export quarantine or isolation, treatment and testing of live-stock as required by importing country requirements and ASEL and obligations on an accredited veterinarian to report on the program, keep records and make declarations in relation to compliance with the program<sup>164</sup> An approved export program may include requirements for matters including pre-export quarantine or isolation and obligations of an accredited veterinarian to report on the program and make declarations in relation to compliance with the program.<sup>165</sup> The “activities” set out in the approved export program may include monitoring the health and welfare of the relevant animals, examining, testing or treating them, keeping records of the implementation of the program, making declarations attesting to the completion of the requirements of the program and otherwise reporting on the implementation of the program.<sup>166</sup> The Secretary may vary an approved export program,<sup>167</sup> The approval may be suspended or cancelled.<sup>168</sup>

**4.98** A veterinarian,<sup>169</sup> in order to apply for accreditation, must have completed the required training program.<sup>170</sup> An accredited veterinarian<sup>171</sup> (who is nominated

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162 The Secretary may direct an authorised officer to undertake some or all of the activities in an approved export program: section 9D EC Act and the Secretary may direct an authorised officer to monitor, review or audit the undertaking by accredited veterinarians of the activities in approved export programs and the activities of exporters in relation to approved export programs; if the authorised officer identifies a deficiency in the undertaking by an accredited veterinarian of the activities in an approved export program he may direct that person in writing to remedy the deficiency within such reasonable time as specified: section 9E EC Act

163 EC (Animals) Order 2.47(2)

164 EC (Animals) Order 2.47(1)

165 EC (Animals) Order 2.47

166 EC Act section 9A(3)

167 if the importing country requirements relevantly change, or ASEL relevantly change or any other relevant circumstance relevantly changes or the Secretary is of the opinion that the variation is necessary to maintain the health of the relevant live-stock or the exporter or accredited veterinarian so requests: EC (Animals) Order 2.49. In considering whether to approve a requested variation, the Secretary must have regard to the importing country requirements, ASEL, the health and welfare of the live-stock concerned and any other relevant circumstance

168 EC (Animals) Order 2.50: if the importing country requirements have relevantly changed, the standards of ASEL have relevantly changed, any other relevant circumstance has relevantly changed or the Secretary is of the opinion that the suspension or cancellation is necessary to maintain the health or welfare of the relevant live-stock

169 who must be a person who is registered under the law of a State or Territory as a veterinarian, veterinary practitioner or veterinary surgeon: EC (Animals) Order 4A.01

170 EC (Animals) Orders 4A.04 and 4A.07. One of the two required programs is run by Animal Health Australia, which is a company having as members the federal government, state and territory governments and industry bodies (which do not include either LiveCorp or Meat and Livestock Australia), CSIRO and the Australian Veterinary Association. The other required program appears to be run by AQIS – it is not detailed on their website. The Secretary may require an accredited veterinarian to undertake further specified training: EC (Animals) Order 4A.09. Accreditation may be varied: EC (Animals) Order 4A.08

171 Accreditation is for 1 year from the date of notice of accreditation unless earlier revoked: EC (Animals)

by an exporter to undertake an approved export program) must keep records including details of any treatment or testing of live-stock to be exported, details of pre-export quarantine of the live-stock and sufficient information to identify the live-stock examined, treated, tested or subjected to pre-export quarantine or isolation.<sup>172</sup> If the veterinarian travels on a relevant export voyage, he or she must make a written daily report to the Secretary in the approved form,<sup>173</sup> and within 5 working days of the end of the voyage make a further written report to the Secretary.<sup>174</sup>

#### Sanctions available against an accredited veterinarian

**4.99** It is an offence to:

- undertake an approved export program without accreditation;<sup>175</sup>
- contravene a requirement to keep records or provide reports;<sup>176</sup>
- fail to remedy a deficiency identified by an authorised officer who directs the veterinarian pursuant to subsection 9E(2) of the EC Act to remedy that deficiency.<sup>177</sup>

**4.100** The extended geographical jurisdiction provision of the *Criminal Code* applies to the sections of the AMLI Act which create offences relating to the activities of accredited veterinarians.<sup>178</sup> This has the effect of extending criminal responsibility to attempts, incitement, conspiracy etc.<sup>179</sup> The AMLI Act is stated to apply both within and outside Australia.<sup>180</sup>

**4.101** The Secretary may, if he or she has reasonable grounds for believing there are grounds for suspension or revocation and he or she considers the grounds justify

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Orders 4A.05, 4A.02. Accreditation can be to provide pre-export preparation services under approved export programs or to provide shipboard services under approved export programs or to provide both services; the Secretary may accredit a veterinarian subject to conditions, including conditions specifying the frequency and intensity of audit: EC (Animals) Order 4A.06

<sup>172</sup> EC (Animals) Order 4A.14

<sup>173</sup> EC (Animals) Order 4A.15. The form may require information about on-board temperature, humidity, wet bulb temperature readings, deck or cargo hold conditions, general conditions, respiratory rate and character of the animals, whether and to what extent the live-stock show heat stress, feed and water consumption of the animals, hospital pen report, mortality rates, number of live-stock that gave birth and estimated stage of pregnancy at the time of giving birth and any other relevant matter

<sup>174</sup> EC (Animals) Order 4A.15(4) in the approved form, setting out details including name of exporter, voyage details, ports of loading and embarkation, details of numbers and types of live-stock, mortality data, the health and welfare of the live-stock and any treatment given during the voyage

<sup>175</sup> EC Act section 9F; the veterinarian must be reckless as to whether the activity is in such a program. It is a strict liability offence, with a penalty of 50 penalty units

<sup>176</sup> EC Act section 9G;

<sup>177</sup> Section 9H EC Act

<sup>178</sup> section 15.2; the relevant part refers to conduct occurring wholly outside Australia, by an Australian citizen or Australian resident (given that no live export vessels at the time of writing are (so far as the author are aware) Australian-registered)

<sup>179</sup> see *Criminal Code* sections 11.1 to 11.5

<sup>180</sup> section 5

taking the action, suspend or revoke the accreditation of an accredited veterinarian.<sup>181</sup> The veterinarian has an opportunity to give what is in effect a 'show-cause' notice giving reasons why the Secretary should not suspend or revoke the accreditation, although the Secretary can determine the length of time given to the veterinarian to respond.<sup>182</sup> If at the end of that period the veterinarian has not responded, the suspension or revocation takes effect as specified in the notice, and if the veterinarian does respond within the set time, the Secretary must consider the response in making the decision whether to suspend or revoke the accreditation.<sup>183</sup> Where the Secretary has reasonable grounds for believing there are urgent grounds for suspending the accreditation of an accredited veterinarian and considers the grounds justify taking urgent action to suspend the accreditation, the Secretary may suspend the accreditation immediately.<sup>184</sup>

*Persons who are potentially liable under the Commonwealth law – the Ship's Master and Operator*

**4.102** *Marine Orders Part 43* (MO43) is the only legislation in the entire legislative scheme which provides for responsibilities of the ship's master or operator in relation to the live export of animals. Animal welfare standards, which were previously a part of MO43, were removed in a revision made in 2006, as those standards were to be dealt with by ASEL and administered by AQIS.<sup>185</sup> A master of a ship must not allow livestock to be loaded until a surveyor has carried out an initial pre-loading inspection of the ship to establish that the livestock fittings, equipment and arrangements for the carriage of livestock comply with the provisions of MO43.<sup>186</sup> The master must not take a ship to sea unless the ship is in compliance with and animals have been loaded in accordance with MO43.<sup>187</sup>

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181 EC (Animals) Order 4A.10, the grounds being that the person has provided false or misleading information in his or her application for accreditation, has ceased to be registered as a veterinarian in the State or Territory for which the person is accredited, has failed to comply with a condition of accreditation, has failed to comply with a direction under section 9E(2) of the EC Act to remedy a deficiency in relation to an approved export program, has been convicted of a serious offence of a kind that diminishes the confidence the Secretary could place in the person as an accredited veterinarian, has failed to keep records in compliance with Order 4A.14 or has failed to make reports on voyages in compliance with Order 4A.15. A veterinarian whose accreditation has been revoked may apply for accreditation only with the written permission of the Secretary: EC (Animals) Order 4A.13

182 EC (Animals) Order 4A.10(3)

183 EC (Animals) Order 4A.10(4) and (5)

184 EC (Animals) Order 4A.11. "Urgent grounds" is defined to mean any of the grounds in Orders 4A.10(1)(a), (b) or (e) or failing to keep records or make reports in accordance with Orders 4A.10(1)(f) or (g) or failing to comply with the condition of accreditation in Order 4A.09(3), being a failure to comply with an approved export program, and the veterinarian has previously failed to keep such records, make such reports and comply with such conditions

185 AMSA website <http://amsa.gov.au/shipping%5Fsafety/marine%5Forders/amsa%5Fregulatory%5Fplan/2005%5F%2D%5F2006/marine%5Forder%5F43.asp>

186 MO43 7.1.1; Order 7.1.2 concerns a short voyage and Order 7.1.3 says that Orders 7.1.1 and 7.1.2 do not apply to the loading of cattle on to a ship undertaking a voyage of less than 10 days if a satisfactory pre-loading inspection has been carried out within 60 days prior to the intended loading and a surveyor considers that a further inspection is not warranted

187 MO43 Order 7.5

Provisions of MO43 include those setting out requirements for the way in which animals must be carried in relation to fittings, deck arrangements, etc,<sup>188</sup> and the way in which relevant structures are constructed.<sup>189</sup>

**4.103** An important requirement under MO43 is that a ship must have a valid Australian Certificate for the Carriage of Livestock in order to carry animals from a port in Australia. This is an obligation imposed on both the Master and the Operator of the ship.<sup>190</sup> An application for a Certificate must be made by the owner (or agent) of the ship.<sup>191</sup> It remains valid for a maximum of 5 years from the date of issue.<sup>192</sup> Examples of specific requirements of MO43 which have application to the welfare of animals on board ship are:

- Access ramps must have suitable walking surfaces;<sup>193</sup>
- Ships must be fitted with systems and equipment that ensure the maintenance of livestock services at a level necessary for the welfare of the livestock;<sup>194</sup>
- Where tending, feeding and watering is wholly or partially by automatic means, arrangements must be provided for the satisfactory tending, feeding and watering of animals in the event of a malfunction of the automatic means;<sup>195</sup>
- Pens and passageways must comply with the specifications in the Orders;<sup>196</sup>
- If sheep, goats or pigs are carried, hospital pens must be provided corresponding to at least 0.25% of the pen area available for the carriage of those species and those pens must be distributed across decks proportionally to the distribution of animals across multi-deck ships; for cattle, hospital pens must be at least 1% of the pen area available on a deck for carriage of the animals;<sup>197</sup>
- Order 37 of MO43 concerns mortality reporting and uses the same reportable levels as are set out in Standard 5 of ASEL; the master must provide to the Manager, Ship Inspections a copy of any notifiable incident report provided to AQIS in accordance with Standard 5.11 ASEL; if the mortality of one species exceed the reportable level, the Manager may direct a surveyor to carry out an inquiry and report.<sup>198</sup>

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188 MO43 Order 8

189 MO43 Order 9

190 MO43 Order 10.1

191 MO43 Order 10.2

192 MO43 Order 10.6

193 MO43 Order 16.2

194 MO43 Order 12 and Appendix 4: this includes matters such as adequate supply of electrical power, adequate ventilation, adequate lighting, drainage, arrangements for proper distribution of feed and water;

195 MO43 Order 17

196 MO43 Order 20 – 22 (sheep); Order 23 – 25 (cattle)

197 MO43 Order 33

198 The Manager may require the owner, operator or master of the ship to provide such information as he or she



### *Enforcement of breaches of Commonwealth legislation*

**4.104** AQIS is the organisation within the Department of Agriculture Fisheries and Forestry which has responsibility both for administration and enforcement of the legislation relating to live export. Although not provided for in legislation, administration and enforcement are carried out by different sections of AQIS. The administrative function is carried out by the Animal and Plant Exports and Imported Foods Safety branch, while enforcement is the responsibility of the Compliance and Investigations branch.

#### Powers relating to enforcement

**4.105** Part III of the EC Act concerns enforcement. It grants powers to an authorised officer in relation to monitoring premises, including, in relation to registered premises or any other premises with the consent of the owner, the ability to search, to inspect, to take extracts from or make copies of any relevant documents or records.<sup>199</sup> An authorised officer may apply to a magistrate for a warrant allowing access to premises.<sup>200</sup> There are powers under the Act relating to the seizure of material which may provide evidence;<sup>201</sup> there is a power for an authorised officer to seize material as evidence in or order to prevent it being concealed, lost or destroyed.<sup>202</sup> Officers have the power, without warrant in cases of emergency, to stop and detain any vehicle, aircraft or ship if he or she suspects on reasonable grounds particular evidential material is in or on that vehicle.<sup>203</sup> Authorised officers who have entered premises under a warrant may require a person to give information or produce documents,<sup>204</sup> and the Secretary may by written notice require a person to give information or produce documents.<sup>205</sup> The owner or occupier of premises entered by an authorised officer must if requested provide reasonable assistance.<sup>206</sup>

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considers reasonably relevant and this direction must be complied with: MO43 Orders 37.3 and 37.4. The Manager may cause the relevant Australian Certificate for the Carriage of Livestock to be suspended if the inquiry reveals circumstances that warrant that action: MO43 Order 37.11 and Order 10.6

199 sections 10 and 10A EC Act; if the relevant premises are a vehicle or ship, an authorised officer may stop and detain the vehicle or ship for the purposes of exercising the power under section 10A

200 section 10B EC Act; the magistrate may issue a warrant if satisfied by information on oath or affirmation that it is reasonably necessary that the authorised officer should have access, for the purpose of finding out whether any or all of the provisions of the Act have been complied with or for the purpose of complying with a direction under subsection 9E(1); warrants may be granted by telephone or other electronic means: section 10G EC Act; rules about means of executing warrants are set out in Division 6 (sections 11-11N) EC Act

201 sections 10D, 10E and 10F EC Act

202 section 10C EC Act; the section applies when an authorised officer has entered premises under section 10A or under a warrant issued under section 10B; if the officer suspects on reasonable grounds that material which may be used in evidence is in or on the premises and it is necessary to seize it without the authority of a warrant under section 10E because of the urgency and seriousness of the circumstances

203 sections 10H and 10J EC Act

204 section 11P EC Act; failure to comply is an offence of strict liability, with a penalty of 30 penalty units

205 section 11Q EC Act - documents and information produced by an individual are not admissible in evidence against the individual in proceedings other than proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code*; failure to comply is an offence with a penalty of imprisonment for 12 months

206 section 13 EC Act; failure to comply is an offence with a penalty of imprisonment for 6 months

**4.106** Part 5 of the EC (Animals) Orders provides powers to an authorised officer to undertake audits to establish whether the requirements of: the Act, the Order, the AMLI Act, an approved export program, the conditions of accreditation of a veterinarian, registration of premises, a NOI or a CRMP are being complied with by the exporter, the operator of registered premises or an accredited veterinarian.<sup>207</sup> The authorised officer must make a report of the results of the audit which must include a statement of whether the officer considers that the requirements of the EC Act, the EC (Animals) Order and the conditions of registration or accreditation and the requirements of any applicable NOI or CRMP have been complied with.<sup>208</sup> The report must describe any failure of compliance and set out the officer's recommendation for corrective action.<sup>209</sup> The Secretary may direct an authorised officer to monitor, review and audit, whether within or outside Australia, activities carried out by accredited veterinarians or activities by exporters.<sup>210</sup>

**4.107** Division 4 of the AMLI Act relates to enforcement, including in relation to whether or not conditions of export licences have been complied with. It grants to “authorised officers”<sup>211</sup> the power to enter premises and inspect them, or seize evidence. The entry can be during ordinary working hours,<sup>212</sup> or at any time with the consent of the occupier or under a warrant.<sup>213</sup> The authorised officer may require a person to give information or produce relevant documents,<sup>214</sup> and the Secretary of DAFF may give a person written notice requiring information to be given to or documents to be produced to the Secretary.<sup>215</sup>

#### Reporting – possible breaches of Commonwealth legislation

**4.108** Section 57AA of the AMLI Act, which was introduced in 2004 (by a Labor opposition amendment) as part of the changes in response to the Keniry Report, imposes a requirement on the Secretary to give the Minister a report, which the Minister must table in each House of Parliament. The reports must be made every 6 months and must contain information based on reporting by the master of the ship under *Marine Orders Part 43*.<sup>216</sup> Information which must be included in the report includes details of the shipment, mortalities for each type of animal and

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207 EC (Animals) Orders 5.01, 5.02 and 5.04

208 EC (Animals) Order 5.07(3)

209 EC (Animals) Order 5.07(4); the officer must within 14 days after he or she completes the audit give copies of the report to the Secretary and to the operator of the registered premises, the veterinarian or exporter audited: Order 5.07(5)

210 Section 9E EC Act, in relation to the undertaking by accredited veterinarians and of the activities of exporter, both in and in relation to approved export programs

211 appointed by the Secretary of DAFF: section 49 AMLI Act

212 section 34 AMLI Act

213 sections 35 and 37 AMLI Act

214 section 47 AMLI Act

215 section 51 AMLI Act

216 MO43 Order 19 provides that the master of a ship must make a report in writing to the Secretary of DAFF and the Manager, Ship Inspections, AMSA, in the form set out in the Orders

action taken by the Secretary in relation to the export as a result of the reporting by the master of the ship. Inspection of reports available on the AQIS website indicates that the only recorded “action taken” is where AQIS decides to conduct an inquiry into a high mortality incident voyage. This is inadequate. There should be details of any action taken and in particular sanctions against persons responsible for breaches of licence conditions or other legal requirements.

**4.109** There is no legislative requirement that AQIS must conduct an investigation of voyages in which mortality exceeds the relevant reportable level of ASEL. However, AQIS appears to have adopted a procedure of carrying out investigations of voyages where the reportable level is exceeded in a particular consignment (there may be more than one consignment on a voyage). Even so, it appears this procedure is not consistently followed, as AQIS did not do reports on the “high mortality” shipments in 2005 (of which there were 5, according to the report tabled in the federal parliament).<sup>217</sup> It has made some versions of reports available on its website. However, those reports do not appear to correspond to the original reports (contrary to the statement on the AQIS website, which is that “full reports” are available).<sup>218</sup>

#### Application of sanctions for breaches of the Commonwealth legislation

**4.110** A curious aspect of the legislative scheme based on the EC Act and the AMLI Act is that the focus of regulation and applicable penalties is on the holder of the export licence (ie the exporter). Sanctions are available against some other participants in the live export process, for example the holder of the registration for registered premises (although it is unclear whether compliance with ASEL is uniformly a requirement) and the accredited veterinarian. Key participants who are not the subject of requirements and sanctions under the legislative scheme are the owner of the animals (given that ownership usually transfers from the exporter to the importer once the animals are loaded on board ship), the owner of the ship, the master of the ship and the on-board stockperson. It is difficult to understand why these persons, whose behaviour and actions (or failure to act) can clearly result in welfare problems for the animals concerned, are beyond the reach of the legislation.

**4.111** There is no doubt that the legislative scheme, focused as it is on responsibilities imposed on the exporter, is virtually impossible for the exporter to comply with, particularly regarding the care of animals on board ship. In fact this was part of the focus of the defence of the exporter Emanuel Exports Pty Ltd in the *Al Kuwait* trial. In that case, counsel for the defence noted that satisfaction of the exporter's obligations under the Commonwealth legislation would be difficult,

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<sup>217</sup> AQIS communication to Animals Australia on 20 November 2007

<sup>218</sup> See [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0006/449223/investigations-summary.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0006/449223/investigations-summary.pdf). Copies of the original reports obtained by Animals Australia under the *Freedom of Information Act* show that the reports published on the AQIS website have had significant information removed.

given that (even if the stockman were employed by the exporter), the sheep would be owned by another party, and the captain of the vessel would not be under the control of the exporter.<sup>219</sup> This represents a major flaw in the legislation.

**4.112** In recent years mortalities on live export shipments have decreased. Overall mortality in 2007 was about 0.9% for sheep and under 0.2% for cattle. This effect is probably due in part to the application of the “heat stress model” to determine loading densities. This model (some of which is based on observations of changes in the physiology of sheep and cattle in response to increased temperature, but most of which is arbitrarily-based) allows for increasing space allocation to compensate for increasing ambient temperature (which will particularly occur when animals are shipped to the Middle East during the northern hemisphere summer).

**4.113** Analysis of AQIS reports of “high mortality voyages” which have been obtained<sup>220</sup> indicates that breaches of ASEL Standards (and hence the conditions of the export licence) are commonplace.<sup>221</sup>

For example, in January 2006 there was a report on a shipment of goats from Geraldton to Malaysia. Mortality in one consignment was 5.93%. The report shows that the following ASEL Standards were breached:

- animals were not identified to property of origin (ASEL 1.3: livestock sourced for export must be identified to the property of source);
- underweight animals were loaded – on board weight estimates indicated some animals with weights as low as 18kg (ASEL 1.12: goat kids must have a liveweight of more than 22kg);
- 23 animals died on board ship prior to leaving Geraldton; the departure was delayed at least 7 days because of “commercial problems with the letter of credit”. This is probably a breach of a condition of the export permit (it is a condition of a permit that the animals to which it applies must leave Australia within 72 hours after it is granted: EC (Animals) Order 2.59(6)).

The report recommended various actions, all reflected as changes in the conditions of the NOI and CRMP for future exports by the relevant exporter. There is no mention of any other action.

On another voyage (from Devonport in February 2006 to the Middle East), the exporter (Roberts Limited) allowed sheep to be loaded on board ship which were

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219 *State Solicitors Office v Daws & Ors* Perth Magistrates Court matter FR9975-7/05;10225-7/05, Crawford M (transcript of proceedings on 13 February 2007, page 88)

220 by Animals Australia under *Freedom of Information* legislation and available on the Animals Australia website at [www.liveexport-indefensible.com/foi\\_reports.php](http://www.liveexport-indefensible.com/foi_reports.php)

221 Analyses of possible breaches of ASEL identified in the AQIS reports are at [www.animalsaustralia.org/media/foi/](http://www.animalsaustralia.org/media/foi/)

suffering from “pink eye” (infectious keratoconjunctivitis). The report on this incident noted that “sheep entered the registered premise (sic) that did not meet the ASEL standards”. There was a subsequent widespread outbreak of the disease aboard ship. The occurrence of pink eye is listed as one of the criteria for rejection of animals for export in Standard 1.7 of ASEL. There was clearly inadequate management of the outbreak, because the crew were engaged in managing problems with the cattle which were also on the same voyage. This is a breach of Standard 5.7 of ASEL (any livestock identified as being sick...must be given prompt treatment, transferred to a hospital pen...or euthanased). Furthermore, the report noted that “fodder had to be rationed at the end of the voyage”. This appears to be in breach of Standard 4.14, which says that suitable feed to satisfy the energy requirements of the livestock for the duration of the voyage (plus reserves equivalent to a further 3 days rations) must be available. It appears that no action was taken against the exporter regarding this voyage.

**4.114** There are many other examples which indicate that the response of AQIS to breaches of licence conditions by exporters is not to apply sanctions, but to seek to impose conditions for future voyages, through the NOI and CRMP. However, it is extremely difficult to establish which if any actions have been taken by AQIS, as the body does not publish details of actions taken against exporters, holders of registration in respect of registered premises or accredited veterinarians, as a result of its investigations. Even so, when AQIS has been forced to make statements about whether sanctions have been applied, it is apparent that they have not. For example, in a voyage on the MV *Maysora* in October 2006, on which there were 247 deaths out of 7,805 cattle shipped, the AQIS report (again not published, but obtained under Freedom of Information legislation) indicated that the accredited vet left the ship before it had arrived at the last port of discharge. This is a clear breach of ASEL Standard 5.1. Senator Kerry O'Brien in Senate Committee hearings on 24 May 2007 asked the AQIS representative whether any sanctions had been taken against the licence holder. The response was that the matter had been "discussed with the exporter" and that "additional arrangements were put in place".<sup>222</sup> It therefore seems that no sanctions were applied. The clear implication is that AQIS regarded compliance with this Standard as being of relatively little importance.

**4.115** Thus, notwithstanding the post-Keniry legislative changes, it appears that there remains in AQIS a culture of not applying sanctions against exporters (or others responsible) where there are breaches of the law in relation to live export. The response seems to be to try and prevent future or further breaches by imposing additional conditions on exporters for future shipments. Thus, of 10 live export voyages transporting sheep (the voyages were in the period between January 2006

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222 Senate Hansard Standing Committee on Rural and Regional Affairs and Transport 24 May 2007, 159

and November 2007) which had exceeded the 2% mortality “trigger point”, the response of AQIS in 7 of those cases was to impose additional space requirements beyond those in ASEL on the next voyage of the exporter concerned.<sup>223</sup>

**4.116** In May 2008 AQIS sought to formalise this approach, which until then had been adopted on a case by case basis. In an “Export Advisory Notice” it stated that 15% additional space would be required for sheep carried on double tier open deck vessels going to various destinations via the Persian Gulf, while 10% additional space would be required for voyages to several destinations via the Red Sea.<sup>224</sup> These requirements have been imposed by way of conditions on the relevant NOI and CRMP, under Order 2.44(4) of the *Export Control (Animals) Order* 2004. Two exporters, Livestock Shipping Services Pty Ltd and Emanuel Exports Pty Ltd (which operate the vessels *Maysora* and *Bader III* – Livestock Shipping Services and the *Al Shuwaikh* and *Al Kuwait* – Emanuel), together with importers and owners of feedlots, commenced an action in the Federal Court challenging the validity of the conditions, under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).<sup>225</sup>

**4.117** One basis for the challenge is that it was said that the imposition of the conditions was claimed by AQIS to be based on voyages of the *Maysora* and the *Al Shuwaikh* in the period between May 2007 and October 2007 in which the mortality “trigger point” of 2% was exceeded. However, AQIS initiates investigations where the “trigger point” is exceeded in a consignment, rather than in a shipment. There may be more than one consignment in a shipment (ie more than one exporter may put sheep onto a ship). ASEL 5.11 refers to a “shipboard mortality rate”, which is defined by reference to the number of the relevant species loaded on the ship. There is no reference to numbers of animals in a consignment. Thus, the claim was that the reference to consignments was an irrelevant consideration which should not have been taken into account. Furthermore, it was said that there was no or insufficient evidence that stocking density was in any case related to mortality. It is impossible to comment on this, given that the details of the “heat stress model” are not publicly available.

The action was discontinued on 23 September 2008. The appearance on 25 September 2008 on the AQIS website of a significantly watered down “Export Advisory Notice” suggests that AQIS realised it was not going to win the case.

All of this raises again the question of why AQIS has not prosecuted exporters for licence breaches (as opposed to using this regulatory approach involving NOI and

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223 see the DAFF website at [http://www.daff.gov.au/\\_data/assets/pdf\\_file/0006/449223/mortality-investigations-summary.pdf](http://www.daff.gov.au/_data/assets/pdf_file/0006/449223/mortality-investigations-summary.pdf)

224 see the discussion concerning conditions of the Notice of Intention above

225 *Hijazi & Ghosheh Co Ltd & Ors v Read & Ors* Federal Court case WAD 146/2008 (Perth Registry)

CRMP conditions).

**4.118** This generally unsatisfactory position is reflected in the fact that the Primary Industries Ministerial Council has been advised by LESAC that RSPCA Australia (a member of LESAC) would not endorse Version 2 of ASEL until “concerns about lack of enforcement, compliance and penalties were addressed and resolved”.<sup>226</sup>

#### *State laws*

**4.119** Several provisions of State laws relating to animal cruelty and animal welfare have the potential to apply to one or more of the stages of live export.

If state laws are applicable, they apply in “Commonwealth places” (such as ports which are Commonwealth property) by virtue of application of the *Commonwealth Places (Application of Laws) Act 1970* (Cth).<sup>227</sup> Foreign ships in local territorial waters will also be subject to local laws by virtue of article 27 of the *United Nations Convention on the Law of the Sea*, which came into force in Australia on 16 November 1994. The geographical reach of a local Australian state or territory law is governed by a co-operative scheme based on the *Crimes at Sea Act 2000* (Cth) and state and territory counterparts. This has the effect of extending the relevant local legislation to a distance of 200 nautical miles offshore from the state or territory, or the outer limit of the continental shelf, whichever is the greater.

**4.120** It is a fact that putting live animals such as sheep and cattle onto a ship and despatching them on a voyage which may last several weeks puts an individual animal in a consignment at an increased risk of harm (compared, at least, to the risk of harm involved in, say, transporting the animals from a farm to a saleyard or eventually to an abattoir). It is likely that the harm will eventuate when the animals are outside the geographical area over which state and territory laws ostensibly operate. The first question, therefore, is which provisions of any relevant state law may prohibit putting the animals onto a ship, knowing that act increases the likelihood that an animal amongst the group will suffer harm. Animals are not exported from ports in New South Wales, so the relevant legislation in that State will not be considered.

Relevant legislation may be:

#### **4.121** *Tasmania*

Section 7 of the *Animal Welfare Act 1993* (Tas) says “a person who has the care or charge of an animal must not use a method of management of the animal which is

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<sup>226</sup> RSPCA advised LESAC – Primary Industries Ministerial Council Record and Resolutions of meeting of 24 November 2006, 104 (at [www.mincos.gov.au/\\_data/assets/pdf\\_file/0016/316095/pimc\\_res\\_11.pdf](http://www.mincos.gov.au/_data/assets/pdf_file/0016/316095/pimc_res_11.pdf))

<sup>227</sup> see *Cameron v The Queen* [2004] WASCA 16

reasonably likely to result in unreasonable and unjustifiable pain or suffering to the animal.” The phrase “method of management” is not defined. The *Oxford Concise English Dictionary*<sup>228</sup> says that the definition of “manage” includes “maintain control...over (an...animal)”. section 8 of the Act says (relevantly) “a person must not do any act, or omit to do any duty, which causes or is likely to cause unreasonable and unjustifiable pain or suffering to an animal.” The section goes on to say a person is guilty of an offence under the subsection if the person (relevantly) “overloads or overcrowds an animal...or...conveys an animal in a manner...or in circumstances that subjects or subject it to unreasonable and unjustifiable pain or suffering”. Section 9 makes it an offence (aggravated cruelty) to do any act or omit any duty referred to in section 8 which results in the “death or serious disablement of an animal”.

Arguably section 8 (and 9) of the Act may apply in the context of live export, and section 7 may apply (depending on the view a court would take of the meaning of “method of management” and whether that view would include export on a ship).

#### **4.122** *South Australia*

There is a curious situation here. The *Animal Welfare Act* 1985 contains no provision which could be said to relate to live export of animals in the way described. However, regulation 10 of the *Animal Welfare Regulations* 2000 says “a person described in an entry in Schedule 2 must, in carrying out an activity described in that entry, ensure compliance with the code of practice specified in the entry – Maximum penalty \$1,250”. Item 7 of Schedule 2 is the *Model Code of Practice for the Welfare of Animals, Sea Transport*, Australian Agricultural Council (1987), as amended from time to time. It appears that this document may never have been amended, so is still current.<sup>229</sup> That being so, some relevant requirements in this code are:

11. In order to minimise the risk of digestive upset and loss of appetite, animals should receive a period of pre-conditioning during which they are progressively introduced to the ration and feeding regime used on the livestock vessel. The period should be of sufficient duration to ensure all animals which are loaded on the vessel are fully adapted to the shipboard diet.” (emphasis added). Appendix 3 of the Code specifically refers to sheep which are “shy feeders” (ie suffering from inanition) and the need to condition them to shipboard feed (periods of more than 14 days are mentioned). It appears that, regardless of the duration or distance of the voyage (ie whether the ship leaves South Australian jurisdiction), this provision will be breached if animals are loaded which are not fully adapted to the shipboard diet. Given that it is well established that many sheep will inevitably suffer from inanition on a voyage (because of failure to adapt to the shipboard diet), it is very

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228 10th Edition, 1999

229 see the PIMC website at [www.mincos.gov.au/publications](http://www.mincos.gov.au/publications)



likely that live export of sheep from South Australia will breach this provision.

#### **4.123** *Victoria*

Section 9(1)(c) of the *Prevention of Cruelty to Animals Act* 1986 says “a person who...does or omits to do an act with the result that unreasonable pain or suffering is caused or is likely to be caused to an animal...commits an act of cruelty upon that animal and is guilty of an offence”; subsection (b) is in similar terms regarding a person who “loads, crowds or confines” and animal and subsection (d) similarly refers to a person who “drives, conveys, carries or packs” an animal. If that act results in the death or serious disablement of the animal the person commits an act of aggravated cruelty.<sup>230</sup>

#### **4.124** *Queensland*

Section 18(1) of the *Animal Care and Protection Act* 2001 says “a person must not be cruel to an animal”, while subsection (2) defines cruelty to include: “[...transporting an animal]...without appropriate preparation...or when it is unfit for the...transport...”. This would seem to apply to an animal suffering from, for example inanition or salmonellosis which is nevertheless loaded onto a ship for export. That animal could be said not to have “appropriate preparation”, or could be said to be “unfit for transport”.

#### **4.125** *Western Australia*

Section 19 of the *Animal Welfare Act* 2002 says (relevantly):

- (1) A person must not be cruel to an animal;
- (3) ...a person in charge of an animal is cruel to an animal if the animal...
  - (a) is transported in a way that causes, or is likely to cause, it unnecessary harm;
  - (b) is confined...in a manner that...causes or is likely to cause, it unnecessary harm;
  - (d) is not provided with proper and sufficient food or water.

Relevant definitions in section 5 are: “harm” includes injury, pain and distress evidenced by severe, abnormal physiological or behavioural reactions; “person in charge” means (a) the owner of the animal, (b) a person who has actual physical custody or control of the animal, (c) if the person referred to in (b) is a member of staff of another person, that other person, or (d) the owner or occupier of the place or vehicle where the animal is or was at the relevant time; “staff”, in relation to a person includes (a) all the people working for or engaged by that person whether as officers, employees, agents, contractors, volunteers or in any other capacity, if the person is a body corporate, its directors, secretary and executive officers and “vehicle” includes a ship.

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<sup>230</sup> Section 10.

The application of the Western Australian *Animal Welfare Act* to live sheep export was the subject of the prosecution in the *Al Kuwait* case, in which exporters Emanuel Exports Pty Ltd and two of its directors were prosecuted for breach of section 19(1) of that Act.<sup>231</sup>

#### **4.126** *Territorial issues*

Statutory provisions in some of the jurisdictions may be relevant to determine whether events which occur during a live export voyage (but beyond the immediate reach of a State's jurisdiction), with detrimental animal welfare results, may come within the reach of the criminal law of that jurisdiction.

Relevant provisions are:

South Australia: Section 5G of the *Criminal Law Consolidation Act* 1935 requires that there be a necessary territorial nexus. This exists if an element of the offence is or includes an event occurring in the State.

Queensland: Section 12(2) of the *Criminal Code* provides for jurisdiction if all the acts or omissions which occur would constitute an offence in Queensland if they were to occur there and one of the acts or omissions takes place in Queensland.

Western Australia: Section 12 of the *Criminal Code* says an offence is committed if at least one of the elements occurs in the State.

There are also several common law tests for determining whether territorial jurisdiction exists.<sup>232</sup>

#### *Inconsistency between State and Commonwealth laws*

**4.127** The key finding in the *Al Kuwait* case<sup>233</sup> was that the relevant section of the Western Australian *Animal Welfare Act* 2002 (at least as it related to the charge proven – that of transporting particular groups of sheep in a way likely to cause unnecessary harm) was invalid by virtue of operational inconsistency between it and the Commonwealth legislative scheme which sanctions live export, pursuant to section 109 of the *Commonwealth Constitution*.

Section 109 of the *Commonwealth Constitution* says “When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

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<sup>231</sup> Footnote 233 below

<sup>232</sup> C Delitt, B Fisse & P Keyzer *Territorial and Extraterritorial Jurisdiction* (Chapter 5, Volume 9) *The Laws of Australia*. Sydney: Thomson Lawbook Co.

<sup>233</sup> *Department of Local Government & Regional Development v Emanuel Exports Pty Ltd & Ors* (Perth Magistrates Court, per Crawford M, in which judgment was handed down on 8 February 2008) – see Chapter 8

The High Court has developed three tests to determine whether there is “inconsistency”:

1. If it is impossible to obey both laws at once; that is, if one law forbids what another law requires;<sup>234</sup>
2. If one law purports to confer a legal right, privilege or entitlement that the other law purports to take away or diminish;
3. If the Commonwealth Parliament has expressed an intention to “cover the field”.

**4.128** The first two of these tests establish a “direct” or “operational” inconsistency. The third has been described as establishing an “indirect” inconsistency. An indirect inconsistency may arise, for example, where both a Commonwealth and a State law proscribe certain forms of communications by telephone and as a result, a particular sort of communication may be unlawful under both pieces of legislation. In this circumstance, the two laws are not in direct conflict. However, if the Commonwealth, by passing the relevant act, has evinced an intention to legislate in the field of telecommunications (under the express power conferred by section 51(v) of the Commonwealth *Constitution*), there is no room for any State law to operate in the same area or “field”. The State law is invalid, not because it is directly in conflict with the Commonwealth law, but because of the implied inconsistency.

Regardless, it is instructive to note the warning concerning the application of these “tests” given by Kirby J in *APLA Ltd v Legal Services Commissioner (NSW)*.<sup>235</sup>

*“[t]his court has repeatedly emphasised the danger of elevating judicial explanations of legal tests to a status where they risk replacing the texts themselves. It is not permissible to over-refine the constitutional concept of “inconsistency”. There are no rigid judge-made categories that define when an inconsistency does, or does not, arise under s109 of the Constitution. In every case, it is necessary to ascertain the operation of the federal law; then to ascertain whether the operation of the state law, as interpreted, would alter, impair or detract from that operation; and then to make a judgment and reach a conclusion as to whether the constitutionally impermissible alteration, impairment or detraction has occurred.”*<sup>236</sup>

What is the “law of the Commonwealth”?

**4.129** In determining whether there is “inconsistency”, one must, as indicated by

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<sup>234</sup> eg *R v Brisbane Licensing Court; Ex Parte Daniell* (1920) 28 CLR 23

<sup>235</sup> (2005) 219 ALR 403, 476

<sup>236</sup> See also *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 102 ALR 621, 627 per Kirby P and references in that case to similar comments in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237

Kirby J in the *APLA* case, “ascertain the operation of the federal law”. However, a necessary first step in the exercise of establishing if there is inconsistency is to establish which of any relevant statutes, regulations, orders and instruments are “laws of the Commonwealth”.

The statutes, regulations, orders and other instruments involved in regulating live export (insofar as animal health and welfare are concerned) are the AMLI Act and the EC Act and their subordinate legislation, and ASEL. The *Navigation Act* and its associated orders no longer deal with several matters relating to health and welfare of animals aboard ships.<sup>237</sup> *Marine Orders Part 43* (Issue 6) currently in force are concerned with matters primarily relating to the safety of those on board ship and the maintenance of services for livestock aboard ship.

**4.130** What are “laws of the Commonwealth” for the purposes of section 109 of the Commonwealth *Constitution*? The *Commonwealth of Australia Constitution Act* 1900 says (in section 5) “This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State...”. In *Jergerv Pearce*,<sup>238</sup> the words “under the law of the Commonwealth” (as used in the *Commonwealth Naturalization Act* 1903-1917) were held to mean “under a law passed under the legislative authority of the Commonwealth.” The High Court considered this issue in *Airlines of NSW Pty Ltd v New South Wales*.<sup>239</sup> Taylor J considered whether Air Navigation Orders, Aeronautical Information Publications and Notices to Airmen published by the Director-General of Civil Aviation under the Regulations made under the *Air Navigation Act* were “laws of the Commonwealth”. Without giving reasons, he held they were not, “in spite of the fact that non-compliance with instructions or directions so given may constitute an offence under the Regulations.” Menzies J agreed with the proposition that administrative directions “do not in themselves constitute laws of the Commonwealth for the purposes of s 109 of the *Constitution*.” In *R v Foster; Ex Parte Commonwealth Steamship Owners' Association*<sup>240</sup> the High Court said “laws of the Commonwealth” were “laws made under the legislative powers of the Commonwealth directly or indirectly.”<sup>241</sup> This would not exclude a regulation made pursuant to statutory authority.<sup>242</sup> Mahoney

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237 See Explanatory Notes *Marine Orders Part 43 Issue 6* (at <http://www.comlaw.gov.au>)

238 (1920) 27 CLR 526

239 (1964) 113 CLR 1

240 (1953) 88 CLR 549, 556

241 See also *Spratt v Hermes* (1966) 114 CLR 226, 246, per Barwick CJ: “the expression embraces every law made by the Parliament whatever the constitutional power under or by reference to which that law is made or supported” and *Lamshed v Lake* (1958) 99 CLR 132, 148 per Dixon CJ

242 see *Sankey v Whitlam* (1978) 21 ALR 505, 519 (per Gibbs ACJ), concerning the interpretation of the phrase in the *Crimes Act*

JA in *Majik Markets*<sup>243</sup> said a “law” included “things having a subordinate legislative operation.” In *Ansett Transport Industries (Operations) Pty Ltd v Wardley*<sup>244</sup> Wilson J said that a document, while not a “law of the Commonwealth” may nevertheless be considered when determining whether inconsistency arises because the document “derives its force” from a Commonwealth law.

**4.131** Perhaps a clearer view of the meaning of the phrase can be gained by considering the intention behind the section. It would seem reasonable to think that when the drafters of the *Constitution* sought to make “laws of the Commonwealth” prevail over inconsistent State and Territory laws, the intention was not to allow rules or directions of legal force, but not scrutinised by Parliament, to have that effect. The Second Reading Speech for the *Legislative Instruments Bill* (2003) is instructive. It says the Bill concerned “laws that are made under a power delegated by Parliament” and that it provides for “enhanced parliamentary scrutiny of legislative instruments” which would be “a major enhancement of parliament's ability to view laws made by the executive.”<sup>245</sup> A modern High Court may therefore take the view that the key determinant of whether a document is a “law of the Commonwealth” is whether or not it is subject to scrutiny by the Parliament.

**4.132** The *Legislative Instruments Act* 2003 applies to instruments which determine or alter the content of the law (rather than applying the law in a particular case) and has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right (as contrasted with an instrument setting out an administrative decision). In any case, an instrument registered under the Bill is taken, by virtue of that registration to be a legislative instrument.<sup>246</sup> Part 5 of that Act provides the mechanisms for Parliamentary scrutiny of legislative instrument.

**4.133** Clearly the AMLI Act, the EC Act and the *Navigation Act* are “laws of the Commonwealth”, as they are directly made by the Commonwealth Parliament under the trade and commerce power of the Commonwealth *Constitution*. The EC (Orders) Regulations, made under section 25 of the EC Act are “laws of the Commonwealth”, as they are a regulation made pursuant to statutory authority, as are the AMLI (Export Licensing) Regulations (made under section 74 of the AMLI Act) and the *Marine Orders Part 43* (made under section 425(1AA) of the *Navigation Act*. The EC (Animals) Order 2004, and the AMLI (Standards) Order 2005, as they are “legislative instruments” under the *Legislative Instruments Act* 2003<sup>247</sup> can probably be regarded as “laws of the Commonwealth”.

<sup>243</sup> *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1991) 102 ALR 621, 635

<sup>244</sup> (1980) 142 CLR 237, 282

<sup>245</sup> Commonwealth Parliament House Hansard (2003), page 17623

<sup>246</sup> Section 5(2)

<sup>247</sup> Section 5 defines a legislative instrument as an instrument in writing that is of a legislative character that is or

**4.134** ASEL does not come within the *Legislative Instruments Act* definition of a “legislative instrument”. Its adoption under the AMLI Act (whereby compliance with ASEL is a condition of an export licence) comes about by virtue of the AMLI (Standards) Order 2005, which is made under section 17 of the Act. It is also mentioned in Regulations 13, 16, 18 and 19 of the AMLI (Export Licensing) Regulations.<sup>248</sup> However, section 14 of the *Legislative Instruments Act* 2003 provides that a legislative instrument may adopt any matter contained in any other instrument.<sup>249</sup> ASEL is referenced extensively in the EC (Animals) Order. Section 25 of the EC Act says (relevantly) “an order may make provision for or in relation to a matter by applying, adopting or incorporating, with or without modification:... (b) any matter contained in any other instrument or writing as in force or existing at the time when the order takes effect...” As ASEL is referenced in various parts of the Acts and other legislative instruments regulating live export and as the EC Act itself and the *Legislative Instruments Act* specifically allow the incorporation, adoption (etc) of instruments such as ASEL by a legislative instrument, it is therefore arguable that, in ascertaining the operation of the federal law in relation to animal welfare during live export, one may refer to the provisions of ASEL.

The central importance of ASEL in the legislative scheme is illustrated by the fact that compliance with ASEL is a condition of an export licence and that breach of a condition of an export licence (either intentionally or being reckless as to the condition) is an offence punishable by imprisonment for 5 years.<sup>250</sup>

#### Tests for inconsistency

##### “Cover the field”

**4.135** This test was first set out in *Clyde Engineering Co Ltd v Cowburn*.<sup>251</sup> Isaacs J said “If...a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another

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was made in the exercise of a power delegated by the Parliament; note section 8 says “A reference in this Act to a power delegated by the Parliament includes a reference to a power delegated by the Parliament to a rule-maker and then, under the authority of the Parliament, further delegated by the rule-maker to another rule-maker”

248 Reg 13: in the context of what an application for an export licence must set out – this includes “how the operations of the business” will comply with ASEL; Reg 16 regarding what the Secretary must have regard to in considering whether to grant an application – including whether the applicant has demonstrated an ability to comply with ASEL; Reg 18: an operations and governance manual must be updated if there is a change to the operations of the business as to how there will be compliance with ASEL (see also Reg 19 – concerning variations to a licence)

249 (1) If enabling legislation authorises or requires provision to be made in relation to any matter in a legislative instrument, the legislative instrument may, unless the contrary intention appears, make provision in relation to that matter: ... (b) subject to subsection (2), by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing at the time when the first-mentioned legislative instrument takes effect .

250 Section 54(3) AMLI Act

251 (1926) 37 CLR 466, per Isaacs J (at 479)

legislature assumes to enter to any extent upon the same field.” In *Ex parte McLean*<sup>252</sup> Dixon J said the inconsistency “...depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.”<sup>253</sup> Dixon J went on to say “...it would probably be of no importance whether each Legislature was directing its attention to the same general topic or had dealt with the same act or omission in the process of legislating upon two entirely different subjects.”<sup>254</sup> In that case Dixon J also remarked on a situation where there was no evident intention to “cover the field” and said in that case the Federal law could be said to be “supplementary to or cumulative upon State law”, in which case “no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties.”

The “rights” test

**4.136** In *Clyde Engineering*<sup>255</sup> Knox CJ and Gavan Duffy J remarked on the “cover the field” test and noted it was not sufficient or appropriate in every case. They said “two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.” In this context in *Victoria v Commonwealth*<sup>256</sup> Dixon J said “[w]hen a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.”<sup>257</sup>

Note that even if the “cover the field” test is not satisfied, the “rights” test may yet be applied and if satisfied have the effect of rendering the relevant State law invalid.<sup>258</sup>

In *Ex parte McLean*<sup>259</sup> Dixon J made the following interesting comment: “if the [Federal law] expressly forbade shearers to injure sheep when shearing, it would not be a necessary consequence that a shearer who unlawfully and maliciously wounded

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252 (1930) 43 CLR 472, 483 per Dixon J

253 See also *Victoria v Commonwealth* (1937) 58 CLR 618, 630 and *Telstra Corporation Ltd v Worthing* (1997) 197 CLR 61, 76

254 see *Telstra Corporation Ltd v Worthing* (1997) 197 CLR 61, 78

255 (1926) 37 CLR 466, 478

256 (1937) 58 CLR 618, 630

257 See *Telstra Corporation Ltd v Worthing* (1997) 197 CLR 61, 76 and also *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151

258 *Telstra Corporation Ltd v Worthing* (1997) 197 CLR 61, 76

259 (1930) 43 CLR 472, per Dixon J

a sheep he was shearing could not be prosecuted under the State criminal law for unlawfully and maliciously wounding an animal.”

**4.137** *Commercial Radio Coffs Harbour v Fuller*<sup>260</sup> dealt with grant of a broadcasting licence under the relevant Commonwealth Act. Operation of broadcasting transmitters was prohibited under the Act, but the provisions of the Act allowed the grant of a licence, thereby exempting a licence holder from that provision. The relevant Part provided the “machinery for the granting of licences and to prescribe what the holders of licences must do to comply with the licensing regime.” It did not “purport to confer powers or authorities on the holders of licences.” Furthermore, removal of the prohibition on broadcasting by the grant of a licence conferred on the grantee a permission to broadcast and there was “nothing in the Act which suggests that it confers an absolute right or positive authority to broadcast so that the grantee, because he has a licence, is immune or exempt from compliance with State laws.” The majority<sup>261</sup> referred with approval to the statement by Dixon J in *Ex parte McLean*,<sup>262</sup> saying in this case, the Act was intended to be “supplementary to or cumulative upon State law.” In *APLA Ltd v Legal Services Commissioner*,<sup>263</sup> Kirby J commented on the *Coffs Harbour* case and said the finding there was no inconsistency because the federal law “...did not address whether or not a radio licensee could construct a transmitter without complying with relevant state laws.”

**4.138** Similarly in *Ansett Transport Industries (Operations) Pty Ltd v Wardley*<sup>264</sup> Stephen J, who was a member of the majority,<sup>265</sup> pointed out that the right granted (to terminate a contract of employment) was not an “absolute right”. It was not “capable of exercise regardless of the unlawfulness under State law of the ground for its exercise.” This was because it contained “nothing in its quite unexceptional wording to suggest that it should stand inviolate, unresponsive to a general law applicable to the community at large and directed to the prevention of some evil practice...” Mason J<sup>266</sup> noted that cases concerning the “rights” test had generally been related to the “cover the field” test, on the ground that “direct inconsistency” was confined to the situation in which simultaneous obedience to both laws was impossible.<sup>267</sup> He remarked that in a given case more than one test is capable of being applied so as to establish inconsistency and this was especially the case when it is the giving of a permission or the grant of a right by Commonwealth law which

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260 (1986) 161 CLR 47

261 Wilson, Deane and Dawson JJ

262 (1930) 43 CLR 472, 483

263 (2005) 219 ALR 403, 478

264 (1980) 142 CLR 237

265 at 246

266 at 260

267 Referring to *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177, at 182, 185 and *Swift Australian Co Pty Ltd v Boyd Parkinson* (1962) 108 CLR 189, 207



founded the claim of inconsistency. He went on to say

*“if according to the true construction of the Commonwealth law, the right is absolute, then it inevitably follows that the right is intended to prevail to the exclusion of any other law. A State law which takes away the right is inconsistent because it is in conflict with the absolute right and because the Commonwealth law relevantly occupies the field. So also with a Commonwealth law that grants a permission by way of positive authority. The Commonwealth legislative intention which sustains the conclusion that the permission is granted by way of positive authority also sustains the conclusion that the positive authority was to take effect to the exclusion of any other law.”*

From this it appears that the “rights” test can often be qualified by the question whether the intention of the Commonwealth Parliament was that the relevant provision should confer an absolute right, and thereby an immunity from the operation of any relevant State law. This qualification represents an overlap with the principle underlying the “cover the field” test.

Is there inconsistency between the Commonwealth and States laws?

**4.139** The Commonwealth Parliament does not have a power (ie arising from the *Constitution*) to legislate in the area of animal welfare. That is not to say that it cannot validly legislate in this area under another head of power, provided there is a “sufficient connection” with that head of power.<sup>268</sup> The trade and commerce power has been said to permit legislation on all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced in Australia, which may include grade and quality of goods, and packing and handling, as well as anything at all that may reasonably be considered likely to affect an export market.<sup>269</sup> The live export legislation is made under the trade and commerce power in the Commonwealth *Constitution*, so the question is whether the Commonwealth Parliament intended it to “cover the field” on animal welfare as it relates to the activity of live export.

Coverage of animal welfare issues in the Commonwealth legislation

**4.140** The AMLI Act's long title is “An Act relating to the Australian meat and live-stock industry, and for related purposes”. It provides (amongst other things) for the licensing of the export of live animals. This activity may be controlled by way of directions or orders made by the Secretary of DAFF. The orders and directions made may relate to or be incidental to matters including “carriage, handling and storage” of live-stock. In granting an export licence the Secretary

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<sup>268</sup> see Blackshield T & Williams G (2006) *Australian Constitutional Law and Theory* Sydney: Federation Press, p778

<sup>269</sup> *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565, 589 per Fullagar J

must have regard to matters including whether the applicant is able to comply with the licence conditions and whether the applicant has been charged under or convicted under a law of a State or Territory, whether the applicant has demonstrated an ability to comply with ASEL and whether the applicant has complied with the requirements of the EC Act. One of the licence conditions is the licensee, in exporting the animals, must comply with ASEL. It is an offence to wilfully or recklessly breach a licence condition. An application for a licence must be accompanied by things including an operations and governance manual for the live-stock export business setting out how its operations will comply with ASEL. The Act requires a report concerning live export voyages to be made to Parliament setting out matters including the percentage mortality for each type of live-stock.

The EC Act's long title is "An Act to provide for the control of the export of certain goods and for related purposes." The Act provides that the regulations may prohibit the export of live animals from Australia and sets out various provisions which must be complied with before animals may be exported. It provides for the accreditation of veterinarians for the purposes of "approved export programs" relating to live export. While there is no satisfactory definition of what such a program is, it is said to be "for the purpose of ensuring the health and welfare" of animals exported live.

**4.141** Orders made under the EC (Orders) Regulations set out in detail the steps to be taken in relation to live export.<sup>270</sup> If the regulations (defined to include Orders) prohibit export of live animals unless specified conditions or restrictions are complied with, a person who exports animals in contravention of those conditions or restrictions is guilty of an offence.<sup>271</sup> Failure to comply with a condition or restriction of a "licence or permission" is an offence.<sup>272</sup>

The Orders prohibit the export of live-stock unless the exporter has a licence granted under the AMLI Act, the exporter complies with the conditions of the relevant "notice of intention" to export (NOI), the "consignment risk management plan" (CRMP), the permission to leave for loading and the export permit. The Secretary may suspend or cancel the registration of registered premises to protect Australia's trading relationship with an importing country or to protect the health or welfare of animals to be exported. The Orders require that a CRMP must set out matters including relevant ASEL standards and the exporter's plans to meet the standards. Criteria for approval of a NOI and a CRMP include whether the export complies with ASEL and the export licence conditions. However, compliance with ASEL is not prescribed as a condition of a NOI or a CRMP or of the permission to leave for loading or the export permit. The Secretary may vary or cancel an

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270 EC (Animals) Order 2004

271 section 8 EC Act: punishable on conviction by imprisonment for a period not exceeding 5 years.

272 section 9 EC Act: fine not exceeding \$50,000

“approved export program” if (amongst other things) he or she is of the opinion that the variation or cancellation is necessary to maintain the health or welfare of the relevant live-stock. Permission to leave for loading is granted only where the authorised officer is satisfied of (amongst other things) that each of the live-stock is fit to undertake the proposed export voyage without any significant impairment of its health. The Orders also say that (in effect) an exporter must make a declaration to the Secretary that the exporter has complied with any conditions to which a live-stock export licence under the AMLI Act was subject – this is a condition of grant of an export permit. Note that making a false declaration is an offence under section 55 of the AMLI Act.

**4.142** ASEL represents a detailed set of standards which could be said to stipulate requirements for the maintenance of animal health and welfare. References in ASEL which illustrate this are:

Standard 1 includes prohibitions on export of animals from northern ports (1.5, 1.5A.1.); requirements that animals must be “fit to enter the export chain”, must be inspected on the farm and rejected if any rejection criteria (there is a lengthy list – all but one related to animal health and welfare: Appendix 1) are met or “any other condition that could cause the animal’s health and welfare to decline during transport or export preparation (1.7); prohibitions on export if they are emaciated or overfat (1.8), weight minima and developmental stage criteria for cattle, sheep, goats and deer (1.9 – 1.12, 1.21); prohibitions on export of pregnant animals (1.13-1.14A); prohibitions of export of horned animals (1.15, 1.16); prohibitions on exporting sheep not properly shorn (1.19); requirement for conditioning of goats to handling etc (1.20); and exclusion of sick or injured livestock.

Standard 2 says only livestock fit to travel must be presented for loading and the health and welfare requirements of livestock must be addressed throughout the whole of the land transport phase. It includes: the need for a travel plan (2.3); requirements for feed and water curfews (2.8); limits for water deprivation (2.9); a requirement for pre-loading inspection and rejection of animals according to the criteria in ASEL 1.7 (2.11); livestock must be loaded in a manner that prevents injury and minimises stress (2.13); stocking densities are specified (2.14); checking through the journey that animals are fit to travel (2.16); unloading for provision of food and water (which must also be in accordance with state and territory legislation) (2.18); livestock distressed or injured at unloading must be given assistance, or euthanased if necessary (2.20).

Standard 3 says that during assembly at registered premises, health and welfare needs of livestock must be appropriately catered for, that livestock leaving the premises are fit for the export voyage and animals rejected for export are managed humanely. It deals with matters including: the maximum distance of the registered premises from the relevant port (3.0); handling facilities which

minimise stress and injury (3.2); protection of animals from extremes of sun, wind and rain (3.5); facilities to ensure adequate supplies of feed and water (3.7); stipulations relating to the type of sheep which can be exported to the Middle East (3.9); stocking densities (3.11); inspection to ensure suitability for export (3.13); daily monitoring of health and welfare (3.16); rejection of animals unsuitable for export (3.17).

Standard 4 refers to vessel preparation and loading and reiterates that livestock must be healthy and fit to travel and must be handled and loaded in a manner that prevents injury and minimises stress. Travel and loading plans must adequately address animal health and welfare. It includes that: there must be a loading plan and requirements for stocking density must be complied with (4.3, 4.4, 4.12); there must be sufficient personnel to ensure animal husbandry and welfare needs are addressed (4.6); animals must be inspected immediately before loading to ensure they are fit to be transported (4.8); animals must be loaded in a way that prevents injury and minimises stress (4.10); there must be proper arrangements for provision of adequate feed and water (4.14).

Standard 5 deals with the onboard phase. It requires that care and management of animals be adequate to maintain their health and welfare throughout the voyage. Animal health and welfare interventions must be undertaken where necessary to treat or euthanase sick or injured animals. An accredited stockperson is responsible for providing appropriate care and management of the animals. Specific Standards deal with: ensuring health, welfare and physical needs of animals are met (5.1); animals identified after loading as sick or injured must be dealt with appropriately (5.2); animals must have access to adequate water (5.5); animals must be regularly inspected to ensure maintenance of their health and welfare (5.6); livestock which are sick and injured must be promptly treated, transferred to a hospital pen or euthanased (5.7); drugs must be available for treating animals (5.8); there must be a contingency plan for various emergencies (5.10); the accredited stock person must provide daily reports on animal health and welfare to AQIS (for journeys greater than or equal to 10 days – 5.12); the stock person must provide an end of journey report on the health and welfare of the animals to AQIS (5.13).

**4.143** The *Marine Orders Part 43* mainly involve the design of pens and equipment relating to transport of animals on ships. Livestock services must be properly maintained (Orders 12, 17); there must be a means of humanely killing animals (Order 18); mortalities must be reported if they exceed the notifiable level (Order 37);

Providing ASEL can be said to be part of the legislative scheme constituting the relevant “law of the Commonwealth”, it is apparent that the breadth and extent of the statutory provisions, regulations, orders and Standards dealing with health and

welfare of animals could arguably be said as indicating an intention by the Commonwealth Parliament to “cover the field”.

**4.144** However, Section 5 of the EC Act says; “This Act is not intended to exclude the operation of any...law of a State or Territory insofar as that law is capable of operating concurrently with this Act.” Order 1.06 of the EC (Animals) Order is entitled "Effect of State and Territory Laws". It says:

- (1) *Nothing in this order affects the operation of a law of a State or Territory if:*
- (a) *it is possible to comply with both this Order and the State or Territory law at once; or*
  - (b) *in particular, compliance with the State or Territory law will also constitute compliance with this Order.*
- (2) *Nothing in this Order, or in the Australian Standards for the Export of Live-stock, is taken to require the Commonwealth, the Secretary or an authorised officer to administer or enforce any law of a State or Territory or any code of practice or similar instrument having effect under the law of a State or Territory.*

There is an analogous provision in section 75 of the *Trade Practices Act 1974* (Cth), which was the subject of *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*<sup>273</sup>. In that case, Mason J said “A Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation...it [makes] clear that the Commonwealth law is not intended to cover the field...” However, he also noted that “leaves room for the operation of such State laws as do not conflict with Commonwealth law.” That is, even where there is such a provision indicating an intention not to “cover the field”, there can still be “direct” inconsistency between the two laws.

**4.145** This provision was discussed in detail in *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd*<sup>274</sup> per Kirby P. In this case, the statute under consideration said (at section 8) “this Act is not intended to affect the operation of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.” Kirby P said “[D]espite the several indications in the terms, structure and purpose of the Federal Act that it did intend to “cover the field”, it is impossible to ignore the express statement of Parliament's intention, expressed in plain terms in the provisions of the Federal Act.” He concluded that there was not inconsistency of the “indirect” variety, by virtue of the operation of section 8 of the Commonwealth Act.

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273 (1977) 137 CLR 545

274 (1991) 102 ALR 621

**4.146** The explicit statements in section 5 of the EC Act, as expanded by Order 1.06 of the EC (Animals) Order show that, at least as far as the EC Act and its subordinate legislation is concerned, the federal legislature has arguably expressed an intention that the States and Territories animal cruelty acts should operate concurrently with the federal act if it is possible to comply with both the State and Territory legislation and the federal legislation. This view is confirmed by the Explanatory Statement for the EC (Animals) Order. It says that the purpose of paragraph 1.06(1)(b) is “to allow State or Territory laws to operate if those laws impose a higher standard than this Order or the Australian Standards for the Export of Live-Stock.” However, as indicated earlier, the provisions of the Commonwealth legislative scheme and of ASEL in particular are sufficiently comprehensive in coverage of matters relating to the health and welfare of animals in the export process (and in particular on board ship) as to leave almost no situations where a State or Territory law would impose a higher standard.

It is also arguable that the same reasoning applies to the AMLI Act, given that under that Act, compliance with the requirements of the EC Act is a condition of an export licence. Thus, the Commonwealth “legislative scheme” can not be said to have been intended by the federal Parliament to “cover the field” of animal welfare as it relates to live export.

It is difficult, therefore, to envisage what acts of cruelty which might breach a State Act would not be covered by the field occupied by the Commonwealth legislation. Perhaps all that is left is something like the deliberate infliction of injury.<sup>275</sup>

**4.147** This still leaves open the question whether the State or Territory Act would be invalid as a result of “direct” inconsistency, by operation of the “rights” test. There is no express indication in any part of the Commonwealth legislative “scheme” governing live export that the federal Parliament intended the grant of a live export licence to confer immunity from the action of State or Territory laws. However, the extensive coverage of animal welfare issues by the Commonwealth scheme does seem to indicate that the intention was that a licence holder should in effect be immune from the operation of State laws, at least where those State laws seek to operate in areas expressly dealt with by the Commonwealth laws (and where the State laws do not “impose a higher standard”). In this regard there is a difference between the Commonwealth legislation governing live export and the legislation covering broadcasting which was the subject of the *Coffs Harbour* case.<sup>276</sup> There the Commonwealth legislation was silent on issues such as environment and planning considerations, being concentrated on the technical efficiency and quality of broadcasting services. Given that, the conclusion was that the Commonwealth

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<sup>275</sup> See the interesting commentary by Ian Weldon (2008) Why doesn't animal protection legislation protect animals?(and how it's getting worse) 1 *Animal Protection Law Journal* 9

<sup>276</sup> paragraph 4.136

Act was not intended to confer an immunity from the operation of the State law. The subject of environment and planning matters was dealt with by the State law.

**4.148** Finally, it is important to note that the legislative scheme in the *Al Kuwait* case has been completely superseded by a far more detailed scheme so far as animal welfare is concerned. In particular, ALES (which applied at the time of the incident the subject of that case) could probably be justifiably said not to “cover the field” of animal health and welfare.<sup>277</sup> Features present in ASEL and which were absent in ALES are an extensive list of rejection criteria relating to the health and welfare of animals and detailed provisions concerning the maintenance of health and welfare of animals aboard ship. Crawford M found that the inconsistency between the Commonwealth and State law arose because the State law purported to take away a right granted by the Commonwealth law (ie grant of an export licence). She did not consider the view expressed in the *Coffs Harbour* case that for such a right to be associated with grant of an immunity from the operation of State law, there had to be an intention evident in the Commonwealth law to grant that immunity. This view may be mistaken, in the light of the lack of comprehensive coverage of animal welfare matters in ALES, which can perhaps be taken to indicate that the Commonwealth Parliament did not intend there to be immunity from the State laws. This view is supported by the statement in ALES that “the animal welfare legislation in each State and Territory specifies the mandatory animal welfare requirements that must be met in that State or Territory.” It is also perhaps surprising that Crawford M made no mention of section 5 of the EC Act (which was in the version of that Act as it applied at the relevant time). However, regardless of that, Crawford M seemed to indicate that the determining factor which in effect gave the exporter immunity from prosecution for breach of the

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<sup>277</sup> Relevant statements in ALES include:

- 1.3 the animal welfare legislation in each State and Territory specifies the mandatory animal welfare requirements that must be met in that State or Territory;
  - 5. LiveCorp is to be advised of a notifiable incident, including “any other incident that has a serious adverse effect on animal welfare (such as an outbreak of endemic disease or a ship running out of feed or water);
  - 6.1.1, 7.1.1; 7.5.1; 7.8.1 animals must not be selected for export unless they “...are free from clinical signs of disease, external parasites and injury”
  - There are also limits on the export of horned cattle, pregnant cattle, horned sheep and goats and on the weight of animals exported from southern ports and the weight and stage of development of sheep and goats and shearing of sheep (6.1.3; 6.1.4; 6.1.7; 6.8.7; 6.8.8; 7.1.3; 7.1.4; 7.1.5; 7.1.6; 7.1.7; 7.1.8)
  - 6.1.6 there must be a management plan to “ensure animal welfare is not compromised during export”
  - 6.4.3; 7.5.3 there must be daily inspections of animals at an assembly depot and sick or injured animals must be appropriately treated and a stock person must be authorised to seek veterinary advice or destroy sick or injured animals (6.4.4; 7.5.4);
  - 6.4.6, 6.4.7, 6.8.10, 6.8.12, 6.8.13, 6.8.14, 6.8.15, 7.5.6, 7.5.7; 7.9.9; 7.9.11 there must be sufficient access to feed and water at feedlots and on ships;
  - 6.6.2; 7.7.2 animals injured during transport must be promptly treated or destroyed;
  - 6.8.16; 7.9.13 a person must be assigned to be responsible for animal welfare;
  - 6.8.17; 7.9.14 veterinary drugs must be carried on board ship;
  - 7.9.15 instructions to the Master must “cover the authority to humanely destroy any animal that is seriously ill or injured”
- There were also detailed requirements relating to stocking density and pen area.

relevant State law was that a Commonwealth officer was required by the legislation to be (and was) satisfied of the welfare of the animals and an AQIS-accredited veterinarian had certified the animals were fit to undertake the export journey.<sup>278</sup> With respect, this may not be sufficient to indicate that intention to grant immunity.

However, it is apparent from all of the above that a State or Territory can not legislate to prevent the live export of animals from the jurisdiction. Such a law would be invalid by virtue of a direct inconsistency between that law and the federal law, notwithstanding the provisions referred to above.<sup>279</sup>

### *Conclusion*

**4.149** The Commonwealth laws relating to live export are a complex mix of statutes, regulations, orders and standards. The structure of the law is irrational and difficult to follow. In some regards it is incomplete and undefined. This reflects, in part, the failure to implement important recommendations made by the Keniry Committee in the wake of the *Cormo Express* disaster.

Much of the law is in the form of delegated legislation and many aspects of that delegated legislation are not reviewed by Parliament. Publication of the key standards of ASEL on a government department website is not a satisfactory way of making legislation available to those interested in enforcement of it, or those who might find themselves the subject of a prosecution.

Key players in the live export chain (particularly the owners of animals once they are on board ship, the ship's owner and the ship's master) are under no legislative obligations (apart from obligations of the owner and master under Marine Orders Part 43 made under the *Navigation Act*, which in any case hardly concern animal welfare).

AQIS, which in practical terms is charged with enforcing the law, has a clear conflict of interest. It sees its role primarily as looking after the interests of its "clients" (that is, the live exporters).

Reporting of mortality, breaches of the law and standards is almost entirely reliant on industry self-reporting. The law does not require there be independent observers during the voyage- this was a central recommendation of the report of the Keniry inquiry (ie that the ship-board veterinarian be contracted to AQIS, not the inspector) and that recommendation has not been implemented.

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278 At paragraph 193 of the reasons

279 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 563 per Mason J



Although both the industry and AQIS claim that there is transparency concerning the regulation of live export, in actuality the opposite is true. The information that is made available is selected and edited. AQIS does not comply with its statutory obligation to report actions taken against exporters. Evidence from unpublished AQIS reports suggests there are many breaches of live export licence conditions and failure to comply with other legal requirements, and that sanctions are not applied. It seems reasonable to assume that this is an indication of even more extensive and commonplace non-compliance. This view is certainly sustained by statements made by counsel for the exporter in the *Al Kuwait* case, in which it appeared that there were many instances in which the exporter had simply failed or was otherwise unable to comply with the legislative requirements imposed by the Commonwealth law.

The conclusion is that the legislative and enforcement process is not working. It appears to the author that this situation can only be improved by making sure that sanctions are applied to those who break the law. This should be done by establishing under statute a separate enforcement body with all of the investigative powers currently given to AQIS, but which is completely independent of AQIS. It is also necessary to improve the law, at least by fully implementing the recommendations of the Keniry committee and preferably by reviewing the legislation. The review should seek to rationalise the legislative scheme into one statute and should include instituting parliamentary review of ASEL. It should also introduce liability for persons other than the exporter who are responsible for the welfare of animals aboard live export vessels, including (but not limited to) the ship's master, the owner of the animals and the owner of the ship.

## APPENDIX 1

### *Rejection criteria in ASEL Standard 1.7 (Note: also in ASEL 3.17)*

Livestock sourced for export must be fit to enter the export chain. Livestock sourced for export must be inspected on-farm and any animal showing signs consistent with the rejection criteria below, or any other condition that could cause the animal's health and welfare to decline during transport or export preparation, must not be prepared for export. Such conditions include those shown below:

#### General requirements

- Fail to meet requirements of protocol/import permit, such as sex, type, breed, tag number
- Lactating animals with young at foot (Note: this does not apply to livestock being exported by air)
- Lactating animals
- Pregnancy status not confirmed as appropriate for journey

#### Systemic conditions

- Emaciated or over fat
- Anorexia (inappetence)
- Uncoordinated, collapsed, weak
- Unwell, lethargic, dehydrated
- Ill-thrift

#### Musculoskeletal system

- Lameness or abnormal gait
- Abnormal soft tissue or bony swellings

#### Gastrointestinal system

- Dysentery or profuse diarrhoea
- Bloat
- Nervous system
- Nervous symptoms (head tilt, circling, incoordination)
- Abnormal or aggressive behaviour/intractable or violent

#### External/skin

- Generalised papillomatosis or generalised ringworm, dermatophilosis
- Generalised and extensive buffalo fly lesions
- Generalised skin disease
- Visible external parasites
- Significant lacerations
- Discharging wounds or abscesses
- Cutaneous myiasis (flystrike)
- Ballanitis (pizzle rot in sheep)
- Blood/discharge from reproductive tract (vulva/prepuce)

#### Head

- Blindness in one or both eyes
- Cancer eye
- Keratoconjunctivitis (pink eye)
- Excessive salivation
- Nasal discharge

Coughing

Respiratory distress — difficulty breathing

Untipped sharp horns

Cattle: horns longer than 12 cm

Buffalo: horns longer than the spread of the ears

Sheep/goats: long horns greater than one curl, except in approved NOI and CRMP

Horns causing damage to head or eyes

Deer: hard antlers longer than 5 cm

Bleeding horn/antler stumps

Broken antlers

In velvet exceeding 10 cm in length

Scabby mouth

Other

Mobs with unusual mortalities over the whole period of pre-export isolation

Large disparities in size or age (redraft animals in this case)