

31 August 2020

Inspector-General of Live Animal Exports
Department of Agriculture
GPO Box 858
CANBERRA ACT 2601

Via: Have Your Say website

Dear Mr Carter

Submission to the review of the Moss Review implementation

Thank you for the opportunity to provide a submission to your review of the Department's progress in implementing the 31 recommendations of the Moss Review.

We acknowledge the Department has made considerable progress in implementing some of the recommendations, including the establishment of the position of Principal Regulatory Officer, a stronger focus on animal welfare indicators as opposed to mortality rates, and greater consultation through the Live Export Animal Welfare Advisory Group. However, several significant recommendations have not been adequately addressed. We outline these in our attached submission.

Fundamentally, we remain concerned that the true essence of the Moss Review has not yet materialised in changes to the Department's capability and culture in regulating the trade. Recent events involving the exemption approval process for the *Al Kuwait* shipment made this abundantly clear. In this case, the Department contradicted its own previously strong evidence-based decision and approved a voyage knowing of the severe implications it posed for animal welfare. As the summary Independent Observer report showed, this voyage went entirely as expected, with several thousand animals suffering severe heat stress. This experience demonstrates that the Department is still grappling with its conflicting roles of trade facilitator on the one hand and animal welfare regulator on the other. This conflict is not simply theoretical but has real world consequences for the welfare of animals and must be addressed as a matter of urgency.

We hope that your review will place strong focus on this enduring issue and how it can be better managed via strengthening the Department's response to the Moss Review recommendations. Please do not hesitate to contact our office should you require further information or clarification on the matters addressed in our submission.

Yours sincerely,



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1. Prescribe the ASEL as regulated standards (rec. 4)

RSPCA Australia raised the limitations of the legal status of the ASEL in our submission to the Moss Review (attached). We highlighted the fact that under the current legislative framework, ASEL simply takes the form of a condition imposed on the exporter's licence under the *Australian Meat and Livestock Industry Act 1997* (Cth) (AMLI Act) and permit under the *Export Control (Animals) Order 2004* (Cth). This status raises issues for both the range and adequacy of available penalties for non-compliance and for the scope of liability under the ASEL.

Penalties are restricted to either the heavy sanctions of licence suspension or cancellation, or simply the imposition of further conditions on the exporter's next consignment, which exporters treat as the cost of doing business. There are no penalties in between these extremes. Infringement notices, administrative sanctions, or prosecution (for breaches that do not reach the high standards of criminality set out in the Criminal Code, AMLI Act, and Export Control Act) are not available to the regulator.

As compliance with ASEL is only a licence/permit condition, liability for non-compliance only applies to the exporter. However, there are a range of other parties involved in the export supply chain including transporters, stock handlers, contractors, the ship's master who could engage in conduct that breaches ASEL but not be held liable because they are not the exporter nor employed by the exporter.

To address these limitations, the standards set out in ASEL should be regulated in the form of the *Export Control (Australian Standards for the Export of Livestock) Regulations* with specified penalties for non-compliance applying to any party involved in the live export supply chain within Australian jurisdiction.

The Moss Review accepted our proposal concluding that 'the RSPCA proposal would strengthen the current regulatory framework' and made the following recommendation:

Recommendation 4: That the department take steps to have the Australian Standards for the Export of Livestock prescribed as regulated standards, with appropriate penalties, for the purpose of strengthening the regulatory framework and encouraging compliance.

The Department's initial response, published on 31 October 2018, indicated that it supported the recommendation in principle and that it would explore the regulatory options available:

Support in principle

The department will explore the regulatory options available either within the existing framework or through the specific prescription of standards relating to animal welfare during export.

Under the Australian Meat and Live-stock Industry (Standards) Order 2005, the holder of a livestock export licence must not export livestock except in accordance with the Australian Standards for the Export of Livestock. The order currently refers to Version 2.3 of the standard that was published in 2011.

It is a condition on all export licences that exporters must meet the requirements set out in the order. Breach of a condition may result in regulatory action such as suspension or cancellation, and may constitute a criminal offence.

However, the Department's subsequent progress report stated that it had investigated the regulatory options and determined that redrafting the ASEL with more enforceable language provided a better approach:

The department has investigated regulatory options available within the existing framework and through the specific prescription of standards relating to animal welfare.

The department determined that redrafting ASEL with more enforceable language provided a better approach for the regulator and industry. This approach will ensure that animal health and welfare requirements can be met while also allowing for a more flexible regulatory framework that can readily facilitate continuous improvements.

This is effectively a rejection of recommendation 4 of the Moss Review. Redrafting the ASEL 'with more enforceable language' does not change the legal status of the ASEL nor does it address the fundamental limitations identified in the Moss Review. The ASEL version 3.0 will still take the form of conditions placed on the exporter's licence and permit approval process. They will not be regulated standards in their own right. Accordingly, the range of available penalties will still be limited as will the scope of liability.

Prescribing the ASEL as regulated standards was a core recommendation of the Moss Review for strengthening the current regulatory framework. We strongly recommend that the current Review characterise the Department's response as a rejection of recommendation 4 and encourage the Department to revisit its position with a view to implementing the recommendation as Moss intended.

2. Develop a common sense of purpose (rec. 13)

The Moss Review identified (pg xi) that:

The department's focus on trade facilitation means that it is balancing competing factors in its role as the regulator of live animal exports. Some stakeholders and department staff members told the review that the department's trade facilitation and regulatory functions are contradictory. The focus on trade facilitation and industry deregulation appears to have had a negative impact the department's culture as a regulator.

The Review went on to recommend that the various roles and responsibilities within the Department be clarified to 'develop a common sense of purpose, identify and alignment in relation to the regulation of live animal exports.' The Department's 2019 progress report indicated that this recommendation has been implemented, noting that 'new governance arrangements have been established in the Live Animal Exports Division to ensure a shared sense of purpose and clear allocation of activities' including the establishment of multi-division management committees to address issues of common interest.

While increased communication between relevant divisions is desirable, we are concerned that the Department is still grappling with its conflicting roles of trade facilitator and animal welfare regulator. This was clearly illustrated by the recent *Al Kuwait* exemption application process where the Department first made a decision to deny the exemption application due to the 'significant risk of heat stress if the exemption is granted', to then effectively reverse the decision 10 days later, allowing the vessel to depart Australian waters with 33,341 sheep for the Middle East during one of the most dangerous times of year.

As predicted, these animals were subjected to severe heat stress with the summary Independent Observer report noting that 3% of the sheep (approximately 1,000 animals) experienced heat stress score 4, and 12% (approximately 4,000 animals) experienced heat stress score 3. Heat stress score 4 is the highest level of heat stress, described in the Department's own Export Advisory Notice (EAN 2018-11) as 'severe heat stress' with 'open mouth panting with tongue out', 'extremely laboured' respiration, and 'distressed'

demeanour. Heat stress score 3 is the next highest score, described as ‘open mouth panting’, ‘laboured’ respiration, and ‘extreme discomfort’ in demeanour.

Notably, the evidence base concerning the risks to animal welfare did not change between the first and second decisions. The first statement of reasons made it very clear that the decision maker considered all of the additional mitigation strategies proposed by the exporter in relation to ‘wool length, pre-existing health conditions, body condition score, heat-sensitive classes of sheep, stocking density, recent ventilation modifications, additional weather monitoring technology during the voyage, additional sawdust, fodder and water provisions, voyage length reduction, and discharge planning.’ However, the decision maker found that these strategies ‘did not provide adequate mitigation against the animal welfare impacts of the significantly higher WBTs expected to be experienced by the MV Al Kuwait if it departed on or about 15 June 2020.’

The only substantive differences between the first and second decisions was a) the decision maker - a more senior officer within the Department, and b) the relative weight placed on the commercial interests of the exporter and of the trade with Kuwait:

I gave weight to RETWA’s concerns about the significant financial and ongoing trade impact that a decision to refuse to grant the exemption would have on its business operations and the interests of other entities and persons associated with it. I considered the impact that a decision to refuse the exemption might have on RETWA’s relationship with its trading partners. I was satisfied that there was a risk that a decision to refuse the exemption might further incentivise RETWA’s trading partner, Kuwait Livestock & Trading Company (KLTT), to develop alternative supply chains away from the Australian market, which would adversely effect RETWA’s business. I also had regard to representations made by KLTT, the Embassy of the State of Kuwait and the Kuwaiti Minister of Commerce and Industry to various Australian Ministers. I was satisfied that a decision to refuse to grant an exemption would adversely impact RETWA’s trade relationship with KLTT and Australia’s trade relationship with the State of Kuwait, and might further incentivise them to develop supply chains away from the Australian market.

The *Al Kuwait* exemption decision is a case study on the conflict between animal welfare and trade facilitation faced by the Department. While typically these deliberations are dealt with internally, the competing interests played out in a very public way during this exemption process. What really led to the decision reversal will no doubt be the subject of further scrutiny as the Australian Senate recently passed an order for the production of documents relating to the decision process.

What is clear from the Al Kuwait decision is that internal compartmentalisation of competing roles is not sufficient to manage conflicting interests. As our submission to the Moss Review noted:

When regulatory responsibilities for protecting animal welfare are placed within the same bureaucratic structure as that which is responsible for promoting and expanding trade and industry productivity, it gives rise to an inherent institutional conflict of interest. We acknowledge attempts by the Department to separate and compartmentalise these competing functions internally, but the weight of evidence demonstrates that this has failed to adequately manage the conflict in practice.

While Dr Clegg [the previous delegated decision maker] may be in a separate unit to those dealing directly with agriculture policy and the promotion of trade and market access, she is nevertheless answerable to the same chain of command. Significant decisions that have potential political ramifications will invariably be elevated up the chain. Ultimately, the Secretary of the Department

will have some bearing on such decisions, and Department Secretaries are arguably the most conscious of government policy as they are directly accountable to the responsible Minister.

In the Al Kuwait case, the initial decision maker, Assistant Secretary Tina Hutchison, made a decision to uphold the integrity of the *Australian Meat and Live-stock Industry (Prohibition of Export of Sheep by Sea to Middle East - Northern Summer) Order 2020*, but her decision was effectively overridden by the Deputy Secretary of the Department. The independence of the delegated decision maker was effectively quashed.

Related public statements made by the Minister on *ABC News Breakfast* (27 May 2020) prior to the decision left no uncertainty as to what his views were on the matter:

They're all in good health I'm advised and we'll work with the exporter about trying to get that boat going. It will miss the deadline of 1 June, for the moratorium on the northern summer exports. But, there is an exemption, I'm advised, in the legislation for the independent regulator, to give, to grant approval for that ship to sail after 1 June.

The Minister was subsequently embarrassed when the application was rejected only days later, and he was subjected to intense criticism from WA farm groups including the Pastoralists and Graziers Association. The optics of the Department then subsequently reversing its decision via the Deputy Secretary without any substantive change to the underlining material facts gives rise, in our view, to a reasonable apprehension of Ministerial involvement. This is damaging to any pretence that the Department is indeed an 'independent regulator.'

It is clear that the Department is still struggling to establish a common sense of purpose, identity and alignment in relation to the regulation of live animal exports, and the Department's focus on trade facilitation still appears to be having a negative impact the Department's culture as a regulator. More needs to be done by the Department to resolve, or at the very least to better manage, this conflict, and to protect the independence of those tasked with upholding the animal health and welfare responsibilities of the Department and the integrity of the laws it administers. We strongly recommend that the Review considers this enduring issue and what additional measures are necessary for the Department to truly give effect to the capability and cultural changes recommended by the Moss Review.

3. Re-establish an animal welfare branch (rec. 14)

To re-orientate the Department's focus on animal welfare, the Moss Review recommended the re-establishment of the Animal Welfare Branch, noting the following (pg 45):

The department needs to re-establish an Animal Welfare Branch to engage with the industry in relation to animal welfare in the context of live animal exports. It is noted that the Commonwealth has few animal welfare powers beyond live animal exports and export approved abattoirs. Nevertheless, the department has a role in providing national leadership from this perspective.

The department will need to define - with the Minister's direction - what broader objective/outcome an Animal Welfare Branch could be expected to have.

The previous Animal Welfare Branch, which was abolished by the Abbott Government in 2013, consisted of approximately 28 staff who were responsible for a range of animal welfare matters in addition to the live animal exports, including the coordination of national animal welfare standards and policy and the implementation of the *Australian Animal Welfare Strategy*. As noted above, Moss clearly intended the re-

established Branch to engage with animal welfare issues outside of live exports, including the provision of national leadership on animal welfare issues.

The Department's 2019 progress report indicates that its implementation of this recommendation is complete. However, to-date, the re-established Animal Welfare Branch sits entirely within the Live Animal Exports Division and its responsibilities are confined to live exports. We are unaware of whether the Department has engaged with the Minister on what broader objectives and outcomes the Animal Welfare Branch is expected to have. We recommend the Review consider whether the Animal Welfare Branch has truly been "re-established" in the sense envisaged by the Moss Review.

4. Establish the Inspector-General of Live Animal Exports (rec. 15)

One of the most significant recommendations to come out of the Moss Review was the establishment of the Inspector-General of Live Animal Exports to oversee the Department as the regulator of live exports. Legislation establishing the Office was successfully passed on 18 September 2019.

To be effective in fulfilling the oversight function, the office of the Inspector-General must have sufficient funding and resourcing, and the Inspector-General must be appointed for a period that provides certainty of tenure. We note that the Inspector-General is currently aided in his duties by a small team consisting of two other officers. We do not believe this is sufficient resourcing for the task of overseeing the Department's role as regulator of the trade and recommend that substantially more funding and resourcing be made available to the Office.

We also note the enabling legislation provides for the Inspector-General to be appointed for a period of up to five years but that the current term of appointment announced by previous Agriculture Minister Bridget McKenzie on 17 December 2019 was only for one year. This does not, in our view, provide the security of tenure required for an independent office. We strongly recommend that the next instrument of appointment include a substantially longer term of office.