

Live Animal Exports

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The trade with Egypt: a case example

1. In February 2006 the Australian Minister for Agriculture, Peter McGauran suspended the live trade in animals to Egypt. This followed a public outcry with the 60 Minutes program exposé of the shocking treatment of cattle prior to slaughter at Cairo's major abattoir, Bassateen. There were media reports too on the abuse of Australian sheep in the lead up to the *Eid Al Adha (Feast of Sacrifice)* in Cairo, where sheep were shown trussed and loaded into car boots in a region known for soaring temperatures, or tied

atop vehicles, before later having their throats cut by untrained and unskilled private purchasers.

2. In October 2006 the Australian Government permitted live animal exports to Egypt on the basis that two Memoranda of Understanding (“MOU”) had been signed by the two governments. The principal MOU was on Handling and Slaughter of Australian Live Animals. This MOU required that international animal welfare guidelines (but not standards) established by the World Animal Health Organisation, known as OIE, apply to the handling of Australian livestock, namely, sheep and cattle. In addition, there are some specific handling requirements for Australian cattle, but not for sheep.
3. The OIE guidelines however are lower than the standards prevalent in Australia. For example, no pre-stunning is required before killing. Killing, according to Halal prescription, is by slitting the throat and bleeding out the animal.

Memoranda of Understanding

4. A Memorandum of Understanding is in Foreign Office speak, ‘a convergence of will’. It is unenforceable and no stipulated consequences ensue for its breach. The Egyptian Government requested, apparently, that its terms be kept confidential. The Australian Government, anxious for the trade to resume, agreed. The terms of the MOUs were thus not exposed to public scrutiny, despite their purported public interest objects.

The principal Memorandum of Understanding enabled though the trade’s initial resumption, which the Minister and Australian Government were embarrassed into suspending by reason of the 60 Minutes exposé of the animals shocking ill-treatment in Egypt.

The MOU breaches on the first resumed shipment

5. By media release dated 13 February 2007, the Minister acknowledged there had been “some appalling cases of animal cruelty detailed in a report released late last year by animal welfare group Animals Australia”. Video footage had been taken by Animals Australia of such breaches in December 2006, and given to the Minister and the industry in early 2007. This report documented eye witnessed breaches by the hundred of the provisions of the Australia/Egypt MOU. These breaches arose from the first and only shipment of sheep aboard the *Maysora* after resumption of the trade to Egypt. Destined originally for Israel, some 40,000 sheep were ultimately unloaded in Egypt.

Despite the federal Department’s promises, no Departmental official met the first resumed shipment at dock or elsewhere. The live animal exporter’s veterinarian aboard the ship had got off at Jordan, only two days sailing time from Egypt, despite the obligation upon the exporter to have a veterinarian stay the journey and attend the animals’ disembarkation.

Only some 20,000 or so were sent to the abattoir, a shocking process as it was by reason of uncaring handling and Halal killing without pre-stunning. But worse, some 20,000 were sold to private purchasers for ritual slaughter purposes, but who had no butchery skills.

As a result, Mr. McGauran wrote to his Egyptian counterpart in March 2007 asking for a report on those alleged breaches. In the interim, with no reply from his Egyptian counterpart, the trade was informally suspended by the Minister.

6. Whilst the trade was thus suspended, by the same media release of 13 February 2007 Mr McGauran said that:

“... A ban on live animal exports would remove any incentive for Egypt to work with Australia to improve animal handling standards.”

Some three months later (23.5.2007) a Departmental officer, Mr Paul Morris, appeared at an Estimates hearing before the Standing Committee on Rural and Regional Affairs and Transport (available at: <http://www.aph.gov.au/hansard/senate/committee/S10252.pdf>) and in his answers one finds the limited means proffered by and available to any Australian Government attempt to improve animal handling standards in Egypt, and the almost insuperable difficulties posed by Egyptian sovereignty once the animals were unloaded dockside at the port of destination.

7. See powerpoint photos (courtesy of animals Australia) in the ‘Current Issues > Live exports’ section of the BAWP website www.bawp.org.au.

The limited endeavour of government to protect welfare

8. As to what Australia does to “try to influence the countries in the region to improve their handling conditions and the slaughter/feedlot conditions in those countries”, Mr. Morris continued (and I interleave his answer with paragraphs):

“We do that through a combination of:

- (a) “the efforts that Dr. Kiran Johar makes in terms of travelling around the region”;
- (b) “the money we put in through the technical cooperation money”;
- (c) “as well as working very closely with industry – Meat and Livestock Australia and LiveCorp, who also allocate money for doing technical cooperation activities and capacity building in the region.””

Finally Mr. Morris noted:

“It is very much a joint effort between us and industry in terms of trying to improve those standards.”

In this respect, we see a government which looks to work in tandem with an industry which has always sought to perpetuate the trade. This is the Australian government’s starting point.

9. It was plain from further testimony by Mr Morris (page 30 of the transcript) that the role of Dr Kiran Johar as Australia's representative to improve animal handling standards in Egypt was sought to be dealt with by him in the course of covering market access and other issues in some 14 or 15 other countries, apart from Egypt, right across the Middle East region. Since then, the Australian Meat & Livestock Corporation and Livecorp have progressively arranged for further representatives to work in the Middle East with importers in an endeavour to improve animal handling standards. That said, sales are still made direct to private purchasers, and no pre-stunning accompanies ritual slaughter. Otherwise, for the industry viewpoint see:

- <http://www.liveexportcare.com.au/>;
- <http://www.mla.com.au/About-the-red-meat-industry/Animal-welfare>;
- <http://www.daff.gov.au/animal-plant-health/welfare/export-trade>.

10. From further testimony by Mr Morris (at in particular pages 35-36 of the transcript), it was apparent that the Australian Government was prepared to only monitor at least "the first couple of shipments" of cattle under the MOU with Egypt. This did not suggest a commitment to the long-term challenge of improving treatment of Australian export animals in Egypt. Moreover, the Minister's wish to "improve" animal handling methods and for Egypt to "*more* humanely handle sheep" could not be taken to be directed to securing humane outcomes as such.

Further, in relation to sheep, Mr Morris' testimony indicated a reluctance to suggest that home or private slaughter be prohibited by way of only authorising export to Egypt of sheep bound for abattoir slaughter. The reason for this reluctance was expressed to be because of the precedent it may set for trade with other Middle Eastern countries. This suggests the focus was upon export dollars rather than welfare. At least abattoir

slaughter for cattle had been agreed with Egypt. That said, the manner of abattoir slaughter could not be viewed as remotely humane, despite the Australian Government's attempts to improve methods of slaughter.

The nine MOUs with Middle East countries

11. Presently, there are nine MOUs with Middle Eastern countries: the United Arab Emirates in December 2004; Kuwait in March 2005; Eritrea in April 2005; both Saudi Arabia and Jordan in May 2005; Egypt in October 2006; and Libya most recently in May 2007. Unlike the other countries, there are two MOUs with Egypt. The first is the standard one that Australia has signed with other countries, requiring that all animals be unloaded regardless of the health conditions. These MOUs with all these countries are solely directed to avoiding the problem that was posed by the *Cormo Express* which in January 2004 had carried some 100,000 sheep stranded on board the vessel for more than two months, because it was unable for many weeks in Middle Eastern waters to find a country to permit it to dock and unload its animals. *None* of these MOUs provide for welfare standards.

The second MOU with Egypt travels beyond these single MOUs with other countries. As stated earlier, this further MOU requires Egypt to apply OIE guidelines in the treatment of animals unloaded into Egypt for sheep and cattle. In addition, it also has some specific provisions for cattle as to their handling. These extend to tracing the animals from arrival through to slaughter, requirements as to use of slaughter boxes and slaughter facilities, and so on.

The ending of the trade in animals with Egypt but for cattle to one port only

12. Ultimately, by an executive order of 29 November 2008, *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008*, the Australian government permitted cattle to be exported to and slaughtered at one port of destination only in Egypt, Al

Sokhna. This order in effect replaced the previous relevant MOU about handling and slaughter.. The order also prevented in effect the export to Egypt of any other animal species.

The welfare stages in the live animal trade export chain

13. The live animal trade comprises:

- their long transport to dock;
- their conditioning dockside to pellet feed;
- their loading;
- their extended voyage with high mortality numbers, and even higher numbers of animals that survive the journey only to arrive ill or in a poor, sub-standard and emaciated condition;
- their manner of disembarkation;
- their manner of treatment upon being unloaded;
- their handling before slaughter; and
- the manner of their slaughter.

The prelude to the *Emanuel Exports* case: the struggle to have the evidence investigated and charges laid

14. Shortly before the *Como Express* incident, the live export ship, the *MV Al Kuwait*, left Fremantle on 11 November 2003 with a shipment of 100,000 live sheep. When the ship docked in Kuwait City 16 days later, evidence was gathered “on the spot” by video as to, amongst other things, the condition of the sheep disembarking and their subsequent treatment at dock and beyond. The video was taken by an Animals Australia representative, Lyn White.

15. See short video (courtesy of Animals Australia) in the 'Current Issues > Live exports' section of the BAWP website www.bawp.org.au.
16. Animals Australia then formally lodged a complaint with the office of the Director-General of the Department of Local Government and Regional Development in West Australia, the person empowered to bring proceedings under the *Animal Welfare Act* 2002 and with ultimate responsibility for securing its enforcement. During the period June to November 2004 the complaint was sent by the Director-General to the West Australian State Solicitor for advice as to jurisdictional issues. Animals Australia believes that the State Solicitor's advice was that no jurisdictional impediments existed to the complaint's investigation. Then, the Director-General advised Animals Australia that she had decided to obtain advice from the office of the federal Attorney-General as to jurisdictional issues.

Eventually, on 24 January 2005 Animals Australia applied in the West Australian Supreme Court for a writ of mandamus against the Director-General, that is to say, a prerogative writ to compel a public officer to perform their duty. On 28 January 2005 the West Australian Supreme Court granted an order nisi. In April 2005 the West Australian State Solicitor advised Animals Australia that the West Australian Government was investigating the complaint. Ultimately, charges were laid in November 2005 shortly before the time to do so expired, and some two years after the alleged offence.

The trial took place in February 2007. The decision of Magistrate CP Crawford was handed down a year later on 8 February 2008.

The Emanuel Exports case

17. In summary, the Court first found that during the *MV Al Kuwait's* journey with a shipment of 13,163 fat, adult sheep (classed as A class wethers and Muscat wethers), ex-Fremantle through Australian territorial waters (24 hours from 1800 hours on 11 November 2003) to ports in North Africa, the risk of them suffering inanition (lack of nourishment from failure to eat) and salmonellosis was such that it constituted cruelty to those animals because they were transported in a way that was likely to cause them unnecessary harm contrary to subsections 19(1) and (3), *Animal Welfare Act 2002* (WA).
18. The Court held that the Commonwealth legislation and associated legislative instruments constituted a regime for regulating the transport of sheep by sea for the purpose of export. The Court further held that the regime did not, and was not intended, to “cover the field” (see *ex parte McLean* (1930) 43 CLR 472 at 483) but that nevertheless there was an “operational inconsistency” between Commonwealth law and the AWA: see paragraph 192, reasons for judgment. This is because, and only because, of the Court’s conclusion that the Commonwealth regime permitted the export of fat sheep by sea in the month of November. The company had obtained a Commonwealth export permit which authorised these particular exports and, the Court held, it followed that any attempt by the State of Western Australia to make such exports under the Commonwealth export permit a criminal offence on welfare grounds produced an “operational inconsistency”. This had the result, it was held, that the State law was inconsistent with section 109 of the Constitution. See paragraphs 189 to 203, reasons for judgment.

In particular, I first note the following from paragraph 193 of the Court’s reasons:

“ ... Certainly the AWA does not in terms prohibit the export of fat sheep in November to the Middle East. Emanuel obtained an export licence and permit from the Commonwealth to do just that. Thus while the State maintains the likelihood of unnecessary harm to fat sheep

shipped in November, made the exercise cruel, the relevant Commonwealth Officer was satisfied, inter alia, of the adequacy of the consignment management plan and the welfare of the animals. A veterinarian accredited by a Commonwealth Agency, AQIS for the purpose, certified all classes of sheep to be healthy and fit to undertake the export journey. Arguably that certification is not inconsistent with the State's construction of the AWA.” [emphasis added]

Further, the Court said at paragraph 194:

*““The Commonwealth regime contemplated, indeed permitted export of fat sheep by sea, in November. Emanuel complied with the requirements of the Commonwealth and secured an export licence and permit. What was, and is, permitted under Commonwealth law, namely the export of fat, adult sheep in November, is made unlawful under the AWA due to the likelihood of unnecessary harm. The exercise of the right, or authority acquired by Emanuel to export sheep, including fat adult sheep, in November would be made criminal if the AWA is given effect, as argued by the State. This is a case of “operational inconsistency”, see *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44 at [201] and *Victoria v Commonwealth (“the Kakariki”)* (1937) 58 CLR, 618.” [emphasis added]*

The central plank of the Court’s reasoning

19. It appears that the central plank of the Court’s reasoning is that, once the company secured an export licence and permit from the Commonwealth, the company had an absolute legal right to export the sheep in question; a legal right that could not be modified, restricted, or made criminal if exercised, by virtue of the State animal welfare act. See paragraphs 173, 174, 191, 194-6 and 199.

Taken together the export licence and permit were conditional, not absolute

20. But the Commonwealth export licence and permit did not confer an absolute legal right to export the sheep in question. Taken together, they were conditional, not absolute. The operation of the export licence conditions did not cease upon grant of the export permit, and still obliged the permit holder to comply with mandatory animal welfare requirements of the State legislation. This was noted by the Court at paragraph 156 of the reasons for judgment. Put another way, whether or not the export permit by its

terms was untrammelled,¹ the exporter remained subject to the relevant export licence conditions “until exported animals are unloaded at their destination”:² see Regulation 9, *Australian Meat and Live-Stock Industry (Export Licensing) Regulations* 1998, in paragraph 22 below.

21. Section 10, *Australian Meat and Live-stock Industry Act* 1997 conferred power upon the Secretary to grant a licence to export livestock from Australia. Section 15 provided:

“An export licence is subject to any conditions that are prescribed by the regulations, in addition to the conditions to which the export licence is subject under this Act.”

22. Regulation 9 of the *Australian Meat and Live-stock Industry (Export Licensing) Regulations* 1998 by sub regulation (3) provided:

“The live-stock export licence is subject to the condition that the holder must have regard to the mandatory animal welfare requirements prescribed by the relevant standards body at all times until exported animals are unloaded at their destination.”

The “Standards Body” was the Australian Livestock Export Corporation Ltd. It is this corporation which published in March 2001 the *Australian Live-stock Export Standards*.

23. Paragraph 1.3 of the Standards provided inter alia:

“Animal Welfare Legislation and Codes of Practice
The animal welfare legislation in each State and Territory specifies the mandatory animal welfare requirements that must be met in that State or Territory. Export preparation must also be in accordance with relevant Codes of Practice.

The Australian Live-stock Export Standards is the national Code of Practice for the live-stock export industry.”

24. To borrow substantially from the language employed by the High Court majority in its reasons in *Commercial Radio Coff's Harbour v Fuller* [1986] 161 CLR 47 at 56-8,³ the construction of the Commonwealth laws led to the conclusion that they do not purport

¹ Not having sighted a copy, I do not know.

² I leave aside here the question of extra-territorial reach of the Regulation.

³ This case was referred to at p.2 of the Court's reasons for judgment as a case referred to in the judgment. However, upon my inspection of the reasons it does not appear to have been referred to.

to state exclusively or exhaustively the law with which the export of live sheep must comply. Indeed, the laws plainly depended upon compliance with State animal welfare legislation. The relevant statutes and regulations prohibited export of live sheep without a licence and a permit.

The prohibition was removed upon a grant of a licence and a permit, subject to certain conditions.

In the case of a yearly export licence, failure to comply with these conditions may result in a failure to renew the licence and an offence under section 52(3), *Australian Meat and Live-stock Industry Act 1997* where a condition was contravened “*either intentionally or being reckless as to the condition*”. A licence conferred on the grantee a conditional only permission to export animals.

In the case of an export permit issued dockside when the consignment was loaded, there was nothing in the Commonwealth laws which suggested that the export permit conferred an absolute right or positive authority to export live sheep so that the grantee, because it had a permit, was immune or exempt from the obligation to comply with State laws imposed by the conditions of the export licence (granted under another and complementary Commonwealth law).

Afterall, an export permit endured for no more than 72 hours in respect of a particular consignment of sheep on a specified export journey, whereas an export licence endured for at least one year, and was capable of renewal: see sections 21 and 22, *Australian Meat and Live-Stock Industry Act 1997*. The conditions of an export licence thus remained in force in respect of all steps in the chain of export over a lengthy period, including beyond the time of grant of the export permit. The export licence conditions

unequivocally required observance by the licence holder of the mandatory animal welfare requirements required by the Australian Standards as a condition of the export licence. Those requirements included compliance with mandatory animal welfare requirements “*that must be met in that state or territory.*” In other words, these requirements had to be addressed and satisfied on an ongoing basis, notwithstanding the grant of a 72 hour export permit. Despite the short duration of the export permit (72 hours), its reach was in effect extended by making an export licence a precondition to the grant of the export permit. Though different legislative creatures, they were thus entirely complimentary and intended to be so.

Indeed, the *Export Control Act* 1982 by section 5 left room for the operation of laws, both State and Commonwealth.⁴ It provided:

“This Act is not intended to exclude the operation of any other law of the Commonwealth or any law of a State or Territory insofar as that law is capable of operating concurrently with this Act.” [emphasis added]

Further, Order 8(f) of the Export Control Orders specifically required an authorised officer to be satisfied that an export licence was held before he could issue an export permit.

The export licence required the holder to observe the Standards (and thus State and Territory laws) “...at all times until exported animals are unloaded at their destination”, and thus at least also to a time subsequent to the grant of the export permit [emphasis added]. The *Australian Meat and Live-stock Industry Act* 1997 provided for a detailed monitoring and enforcement regime to establish compliance with export licence conditions. The Commonwealth laws then were intended to operate within the setting of other laws of which the grantee of a permit was required to comply.

The operational inconsistency test for sec. 109 is passed

25. Accordingly, subsections 19(1) and (3), *Animal Welfare Act* 2002 (WA) pass both of the tests enunciated by Mason J in *New South Wales v Commonwealth and Carlton* (1983) 151 CLR 302 at 330, 45 ALR 579 at 598:

“[The ‘alter, impair or detract from’] test may be applied so as to produce inconsistency in two ways. It may appear that the legal operation of the two laws is such that the State law alters, impairs or detracts from rights and obligations created by the Commonwealth law. Or it may appear that the State law alters, impairs or detracts from the object or purpose sought to be achieved by the Commonwealth law. In each situation there is a case for saying that the intention underlying the Commonwealth law was that it should operate to the exclusion of any State law having that effect.” [emphasis added]

The Keniry Report, and amendments to the Commonwealth legal regime

26. The *Cormo Express* incident led to the Keniry Report into livestock exports announced by the federal Minister for Agriculture on 30 March 2004. The Government’s response was to amend the *Australian Meat and Live-Stock Industry Act* 1997 and the *Export Control Act* 1982. These amendments were made by the *Agriculture, Fisheries and Forestry Legislation Amendment (Export Control) Bill* 2004 to provide, in summary, for increased government regulation of the live animal export trade.

The present Commonwealth legal regime

27. To assist in navigating the complexities of the present Commonwealth legal regime, here is a broad overview of its general structure and operation, namely:
- (a) the *Australian Meat and Livestock (Standards) Order* 2005 as amended (and made by the Secretary under section 17 of the Act) by Order 3.1 provides:

“The holder of a live-stock export licence must not export live-stock except in accordance with the *Australian Standards for the Export of Livestock*” (Version 2.1, November 2006).
 - (b) by section 17(1), *Australian Meat and Live-stock Industry Act* 1997 the Secretary may make written orders or given written directions not inconsistent with the regulations to be complied with by the holder of an export licence; and

importantly, by section 17(5)(a) an export licence is subject to “the condition” that the holder of the licence must comply with orders made under this section;

- (c) accordingly, compliance with the *Australian Meat and Livestock (Standards) Order* 2005 requiring observance of the Australian Standards for Export of Live-stock is a “condition” of any export licence;
- (d) further, section 8(3), *Export Control Act* 1982 makes it an offence to export prescribed goods “in contravention of the conditions”, “sheep” having been declared to be prescribed goods under the *Export Control (Animals) Order* 2004, Regulation 1.04(a)); and the “conditions” referred to in section 8(3) can only be construed as including conditions to which a live-stock export licence under the *Australian Meat and Live-stock Industry Act* 1997 is subject;
- (e) the Australian Standards for the Export of Livestock (Version 2.2) are directed to health and welfare outcomes for livestock in the major steps along the export chain and incorporate State and Territory animal welfare legislation; and taking Standard 1 by way of example, we note it provides in common with the other Standards inter alia that:

“These Standards are relevant to each stage of the livestock export chain and should be reflected in relevant quality insurance programs. Livestock sourced for export must meet any requirement under a law of a state or territory. State and territory governments are responsible for ensuring that these jurisdictional requirements are met under respective state and territory legislation. AQIS must be satisfied that importing country requirements and the Standards have been met before issuing a health certificate and export permit.

Further details regarding roles and responsibilities and the export chain process are outlined in the Australian Position Statement on the Export of Livestock (www.daff.gov.au/livestockexportstandards.com.au). [emphasis added]

- (f) the Standards (by reason of the last sentence in the quotation from Standard 1) expressly incorporate by reference the Australian Position Statement on the Export of Livestock to the extent it outlines further details regarding roles and

responsibilities and the export chain process; and the Australian Position Statement on the Export of Livestock (published November 2006, the same month in which the Standards were published) by reason of its repeated references to the application of State and Territory government animal welfare legislation (see for example paragraphs 3.1, 4.1, 6.1, 6.2 and 6.6) puts beyond any doubt that State legislation applies;

- (g) the Commonwealth export licence and export permit do not confer an absolute legal right to export sheep because, taken together, they confer a right to export which is conditional, not absolute; and the licence holder remains obliged to comply with the Australian Standards for the Export of Livestock not only before the grant of the export permit, but also after the grant of the export permit but in respect of State legislation only for so long as and to the extent State jurisdiction extends offshore;
- (h) no direct operational inconsistency under section 109 of the Constitution arises between the State law and the Commonwealth laws: if however a State law was amended with the effect of making the actual export of a particular consignment of sheep by sea (or taking antecedent steps taken in the chain of export) a criminal offence on welfare grounds, a direct operational inconsistency would arise;
- (i) Standards 4 and 5 provide for the transfer to the master of the vessel of responsibility for the management and care of the animals from the time the sheep arrive at the port of loading to the port of disembarkation and thus raise the question whether these provisions exclude the exporter's possible responsibility under State legislation from the time the sheep arrive at the port of loading;

- (j) although not free from doubt, it would appear that the exporter continues to be obliged to comply with the Standards, despite Standards 4 and 5, during the voyage;
- (k) in particular, because the Standards require the exporter to engage an accredited stock person to achieve its obligation to ensure inter alia adequate onboard management and care of livestock during the voyage and in turn require the stock person to be “responsible for providing appropriate care and management of the livestock on board during the voyage”, it is contended that the responsibilities of the stock person as the exporter’s agent satisfy the test for ‘a person in charge’: the Tasmanian statute for example provides in sections 6 and 7 that the person have “the care or charge of an animal”;
- (l) by parity of reasoning, the same may be said of the “competent animal handlers” required to be provided by the exporters and thus act as the exporter’s agents in “ensuring” the humane loading of the animals.

The extra-territorial operation of State statutes

28. ‘Standard 5 – Onboard Management of Livestock’ provides that

“Onboard management covers the period from the time the first animal is loaded onto the vessel until the last animal is unloaded at the port of disembarkation”;

thus raising the question of the extraterritorial operation of State animal welfare legislation expressly incorporated by the Standards. For those interested there is set out in an **appendix** to this paper an answer to this question and the steps by which the conclusion is reached.

Two memoranda of advice on relevant questions

29. Further, also again for those who are interested, there is posted (in the ‘Current Issues > Live exports’ section of the BAWP website www.bawp.org.au) copies of two memoranda

of advice by Dr C Pannam QC and I, the first of which deals with the question of whether the Magistrate erred in law in the *Emanuel Export* case in concluding that there was an operational inconsistency under section 109 with Commonwealth laws on the part of the West Australian *Animal Welfare Act* 2002 (subsections (19)(1) and (3)), with the consequence that the Act or those provisions were invalid or inoperative. The second and later opinion dated 21 April 2008 concerned whether particular sections of the Tasmanian *Animal Welfare Act* 1993 were excluded by Commonwealth laws from possible application to steps in the chain of export of live sheep from Tasmania. It will be remembered that the Commonwealth laws were changed between those that applied in the *Emanuel Exports* case and the date of this second opinion by reason of the Keniry Report and the amendments to the two principal Commonwealth statutes.

Commonwealth legal regime: some criticisms

30. The Commonwealth legal regime for the export of live animals is a ‘mish mash’ of two statutes, *Australian Meat and Live-stock Industry Act* 1997 and the *Export Control Act* 1982; Regulations such as the *Australian Meat and Live-stock Industry (Export Licensing) Amendment Regulations* 2005 (No 1); Orders such as the *Export Control (Animals) Order* 2004, *Export Control (Orders) Regulations* 1982, and *Australian Meat and Live-stock Industry (Standards) Order* 2005 (as amended up to *Australian Meat and Live-stock Industry (Standards) Amendment Order* 2008 (No 1)); *Australian Standards for the Export of Livestock* (Version 2.2, November 2008) and the *Australian Position Statement; Navigation Act* 1902; *Marine Orders Part 43 Cargo & Handling Livestock Issue No 6*; and a local statute, such as Western Australia’s *Animal Welfare Act* 2002, which by section 19(1) provides that a person must not be cruel to an animal, and by subsection (3)(a) provides:

“Without limiting subsection (1), 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.”

Some 80% of Australia's 4 million live sheep exports annually are shipped ex-Fremantle.

Animal welfare standards stand or fall at the stroke of a pen

31. The first point to be made is that, local statutes apart, animal welfare standards stand or fall by the administrative fiat of the Secretary of DAFF. They do not endure as if reposed in a statute, for example. Item 2 of 'Schedule 1-Amendments' of the *Australian Meat and Live-stock Industry (Export Licensing) Amendment Regulations 2005 (No 1)* now requires compliance with standards which "*may be specified in an order made by the Secretary under section 17 of the Act*". It will be recalled that the Standards were so specified in an Order made by the Secretary under section 17 of the Act, namely, Order 3(1), *Australian Meat and Live-Stock Industry (Standards) Order 2005* (as amended up to *Australian Meat and Live-stock Industry (Standards) Amendment Order 2008 (No 1)*), in these terms:

"The holder of a live-stock export licence must not export live-stock except in accordance with the Australian Standards for the export of live-stock." (Version 2.2, November 2008)

As stated earlier, Section 17(5)(a) of the Act makes compliance with this Order a "condition" of any export licence.

As it is these Standards which incorporate State and Territory animal welfare legislation, State and Territory jurisdiction in animal welfare may be liable also to stand or fall by the administrative fiat of the Secretary of DAFF.

In any event, whereas these Standards are now prescribed by the Secretary, previously (up until 2004) they were published by the Australian Livestock Corporation Limited, despite its self-evident conflict of interest. Such was the degree of self-regulation of the trade.

The conflict of interest of DAFF

32. Not only is it unsatisfactory that animal welfare standards are not prescribed in an enduring manner, but it is also unsatisfactory that a Department or agency subject to a

self-evident conflict of interest should prescribe such standards. I am unaware of any prosecutions or disciplinary proceedings or action taken of any substance by DAFF or its delegate, AQIS. Indeed, AQIS documents obtained under FOI applications show that, despite AQIS claims that it had made “full reports” of “high mortality investigation reports” on its website, these claims were untrue: in fact, AQIS had ‘sanitised’ its reports by deleting evidence of export licence breaches by its “clients”, namely export licence holders. AQIS has since rectified this.

The failure to enforce

33. Or again, there are grounds for believing that AQIS does not prosecute or relevantly enforce export licence breaches. For example, AQIS “Export Advisory Notice” (no. 2007-16) (obtained under an FOI application) refers to audits of live exporters, identification of shortcomings in those audits, and requests for “corrective action”. Audit reports are rated as “acceptable”, “marginal”, or “unacceptable”. According to the Notice, the sanction applied with marginal or unacceptable audit outcomes is no more than an increase in “*audit frequency and supervision of consignments*”. Not even export licence renewal would appear to be put in jeopardy.

A case example of the conflict of interest and attitude to enforcement: the sanction of ritual slaughter without pre-stunning

34. Again, the federal department, DAFF, in conjunction with the Victorian Minister for Primary Industries and his Department in 2007 publicly sanctioned the continuance in Victoria of ritual slaughter (slitting the throat) of sheep, without pre-stunning, for the purposes of an export program to the Middle East by an abattoir in country Victoria, despite the barbarity of such slaughter without pre-stunning. Prior to this coming to light in 2007, it was not thought to be taking place in Australia on the basis that it would

be contrary to Australia's animal welfare laws. However, DAFF without any public notice had granted permission for this to occur.

Remarkably, once the matter became public knowledge, the Victorian Minister stated he would arrange a Departmental review of whether such slaughter was inhumane. Nothing further has been heard since. Yet the British Government appointed Animal Welfare Council more than 20 years ago urged it be banned on the ground that it was particularly inhumane.

The actions of DAFF and the Victorian Department would suggest that welfare considerations were, and remain, subsidiary, even when confronted by Australia's animal welfare standards. It will be appreciated that live sheep or other animals transported to the Middle East are slaughtered by ritual slaughter without pre-stunning, one of the many reasons the trade is opposed by animal welfare societies.

I will post on the course website the Panel letter to government members of the federal parliament on the question of ritual slaughter.

An alternative – establish an independent agency to prescribe standards and enforce them

35. Examination should be made of whether an independent agency should be established to prescribe animal welfare standards in a more enduring manner and to be responsible for their enforcement. It is difficult to see any public interest reason which dictates the trade cannot be administered by DAFF on the one hand, whilst animal welfare standards are prescribed and enforced by an independent agency on the other.

The Standards are discursively expressed , thus not lending their provisions to enforcement

36. Next, the Standards themselves are expressed in a discursive way, thereby not lending themselves to law enforcement (or perhaps observance in different respects by the industry).

The AQIS accredited veterinarians are paid by the exporters

37. Next, AQIS accredited veterinarians are charged with inspecting sheep before loading. This is undertaken dockside. They complete a declaration that they have inspected the animals and are satisfied they are healthy and fit to undertake the export journey. In the *Emmanuel Exports* case the Magistrate in her reasons for judgment at paragraph 187 noted that in evidence, Robinson, while not recalling the relevant shipment, said that the inspections team would stand on each of the individual races from the industrial truck to observe the sheep as they pass single file down the race. The Court noted that “*over 103,000 sheep were loaded over 10 and 11 November 2003 before departure....*” and that she inferred that “*Grandison [the AQIS accredited veterinarian] observed the sheep momentarily, as they passed in the race, dockside on their way on board*”. [emphasis added]

Although these veterinarians are AQIS accredited, their fees are paid by the exporters. Examination should be made of whether, for example, such veterinarians should be subject to loss of accreditation or penalties where they do not discharge their obligations properly. After all, the public interest is at stake: the fitness of sheep to travel the some three week journey to the Middle East is a vital one in terms of sheep welfare in the chain of export. The veterinarians sign-off is also a precondition to the grant of an export permit for the loaded consignment to leave port.

Are the exporters ‘a person in charge’ during the voyage?

38. Next, in the *Emmanuel Exports* case the question was ventilated of whether the exporter, Emmanuel, was a “person in charge” of the sheep transported by reason of the agency of the onboard stockman. It will be recalled that section 19(3)(a), *Animal Welfare Act 2002* (WA) (see paragraph 23 above) is directed to “a person in charge of an animal”. The Magistrate noted in her reasons for judgment that Emmanuel argued that the onboard stockman, Norman House, was engaged by KLTT (the importer), not it, and that the master of the ship, not Emmanuel, was in control of the ship and sheep: see paragraph 25. The former *Australian Livestock Export Standards* specifically required an exporter to ensure that there was a suitably experienced stock person on board with a duty of care for the animals: see paragraph 29, judgment. The defence submitted that the master and crew were in control: see paragraph 34, judgment. In paragraph 35 in particular, the Magistrate set out her reasons as to why House satisfied the legal test, despite ownership having passed to KLTT dockside at Fremantle, and Emmanuel having no financial interest in the sheep during the voyage (see paragraph 37).

39. Under the new Standards prescribed by the Secretary, DAFF, ‘Standard 4 – Vessel Preparation and Loading’ provides that once loading begins the master of the vessel assumes responsibility for the management and care of the livestock to the point of disembarkation. Standard 4.16 provides that:

“As the livestock for export are loaded on the vessel at the port of export, responsibility for the livestock transfers to the master of the vessel...”

Whilst a legal argument can be mounted that the exporter remains liable for the welfare of the stock during the voyage, it is plain the matter is not free from doubt. It will be recalled that the argument would run that the exporter is obliged by Standard 5 to engage an accredited stock person to ensure the onboard care and management of the livestock

is adequate to maintain animal health and welfare. Thus, it would be suggested, the accredited stock person acts as the exporter's agent, and in this way, the exporter remains liable as the person in charge of the animals.

This last point illustrates the lack of clarity and deficiency in the present Standards on a very important question of welfare, namely, the welfare of the animals during the voyage. This is so in circumstances where 'Standard 5 – Onboard Monitoring of Livestock' provides that the Standard applies “... *until the last animal is unloaded at the port of disembarkation.*”

Relevant State animal protection statutes should be legislated to operate extra-territorially

40. Although it is not altogether free from doubt, State animal welfare laws are intended to be part of the Commonwealth legal regime for the export of live animals. There is no provision in the *Animal Welfare Act 1993* (Tas), the *Animal Welfare Act 2002* (WA) and the *Prevention of Cruelty to Animals Act 1986* (Vic) which suggests the statute operates extraterritorially. Western Australia, Tasmania and Victoria are the principal states from which live sheep exports are made. The cruelty provisions of those statutes should be legislated to apply to the fate of the animals beyond State waters: see paragraph 28 above and the Appendix for the legal principles and how they apply.

APPENDIX

‘Standard 5 – Onboard management of livestock’ provides that:

“Onboard management covers the period from the time the first animal is loaded onto the vessel until the last animal is unloaded at the port of disembarkation”;

thus raising **the question of the extraterritorial operation of State animal welfare legislation** expressly incorporated by the Standards.

Taking the Tasmanian *Animal Welfare Act* 1993 as an example, the steps in reaching a conclusion would appear to be as follows:

- (a) so far as the application of the State animal welfare legislation is concerned, there is the common law presumption that State legislation is intended not to operate extraterritorially⁵ so that, in the absence of a clear contrary intention, State criminal jurisdiction in respect of statutory offences extends only to offences committed within the State’s territory: Carney on The Constitutional Systems of the Australian States and Territories (published Cambridge University Press, 2006), paragraph 7.8.1 (at p.238);
- (b) no provision in the *Animal Welfare Act* 1993 (Tas) suggests the statute operates extraterritorially;
- (c) however Tasmania (like other States) has extended its criminal jurisdiction to offences partly committed within its territory, with the effect that this statutory extension confers jurisdiction where at least one element of the offence occurs within the jurisdiction, or where an event or the act which caused the event occurred within the jurisdiction: see *Criminal Law (Territorial Application) Act* 1995 (Tas), sections 3 and 4; see also Carney (supra) at 240;

⁵ The common law doctrine that crimes are committed in a single place – the crime is local – has proven to be unsustainable in the face of crimes extending beyond more than one jurisdiction, such as conspiracy offences, environmental offences and computer offences: Carney (supra) at 239.

- (d) the definition of “crime” in section 3, *Criminal Law (Territorial Application) Act* 1995 (Tas) does not extend though to an offence under the *Animal Welfare Act* 1993 (Tas), but the Tasmanian parliament could of course give consideration to amending the definition of “crime” for it to do so;
- (e) the *Criminal Law (Territorial Application) Act* 1995 defines “the State” in section 3 to include:

“(a) *the territorial sea adjacent to the State; and*
 (b) *the sea on the landward side of the territorial sea that is not within the limits of the State.”*

By section 5(a), *Coastal Waters (State Powers) Act* 1980 (Cth) each State’s general legislative powers under its Constitution are extended to the making of laws inter alia over its adjacent territorial sea not within State territory, and by sections 3 and 4 the territorial sea adjacent to each State is defined as the ‘coastal waters of the State’ and is confined to three nautical miles, despite the expansion in Australia’s territorial sea to 12 nautical miles in 1990⁶: see further Carney (supra) at 214;

- (f) prior to that statutory extension of State legislative capacity, the High Court held by majority in the *Seas and Submerged Lands Act* case (*New South Wales v Commonwealth* (1975) 135 CLR 337) that the territory of the States ended at the low-water mark, the States having unsuccessfully argued inter alia that they had dominion over the territorial sea of three miles (see further Carney (supra) at 212);
- (g) in considering whether to amend the definition of “crime”, it may be noted that State parliaments may legislate extraterritorially where a sufficient connection⁷ or nexus exists

⁶ As from 20 December 1990 by Proclamation under section 7, *Seas and Submerged Lands Act* 1973 (Cth): Commonwealth Government Gazette No. S297, Tuesday 13 November 1990.

⁷ Dixon J enunciated in *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, at 375, a classic statement of the sufficient connection test:

“The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected

between the State and the extraterritorial effect of the law: see *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; Carney (supra) at 210, 220-222: according to the High Court, this test of sufficient connection is to be applied liberally so that even a remote or general connection would be sufficient: see further *Union Steamship Case* (supra) at 14, *Port MacDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340 at 372 and *Mobil Oil Aust Pty Ltd v Victoria* (2002) 211 CLR 1 at [9], 22-3, [123] 58-9;

- (h) with the requisite connection established, State laws may also operate over the high seas – beyond the territorial sea, as commonly occurs for purposes of fishing regulation, criminal law, and maritime industrial relations: see Carney (supra) at 237; although the definition of “the State” in section 3, *Criminal Law (Territorial Application) Act* 1995 for the purposes of that Act confined jurisdiction to the territorial sea and not beyond it (see further Carney (supra) at 235;
- (i) otherwise, sections 7 and 8, *Animal Welfare Act* 1993 (Tas) proscribe the doing of things, or omitting to do any duty, which is “reasonably likely to result” (section 7) or “likely to cause” (section 8) unreasonable or unjustifiable pain or suffering to an animal;
- (j) accordingly, it can be argued that the question of likelihood is able to be determined at the time that the thing is done or the duty is omitted to be done, which in the case of export of sheep to the Middle East may be open to be determined at the point of embarkation, and before the vessel leaves State waters and thus State jurisdiction;
- (k) otherwise, to the extent section 8 proscribes doing an act or omitting to do a duty which “causes” such pain or suffering to an animal, the pain or suffering caused would need to

with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers.”

have occurred whilst the vessel remained within State waters (see further Carney (*supra*) at 235-7).