Productivity Commission Inquiry into the Regulation of Australian Agriculture

SUBMISSIONS

Australian Livestock Export Corporation Ltd (LiveCorp)

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Contents

1. LiveCorp and Australian Agriculture

LiveCorp

1. LiveCorp is a not-for-profit industry body owned and funded through contributions by livestock exporters. LiveCorp's revenue comes primarily from a compulsory levy on cattle (except dairy cattle), sheep and goats exported. The government provides the legal framework for the collection of the compulsory levy. Exporters have also agreed to make voluntary contributions for dairy cattle exports.

2. The current compulsory levy rates are:

   (a) Beef cattle - $0.009523 per kg ($0.007936 for marketing and $0.001587 for R&D).

   This equates to approximately $3 per head for a standard 315 kilogram animal

   (b) Sheep - 60 cents per head (50 cents for marketing and 10 cents for R&D)

   (c) Goats - 50 cents per head (40 cents for marketing and 10 cents for R&D)

3. The voluntary contribution is:

   (a) Dairy cattle - $6 per head

4. In the financial year 2014-15, LiveCorp collected just over $4.8 million for marketing and $1 million for RD&E from the compulsory levy and approximately $176,500 from the voluntary dairy cattle contributions.

5. All licensed Australian livestock exporters are eligible to become members of LiveCorp and it currently has 55 full members. Associate membership, that does not have voting rights attached, is also available to other industry participants who can benefit from LiveCorp's services. ALEC and its state chapters are industry members of LiveCorp.

6. LiveCorp provides RD&E, marketing, training and communications services to the Australian livestock export industry, working closely with stakeholders to continuously improve performance in animal health and welfare, supply chain efficiency and market access.

7. As a highly regulated industry, improving industry operations has increasingly meant providing technical input to government under difficult timeframes on the design and improvement to conditions on exports, especially most recently ESCAS.

8. In addition, LiveCorp is also responsible for the training of onboard stock people who care for livestock exported by sea through its Shipboard Stockperson Accreditation Program. The skills of people across the entire supply chain are broadened through education and training programs to ensure the industry's long-term sustainability, efficiency and competitiveness.

9. LiveCorp's company constitution sets out the objects of the company and establishes the framework for making investments in program activities, including RD&E. The priorities for this work are set out in LiveCorp's strategic and annual operating plans.

LiveCorp Constitution

The objects of LiveCorp under its Constitution are:

- To act as an industry Services Body as declared by the Minister including by providing R&D and marketing services for the benefit of members and the general community;
- To promote:
  - the humane handling and management of livestock throughout the export supply chain;
  - the export of Australian livestock to overseas countries; and
  - trade access in the interest of licensed livestock exporters;
- To provide goods and/or services to, or for the benefit of, licensed livestock exporters;
- To facilitate continuous improvement in animal wellbeing having regard to the Australian Standard for the Export of Livestock and to otherwise recognise and promote compliance with the Australian Standard and other relevant Australian standards and codes;
- To provide R&D and technical support for licensed livestock exporters;
- To protect and further the interests of the Australian livestock export industry in any lawful manner; and
- To consult with the Australian livestock export industry in relation to the Company's activities.

10. Relevant to the Commission's Inquiry, LiveCorp has worked alongside the industry's peak council – ALEC – to provide technical support, advice and input into its reform activities. This included preparing detailed analysis of consignment and ESCAS administrative processes and the ESCAS auditing structure and developing possible solutions as part of the government's ESCAS review.

11. LiveCorp has also been a member of a range of relevant consultative and engagement mechanisms including the Industry Government Working Group – which undertook the initial design of ESCAS, the Industry Government Implementation Group – which supported ongoing roll-out and developments of ESCAS, and most recently in the Industry Government Roundtable which has provided the forum for reform of ESCAS and consignment administration processes over the last two to three years.

12. LiveCorp believes that in its role as a service company and R&D provider and given its experience and history with the ESCAS regulation, it is well positioned to provide the Inquiry with reliable information, discussion and possible solutions for resolving avoidable costs and inefficiencies affecting producers and exporters.

2. Executive Summary

2.1 Platform

KEY PROPOSITIONS

P3.1: The live export industry is a valuable and integral part of the Australian agricultural sector.

P3.2: ESCAS has been overwhelmingly successful in providing increased risk management and assurance over the welfare of exported livestock, but at a significant cost for both the industry and government, and with reduced competitiveness against other export nations.

P3.3: Avoidable costs, burdens, risks and restrictions of the system continue to challenge the livestock export industry and its ongoing competitiveness and attractiveness.

RECOMMENDATIONS

R3.1: Livestock exports should be regulated to a similar degree as other socially sensitive / high risk industries.

R3.2: With lessons learned since ESCAS implementation, genuine reform is needed to reduce unnecessary burden and costs on the department and industry to ensure the ongoing sustainability and competitiveness of Australia as a livestock export supplier in the coming decade.

R3.3: ESCAS and livestock export regulation, including the outcomes of this inquiry, should be subject to periodic review on a two yearly basis.

2.2 Fundamental features affecting good regulation

KEY PROPOSITIONS

P4.1: The live export regulatory regime lacks a clear objective and guidance or principles over decision making and the exercise of discretions. It also fails to articulate the regulator's need to balance legitimate social and economic goals, or how this should be achieved.

P4.2: The regulator is afforded overly broad discretionary powers. The absence of reasonable limits, or sufficient legislative guidance, creates fundamental and wide reaching problems for regulatory oversight and action.

P4.3: The live export regime fails to distinguish between operational and substantive obligations and imposes the character of a licence "condition" on any and every aspect of compliance with the regulations, including ESCAS and controls separately imposed by the regulator.

P4.4: ESCAS does not clearly adopt principles of reasonableness and requires unachievable absolute compliance (infallibility) from exporters, including for the actions of third parties irrespective of culpability or possible control.

P4.5: The livestock export regulation operates so that ASEL and ESCAS are authoritative norms, requiring continuous close scrutiny where any failure to meet them equates to a non-compliance requiring punitive measures.

RECOMMENDATIONS

R4.1: The live export regime should incorporate clear objective(s) and principles that explicitly reflect and articulate an appropriate balance between all relevant objectives.

R4.2: The live export regime should be amended, in line with best practice regulation, to incorporate appropriate limits and guidance for regulator decision-making to eliminate unnecessary, and control necessary, discretionary powers.

R4.3: Absolute compliance obligations should be removed (or revised) and replaced by enshrining clear references to an achievable standard of compliance, for example by:

(a) adopting a "reasonable steps" or "reasonably practicable" standard for relevant obligations (including ESCAS);

(b) incorporating a "reasonableness defence"; or

(c) defining the meaning of "ensure", including to provide that the requirement is satisfied if specified reasonable steps are taken.

R4.4: The live export regime be amended to focus direct and close regulatory scrutiny, and punitive consequences, on substantive matters and that this be triggered in regard to operational compliance obligations in defined circumstances that warrant such regulatory involvement. For example, where evidence demonstrates either:

(a) significant non-compliance;

(b) lack of integrity, failure to meet behavioural standards; or

(c) systemic issues or a systems failure.

2.3 The importance of risk appetite

KEY PROPOSITIONS

P5.1: Regulated entities are entitled to have confidence that the regulatory environment is stable and the approach of the regulator is predictable, evidence based, proportionate and in accordance with well accepted administrative law principles of due process and natural justice.

P5.2: Lack of reasonable legislative limits on broad discretionary regulatory powers within the socially sensitive livestock export industry increases the potential for risk appetite to inappropriately influence the regulatory approach, including the imposition of regulatory controls or enforcement actions.

P5.3: Changeable risk appetite and unreasonable sensitivity of regulatory oversight creates significant avoidable uncertainty and inefficiencies, for both the department and industry, as well as disproportionately punitive direct cost impacts for industry and encouragement of regulatory creep.

RECOMMENDATIONS

R5.1: The legislature should prescribe clear guidance and limitations on the exercise of broad discretions conferred on the department to insure against susceptibility to, or undue influence by, external perceptions and risk appetite.

2.4 Enabling the regulator: recognising QA and equivalence

KEY PROPOSITIONS

P6.1: The department faces significant logistical and evidential challenges to maintain appropriate regulatory oversight, with limited resources, and to ensure that it has appropriate assurances of the reliability and independence of evidence obtained and relied upon.

P6.2: Legislative reliance on independent quality assurance and express recognition of equivalence in other systems or jurisdictions, with a clearly defined "meeting point" of the interface with regulatory oversight, is frequently utilised to enhance regulatory scrutiny and:

(a) support more efficient, reliable, evidence based and transparent decision making;

(b) insure against undue influence of changing risk appetite;

(c) substantially reduce regulatory burden;

(d) provide reliable assurances of systems compliance; and

(e) enable regulators to avoid unnecessary micro-management and focus resources on substantive regulatory issues.

P6.3: The live export regulatory regime stretches departmental resources but does not formally adopt or recognise independent quality assurance programs or equivalence as demonstrating compliance with relevant objectives and outcomes, including ASEL and ESCAS.

RECOMMENDATIONS

R6.1: The legislation enshrine approval and reliance on independent quality assurance programs, to a particular standard and clearly defined scope, to address relevant departmental logistical challenges, enhance efficiencies and ensure "best evidence" is available to support regulatory scrutiny and decision making.

R6.2: The live export regime incorporate mechanisms to formally recognise or adopt equivalence of appropriate standards, codes or regulatory regimes in other jurisdictions as demonstrating - in whole or part - compliance with (or exceedance of) relevant obligations, including ASEL and ESCAS.

R6.3: The legislature clearly identify and prescribe a "meeting point" between direct regulatory oversight and reliance on QA or equivalence to enable regulatory focus to be maintained at a systems level, where appropriate, and to define how any interaction or information flow is to be managed between these systems.

2.5 Non-compliance and enforcement

KEY PROPOSITIONS

P7.1: The live export regime provides no (or minimal) guidance on what is sufficient to meet various regulatory obligations, including ESCAS, or on how the department must exercise its discretion in non-compliance assessment and enforcement.

P7.2: The failure of the legislature to differentiate between operational and substantive non-compliance, to constrain departmental discretion and prescribe conduct that meets relevant obligations (particularly for operational obligations) has embedded micro-management and low risk appetite into routine administration and non-compliance interactions with exporters.

P7.3: An effective approach, used in many regulatory regimes, is to combine detailed regulations with formal adoption of regulatory instruments, such as codes of practice, to clarify for the regulator and the regulated:

(a) compliance expectations and minimum standards that should be met; and

(b) the reasonable scope of potential liability for third party actions, including by reference to issues of control, culpability and having appropriate risk management systems.

P7.4: Exporters face a risk of regulatory action, or sanction, in circumstances where the live export regime provides no guidance on the relevance or impact of fundamental issues of control, culpability, foreseeability, reliability of evidence or whether the non-compliance was substantive or operational.

P7.5: The department typically imposes pre-emptive conditions on exporters as a precaution while allegations are being investigated and before any relevant breach has been fully established. This takes place in an environment of low risk appetite and can have significant detriment to exporters.

P7.6: Judicious reliance on codes of practice and/or incorporation of similar principles in regulations, placing the onus on the regulator to demonstrate a sufficient basis for burdensome regulatory action, is an important and well recognised method of alleviating the risk of disproportionate and pre-emptive regulatory action.

P7.7: The live export regime does not overtly recognise or provide a formal avenue for redress if departmental controls are believed to have been unfairly imposed and unreasonably caused loss.

P7.8: There is no legislative guidance or differentiation between the severity of non-compliance and potential sanctions or criminal penalties. Live export laws fail to clarify or prescribe appropriate levels of penalties, contrary to the approach taken by many regulatory regimes, including in high risk industries.

RECOMMENDATIONS

R7.1: The legislation be amended to incorporate clear prescriptive parameters on what represents non-compliance and what the consequences will be, including by formal adoption of standards or codes of practice.

R7.2: Reform of the compliance assessment and enforcement legislative framework should, as a minimum:

(a) maintain a strong link between licence approvals and serious issues indicative of a failure to meet fundamental obligations on exporters (integrity / incompetence), including a broad discretion for the department to address those matters;

(b) decouple operational non-compliance (including ESCAS) from licence and export approvals, supported by formal adoption of codes of practice to limit regulatory discretion and prescribe a focus on systems compliance, with clear triggers to escalate departmental involvement; and

(c) remove third party supply chain participant non-compliance from direct departmental intervention or oversight, supported by codes of practice and a prescribed focus on proactive risk management and systems compliance.

R7.3: The live export regime should also deem compliance with relevant standards or codes of practice as being sufficient:

(a) to meet relevant regulatory obligations; and

(b) evidence of compliance, which prohibits the department from pre-emptively taking regulatory action, or imposing controls, unless or until it has proved otherwise.

R7.4: The live export regime incorporate clearly defined escalating penalty levels and criminal sanctions and prescribe appropriately matched proportionate penalties for particular breaches. This should include separating penalties for operational non-compliance (e.g. ESCAS) from breaches of substantive provisions (e.g. misleading conduct).

2.6 Self-reporting

KEY PROPOSITIONS

P8.1: Legislative provisions that enshrine certain benefits for self-reporting are a common feature of many enforcement regimes, particularly for highly regulated industries such as environment and safety. It is widely viewed as improving compliance and reducing enforcement costs

P8.2: The live export regime currently provides no legislated basis for a different outcome (or treatment of exporters) for self-reported non-compliance to encourage and reward continuous improvement and transparent communications with the department.

RECOMMENDATIONS

R8.1: Recognising the value to the integrity and objectives of the live export regime, the legislature should enshrine clearly defined outcomes, such as mitigation of sanction severity, for self-report of non-compliance.

2.7 Enforcement: the narrow scope of secondary liability

KEY PROPOSITIONS

P9.1: ESCAS seeks to enforce its objectives by creating a system of strict obligations on exporters to "ensure" traceability, control and animal welfare outcomes in overseas markets, which includes holding exporters liable (including criminally) for the actions of others.

P9.2: Such secondary liability is not novel in Australian criminal or civil law. However, it has been strictly confined to limited circumstances that justify its application, particularly where potential criminal liability is involved.

P9.3: As a consequence, the scope of apparent liability on exporters for the actions of third parties under ESCAS is novel (unprecedented), particularly given the absence of any recognised key features capable of justifying its imposition.

P9.4: Possible criminal consequences and significant punitive regulatory outcomes for exporters can arise irrespective of whether or not an exporter had any

relevant control, culpability or way to reasonably foresee the risk of non-compliance by third parties.

P9.5: The characterisation and enforcement of ESCAS non-compliance within current live export laws fails to recognise that exporter/importer relationships are fundamentally inconsistent with the key characteristics that justify imposing liability for the actions of others.

RECOMMENDATIONS

R9.1: The legislation should overtly restrict potential exporter liability for non-compliances due to third party actions to events and circumstances consistent with the widely recognised limited scope of secondary liability in Australian law.

2.8 Impacts on industry: cost inefficiencies and implications

KEY PROPOSITIONS

P10.1: Evidence clearly supports the value and need for implementation of recommendations made to address issues outlined in this submission and demonstrates the significant and avoidable impact on both the department and industry, including:

(a) imposition of inefficiencies, operational and structural costs and regulatory burden on the department and industry; and

(b) lost opportunities for industry, reduced competitiveness and commercial detriment.

2.9 Estimates of potential reform savings

KEY PROPOSITIONS

P11.1: If the recommendations of this submission are adopted, conservative and realistic real world estimates indicate that savings for industry would confidently be expected to be at least **$15 million per annum,** and most likely around or in excess of **$25 million per annum** in direct, indirect and delay costs. A significant impact of those savings would in turn be transferred from regulatory costs to industry profitability.

3. Platform

KEY PROPOSITIONS

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R3.1: Livestock exports should be regulated to a similar degree as other socially sensitive / high risk industries.

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R3.3: ESCAS and livestock export regulation, including the outcomes of this inquiry, should be subject to periodic review on a two yearly basis.

13. The Productivity Commission has been tasked with the review of a wide scope of regulations related to agriculture and in particular as they impact on producers.

14. Within this scope, there is a specific reference to the Exporter Supply Chain Assurance System (**ESCAS**) which regulates the animal welfare assurance role of Australian livestock exporters in overseas markets.

15. It is recognised that ESCAS is a relatively modest component within the broader scope of issues under consideration by the Commission. However, in light of the importance of a competitive livestock export sector to producers, regional Australia and the economy and the ongoing complexities of balancing the costs and benefits of ESCAS, its inclusion in this Inquiry is welcomed and well justified.

16. In preparing this submission, LiveCorp sought to closely align its input with the terms of reference of the Inquiry and the questions raised in the Issues Paper. In particular, the Inquiry issued the following questions which LiveCorp determined were areas where it could contribute:

(a) Do existing animal welfare regulations (at the Australian and state and territory government levels) efficiently and effectively meet community expectations about the humane treatment of animals used in agriculture production?

(b) Do animal welfare regulations materially affect the competitiveness of livestock industries, and if so, how?

(c) What are the reform priorities for animal welfare regulations, if any, and have recent reforms, for example in relation to the ESCAS, delivered net benefits to the community?

(d) Are animal welfare regulations appropriately enforced?

17. Recognising the breadth of the questions, LiveCorp sought to logically group its main responses into seven key headings / topics, being:

(a) Fundamental features affecting good regulation

(b) The importance of risk appetite

(c) Enabling the regulator: recognising quality assurance and equivalence

(d) Non-compliance and enforcement

(e) Self-reporting

(f) Secondary liability

(g) Impacts: costs and inefficiencies

18. In each of these topics, we have considered the questions above and also sought to align our input closely with the terms of reference of the review by identifying the areas where there is the greatest scope to reduce unnecessary regulatory burden and pursue regulatory objectives in more efficient (least cost) ways. A key focus has also been to consider relevant regulatory approaches adopted in other jurisdictions (domestically and internationally).

19. LiveCorp would welcome further inquiry and discussion with the Commission of priorities and potential reform options available for the livestock export industry and ESCAS.

3.1 Livestock export, ESCAS and why it matters to producers

20. The livestock export industry is an important component of the Australian agricultural sector. It contributes an average of $1 billion in export earnings annually to the Australian economy and employs around 13,000 people in regional Australia.

21. The industry provides an important marketing channel for Australian livestock producers, underpinning farm gate prices, contributing to economic diversity and activity, and providing employment in rural and regional Australia. In particular, in some areas – such as the Northern Territory (cattle) and Western Australia (sheep) – the export industries success is a strong contributor to the fortunes of producers.

22. A number of studies have analysed the positive effect of live exports on domestic livestock prices and the profitability of livestock producers. These studies reached the common conclusion that interruptions to the live export trade would result in a redirection of livestock toward the domestic market, placing downward pressure on saleyard prices. The potential for the domestic market to absorb the increased supply without a decline in price is limited, resulting in lower farm gate prices and increased transport costs for many producers.

23. Some of the benefits to producers were outlined by Volume 10 the Australian Farm Institute in its quarterly newsletter – *Farm institute insights* – of August 2013[i] where it stated:

(a) *"During the first half of 2013, the flow-on impacts of these changes in the live cattle export market became evident throughout the Australian beef industry.*

The dramatic fall in confidence and limited market options for northern Australian cattle, in combination with adverse seasonal conditions throughout much of northern Australia and in particular Queensland, resulted in farmers in the worst-affected regions having no other choice but to sell cattle for slaughter domestically.

The result was a flood of cattle onto domestic markets, and monthly Australian cattle slaughter numbers reached 30 year highs…As a result, domestic cattle prices fell by over 30 % from July 2012 to May 2013.

What was most significant about this fall in Australian cattle prices was that it occurred at a time when international beef prices were at historically high levels.

The result was the biggest divergence that has been observed between the Australian and the United States cattle prices for a considerable period.

This highlights the flow-on impact that these developments in the live cattle export market have had on the entire Australian beef industry, and serves as a reminder that the Australian beef industry cannot assume that a cessation of live exports would simply result in an increase in processed beef exports, as some economic analyses have assumed."

24. Further insight has also been provided in reports completed by the Centre for International Economics (CIE) for LiveCorp / Meat and Livestock Australia in 2011 and Australian Wool Innovation in 2014, which highlighted:

(a) In 2011, the Centre for International Economics (CIE) completed an independent assessment of the value of the Australian livestock export industry. CIE analysed how the livestock industry output would change in the absence of the livestock export trade and the impacts this would have for producers, the entire livestock industry, and the communities that rely on it.

(b) CIE showed that the livestock export trade significantly increases prices to producers and that in the absence of the trade prices would be 4 per cent lower for cattle; 7.6 per cent lower for lambs and 17.6 per cent lower for older sheep and farm level income would drop by $47 million in the cattle industry and $64 million in the sheep industry.

(c) While the impacts modelled by CIE on prices at saleyards for both cattle and sheep represent a national average, it is acknowledged that the impact would be most acute in regions directly reliant on the trade.

(d) For example, in March 2014 the CIE completed a more targeted assessment to look at the impact of the live export of sheep on woolgrowers. This showed that in the absence of the trade, saleyard prices would be 4.5 per cent lower for lambs and 24.2 per cent lower for older sheep. This assessment showed that the absence of the live export trade would have a particular impact on Western Australian wool producers:

(i) state wool production would fall by 12 per cent;

(ii) the farm value of production would fall by $302.3 million (based on 2012 production levels);

(iii) the price paid by processors would default to the price, less transport costs of $25-$30 per head; and

(iv) saleyard prices could fall by as much as 35 per cent for lambs and 66 per cent for older sheep.

25. Other recent studies to support these findings include:

(a) Deards B, Leith R, Mifsud C, Murray C, Martin P & Gleeson T 2014, Live export trade assessment, ABARES report to client prepared for the Live Animal Exports Reform taskforce of the Department of Agriculture, Canberra, July.

(b) Centre for International Economics. Contribution of live exports to the Australian wool industry, prepared for Australian Wool Innovation, Canberra, March 2014.

(c) Centre for International Economics. The contribution of the Australian live export industry, prepared for LiveCorp and Meat & Livestock Australia, Centre for International Economics, Sydney, March 2011.

(d) Clarke, M, Morison, J, Yates, W 2007, The live export industry—assessing the value of the livestock export industry to regional Australia, AgEconPlus and Warwick Yates and Associates for Meat & Livestock Australia, Sydney.

(e) Hassall and Associates 2006, The live export industry: value, outlook and contribution to the economy, prepared for Meat & Livestock Australia, Hassall and Associates, Sydney.

(f) Nixon, B, Whitehead, M 2013, Indonesian Beef Self-Sufficiency and Implications for the Australian Beef Industry, ANZ Agribusiness Research, September 2013.

(g) Department of Agriculture and Food Western Australia, 2011. The economic importance to Western Australia of live animal exports. Western Australian Agriculture Authority, July 13 2011.

26. Annexure 1 provides further background on the benefits of the industry.

27. Annexure 2 also provides a cost benefit analysis conducted for LiveCorp by EY (Ernst Young) for the purposes of informing this inquiry.

3.2 ESCAS implementation and the case for change

28. In 2011, the strong adverse public response to footage of mistreatment of Australian animals in some Indonesian abattoirs led the then Australian Government to temporarily suspend the cattle trade with Indonesia until new animal welfare safeguards were established.

29. The government, in consultation with industry, developed within short timeframes and under extreme pressure, the ESCAS framework and the underpinning principles and policies to allow the re-establishment of trade – summarised by the department in its *ESCAS Report*:

> "*The Exporter Supply Chain Assurance System (ESCAS) was designed in a matter of weeks and was implemented in Indonesia. It was then progressively rolled out to all Australian export markets during 2012. ESCAS was designed to ensure that Australian livestock exported for feeder and slaughter purposes are handled in accordance with international animal welfare standards and to provide a mechanism to deal with animal welfare issues when they occur—preventing the need for trade suspensions*."

30. The goal of ESCAS was unprecedented and as the Australian Department of Agriculture and Water Resources (the department) has indicated "*The development and implementation of ESCAS represented a significant innovation in government policy. There are relatively few areas of policy where the government places regulatory requirements on exporters that extend into other countries."*

31. The short time frame for development, the unprecedented nature of the regulatory objective and the socio-political pressure at the time also meant that ESCAS was not perfect regulation, but - impressively given the circumstances and largely thanks to the department, the exporters and the importing countries – it was workable and achieved the outcomes desired.

32. In the last five years, exporters, importers, facilities and the department have undertaken significant efforts to achieve the implementation of ESCAS and in doing so each party has had to adjust substantively.

33. For the regulator, it faced a substantive and challenging adjustment in undertaking a regulatory task of an unprecedented scope and nature with difficult expectations placed on it by external parties for managing performance and compliance to an essentially infallible level. As it identified itself in the *ESCAS Report*, "*Extending the government's regulatory reach internationally through ESCAS poses challenges for compliance and enforcement*."[ii]

34. It also brought the department into an area where it has not had to regulate before and its efforts, as well as industry's, in working its way through were significant and commendable.

35. For exporters and importers, the changes brought about by ESCAS were significant with animal welfare becoming a core part of their businesses. Whereas exporters were a logistics partner in the supply chain until 2011, they have since developed into a provider of animal welfare knowledge and infrastructure and a partner in the monitoring, reporting and enforcement of the regulation.

36. As a result, the achievements in animal welfare improvements delivered by exporters and their customers have been significant, if not generational.

37. Whereas there was no regulation – and minimal knowledge of what occurred in markets – prior to 2011, as of 2015, more than 8 million livestock had been exported to around 900 facilities overseas which had achieved and demonstrated through third party audits adherence with OIE and ESCAS animal welfare standards.

38. To achieve this, the facilities and importers had to, with the support of exporters and industry bodies, implement Standard Operating Procedures, install infrastructure – restraint devices / stunners – and undertake training in areas relating to animal welfare and traceability.

39. In turn, exporters have actively worked to build the in-market commitment to ESCAS and support increasing and ongoing rates of voluntary compliance, particularly in light of the challenging restrictions on livestock movements / sale. For example, these have included further systems of reporting, in-market representatives and in some cases CCTV.

40. Given the unprecedented nature of the regulatory challenge ESCAS sought to address, the success in providing increased risk management and assurance over the welfare of exported livestock has been overwhelmingly achieved.

41. This success has been identified by animal welfare experts, the OIE, competitors alike and the Minister for Agriculture:

    (a) "*The Australian live export industry is light years improved from the videos of 2011.*" (Dr Template Grandin, LIVEXchange conference 2015)

    (b) "*Industry's investments in improving implementation of OIE animal welfare standards and taking those improvements internationally to the rest of the world, have OIE's full and unequivocal support.*

    The live export trade (in Australia) is leading the world in animal welfare and providing benchmarking."

    (Dr Derek Belton the head of the International Trade Department at the OIE, 2013)

    (c) "*What you have done here in Australia in animal welfare in the live business is phenomenal.*

I was impressed this morning seeing the controls you have in place for animal welfare. Bloody well done Australia, you've done a bloody good job.

We (Brazil industry) still have a long way to go, and we are nowhere near the sophistication of the Australian industry."

(Mr Iain Mars, Chief Operating Officer, Minerva Foods, Brazil Beef – LIVEXchange 2015)

(d) "*We can also be proud that we are exporting more than our livestock, we're also exporting animal welfare improvements. In fact government and industry are continuing to work with our trading partners to enhance animal handling and husbandry skills and improve animal welfare outcomes—training more than 7,000 people to date. Industry is continually helping to upgrade facilities in-country to meet international animal welfare standards and our shared commitment to this work is ongoing.*"

(Minister for Agriculture, the Hon Barnaby Joyce MP – *ESCAS Report Foreword*)

42. However, these benefits have been achieved with significant costs and adjustment for the industry (exporters and overseas businesses) and reduced competitiveness against other export nations.

43. These costs reflect the challenges of implementing ESCAS in such short time frames. The main issue as a result was that while ESCAS was workable it was also extremely costly and burdensome – for both the government and the industry. As per the *ESCAS Report*:

(a) "*The short development time and immediate implementation has resulted in a system which is, at times, clunky, rigid and complex. It is an administratively burdensome regulatory arrangement for both government and industry. Despite these shortcomings, the system has been effective in delivering improved animal welfare outcomes.*"

(b) "*Despite its successes, the regulatory model for ESCAS is complex and imposes costs of over $17.6 million a year on government and the industry. The question remains whether the same gains in animal welfare could have been made through a simpler, clearer and ultimately cheaper system.*"

44. For the livestock export industry and its sustainability, the question is not whether the same gains could have been achieved in a more efficient or better way, but how – to sustain a competitive industry – these same gains can be achieved more efficiently, reasonably and collaboratively over the next ten years.

3.3 Government reforms

45. The pathway for reform of ESCAS and other livestock export regulation has been established and – after over a decade of control and command regulatory administration – there has been significant effort recently by government and industry to introduce better, more efficient regulatory approaches.

46. These reforms have reduced costs and red tape and introduced better practice and structures in the enforcement of existing regulations. In turn, there have been savings, efficiencies and more broadly practice improvement for the department / government and exporters.

47. The various reform activities have been supported by the department's strong consultative and collaborative approach with industry. Most recently, through the Industry Government

Roundtable, reform opportunities have been identified and implemented with joint support and input for the last two to three years.

48. Some of these reforms – as outlined in the Australian Government's *ESCAS report* – have included:

(a) allowing exporters to submit declarations attesting that contracts with importers and facilities are in place rather than submitting copies of each contract;

(b) removing the need to submit end-of-processing reports for each cattle and buffalo consignment;

(c) removing the need to submit the auditor's assessment checklist when submitting independent audits;

(d) replacing the requirement to publish individual audit reports with publication of audit summaries every four months;

(e) simplifying the approval arrangements for ESCAS variations, reducing paperwork and improving assessment times;

(f) separating ESCAS approvals from individual consignment approvals, reducing the amount of paperwork involved;

(g) implementing risk-based auditing of supply chains, which reduces the duplication and frequency of audits and reduces the costs to exporters; and

(h) consolidating and improving the auditor checklists used to assess compliance with OIE animal welfare standards.

49. In addition to the ESCAS reform, substantive changes have been developed for the enforcement and regulatory management of the Australian Standards for the Export of Livestock (ASEL) and consignment certification.

50. This has been pursued through the development and trialling of Approved Arrangements for livestock exports – effectively adopting a more macro-management approach for the department consistent with all other export commodities. Further detail on the steps to develop and the potential benefits of this reform are available in the government's *Regulatory Impact Statement – Approved Arrangements for Livestock Exports, October 2015*.[iii]

51. A further operational reform that is being introduced is a refined / new structured risk based regulatory approach to administrative decisions, enforcement and compliance management. Such an approach is consistent with best practice regulatory management and, assuming that it can be supported by the necessary cultural changes, could have significant benefits for efficiency in the department's administration of the livestock export industry.

52. While these reforms have been welcomed, they have been mainly operational / administrative particularly in relation to ESCAS and due to constraints from legislative structures and established policies have not been able to address longer term strategic reform and cost saving opportunities.

53. This is not to say that opportunities have not been identified within the government and industry processes or indeed by the department itself for next steps. However, prior to discussing what these opportunities may be it is worth briefly noting the broader government context that supports such broader reform.

54. As the Commission is well aware, regulation has been increasing steadily for some time and governments at all levels have strongly identified within their regulatory guidance

materials the goals of achieving policy objectives by implementing the least intrusive, lowest cost regulatory approach.

55. Such intent was summarised by the Honourable Josh Frydenberg MP Parliamentary Secretary to the Prime Minister in his opening statement to the *Australian Government's Guide to Regulation*[iv]:

> "*This Guide has been written to help policy makers see regulation in a new light.*
>
> *The Government's rigorous approach to policy making seeks to ensure that regulation is never adopted as the default solution, but rather introduced as a means of last resort.*
>
> *Regulation can have benefits, but businesses, community organisations and families pay the price of poor regulation.*
>
> *Regulation can't eliminate every risk, nor should it. We therefore seek better regulation, not more regulation.*
>
> *Policy makers must seek practical solutions, balancing risk with the need for regulatory frameworks that support a stronger, more productive and diverse economy where innovation, investment and jobs are created.*
>
> *With this new approach, stakeholders can look forward to a future with substantially less red tape and Australia's economy continuing to grow and prosper.*"

56. The concepts within the pre-amble are expanded further within the document with ten principles outlined, the first of which is:

> "*Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.*"

57. From such a starting point, the Guide also further outlines different options which should be considered in the development of regulation and these are equally as relevant for a consideration of ESCAS and the regulation of the livestock export industry. The options listed in the report are:

(a) no regulation;

(b) better enforcement of existing regulation;

(c) light touch regulation;

(d) self-regulation

(e) quasi-regulation

(f) co-regulation;

(g) explicit government regulation; and

(h) alternative instruments.

58. These concepts and the need to consider them is not new, although perhaps not necessarily always effectively adopted, and a similar objective is encompassed within the earlier COAG Best Practice Regulation Handbook[v], which states:

> "*a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed*."

59. As mentioned earlier, the department has in its *ESCAS Report* identified further reform options for ESCAS which start to consider the above options. Specifically, it stated:

> "*These improvements are the first steps in reducing unnecessary red tape while retaining animal welfare safeguards. There are further opportunities for reform to simplify administrative processes and reduce cost burdens while still meeting the essential objectives of the ESCAS system. These could include:*
>
> *i. clearer guidelines for describing and managing non-compliance, and clarifying third party complaint processes*
>
> *ii. allowing the sharing of audits for the same facilities or supply chains, which will remove duplication, reduce costs and improve opportunities for co-operation between individual exporters*
>
> *iii. encouraging opportunities for industry to take greater responsibility for proactively managing the risks within supply chains, and supporting industry development of an assurance system as recommended by the Farmer Review. ESCAS could potentially be broadened to allow for comprehensive company or industry assurance systems operating within an appropriate statutory framework.*
>
> *Despite the challenges ESCAS has posed and the need for improvements, it has delivered significant outcomes. Trade has continued, when it may have otherwise been limited or even phased out entirely. Awareness of animal welfare issues, and of their importance, in livestock handling and slaughter facilities overseas has been improved and ESCAS has provided a valuable source of previously unreported data about the movement and the treatment of animals. However, these benefits may also be able to be provided under a more efficient system than the one currently in place."*

60. The *ESCAS Report* also identified: "*The Farmer Review recommended that industry develop a through-chain quality assurance system to complement the government's regulatory compliance programs. This could help reduce the regulatory burden imposed by the government upon industry. An industry-managed assurance system may also facilitate more efficient and effective management of off-shore supply chain participants that are outside of Australia's regulatory reach. If developed, such a system could provide an alternative way for exporters to meet ESCAS principles, provided it was underpinned by an appropriate statutory framework. Such a framework would allow the regulator to audit and verify the operation of the assurance system and step in should the industry managed system fail."*

61. These points are important as they highlight that the regulator sees value among the possible regulatory options available for an industry-managed assurance system in reducing the costs and burden of the current regime, including in allowing itself to take a macro-management role in the future.

62. There are also a number of additional critical areas which need to be reviewed and considered – many of which will be fundamental to both reducing avoidable costs and providing business predictability under an assurance model or a continued refinement of the current ESCAS regulation. These relate to issues such as discretionary powers, secondary liability, non-compliance and enforcement and risk appetite.

3.4 Why do we need reform?

63. Five years on from the introduction of ESCAS, the administrative costs and restrictions of the system have continued to challenge the livestock export industry and its ongoing competitiveness.

64. Non-administrative costs are also having a negating effect on the industry, including the exporter's exposure to significant compliance risks for the infallible performance of third parties and the challenges of achieving voluntary acceptance and compliance from

potential customers of ESCAS (e.g. restrictions on the free sale or movement of their purchased livestock).

65. Further, despite the positive objectives and success of ESCAS both the regulator and the exporters continue to face external pressures to meet unreasonable expectations of achievable compliance and criticisms and negative portrayals of effective and normal rates of compliance as failings by the system, the regulated or the regulator.

66. With five years now passed since the introduction of ESCAS, there have been significant changes in our understanding and involvement in animal welfare within export supply chains and, through this, extensive learning on how best to support the commitments of importers / facilities and regulate the exporters.

67. It's time now for the investments and substantive animal welfare outcomes achieved by the industry, the exporters, the importers and facilities (and the department) to be recognised with better, more efficient and considered regulation.

68. For the sustainability of the livestock export industry, it is critical that ongoing and substantive reforms be considered or Australia risks declining competitiveness of its livestock in overseas markets and substantive losses of profitability within the supply chain.

69. Certainly, Australia cannot afford to presume an ongoing ability to leverage an absence of competition or a preference and premium for Australian livestock to achieve acceptance of ESCAS over the next ten years.

70. This was highlighted by Mr Iain Mars of Brazil's Minerva Foods at LIVEXchange 2015, where he indicated not only the challenges facing Australia in its weakening ability to supply markets due to the large decrease in the Australian herd size, but also highlighted that Brazil will eagerly fill this gap in supply.

71. Equally other export nations are increasingly competing with Australian livestock and they are not required to comply with equivalent regulatory requirements in terms of animal welfare, restriction of livestock sales / movements or intrusion into overseas businesses.

72. There is a substantial risk that, faced with like products, the animal welfare gains achieved and the economic benefits, returns and jobs of the industry, will be lost through importers turning away from the costs, burden, risks and constraint on trade.

73. This is one of the most significant challenges for the Australian livestock export industry and its ability to continue to provide a marketing option and returns to producers and to solidify and continue to support and drive the adoption of OIE welfare standards.

74. Of course, sustainability and longevity will rely on addressing not only the challenge of achieving the above but also remaining acutely cognisant of the risks that led to the events of 2011 and the introduction of ESCAS, and ensuring that these are mitigated effectively into the future.

75. However, if a balance can be achieved in the cost and burden of ESCAS on overseas facilities / importers and Australian exporters through better regulation, the industry has the potential to deliver real, competitive benefits to producers, the economy and global animal welfare.

76. And this should be achievable.

77. Governments are experienced at regulating industries and issues which are equally – if not arguably more – sensitive to society and where there are both social and economic goals. These include workplace safety (OH&S), radiation, pollution, human health, food safety and natural resource allocations and management. This extends indeed to animal welfare and cruelty regulation domestically.

78. Within these structures, there are principles and approaches which work to manage the risks to the community of death and injury to the human population and significant degradation to crown resources. Without entering into the consideration of where overseas animal welfare sits in importance, there needs to be reasonableness to the approach when considered in the context of these broader industries.

79. This submission will outline key issues that are imposing costs and uncertainty within the livestock export industry, identify key learnings from other industries and from the last five years of ESCAS operation and suggest opportunities for further reform.

80. LiveCorp is confident that through a considered assessment and approach which better refines the existing ESCAS framework and regulatory expectations, provides for a co-regulatory approach (e.g. QA or assurance) and recognises equivalence in other systems or countries, the sustainability and success of the industry can be better assured and the animal welfare outcomes even more successfully delivered.

81. It is time now to strategically and logically consider better means to regulate the management of animal welfare risks within the livestock export supply chain and achieve a structure that can also support Australia as a competitive, responsible livestock supplier to the world.

4. Fundamental features affecting good regulation

KEY PROPOSITIONS

P4.1: The live export regulatory regime lacks a clear objective and guidance or principles over decision making and the exercise of discretions. It also fails to articulate the regulator's need to balance legitimate social and economic goals, or how this should be achieved.

P4.2: The regulator is afforded overly broad discretionary powers. The absence of reasonable limits, or sufficient legislative guidance, creates fundamental and wide reaching problems for regulatory oversight and action.

P4.3: The live export regime fails to distinguish between operational and substantive obligations and imposes the character of a licence "condition" on any and every aspect of compliance with the regulations, including ESCAS and controls separately imposed by the regulator.

P4.4: ESCAS does not clearly adopt principles of reasonableness and requires unachievable absolute compliance (infallibility) from exporters, including for the actions of third parties irrespective of culpability or possible control.

P4.5: The livestock export regulation operates so that ASEL and ESCAS are authoritative norms, requiring continuous close scrutiny where any failure to meet them equates to a non-compliance requiring punitive measures.

RECOMMENDATIONS

R4.1: The live export regime should incorporate clear objective(s) and principles that explicitly reflect and articulate an appropriate balance between all relevant objectives.

R4.2: The live export regime be amended, in line with best practice regulation, to incorporate appropriate limits and guidance for regulator decision-making to eliminate unnecessary, and control necessary, discretionary powers.

R4.3: Absolute compliance obligations should be removed (or revised) and replaced by enshrining clear references to an achievable standard of compliance, for example by:

(a) adopting a "reasonable steps" or "reasonably practicable" standard for relevant obligations (including ESCAS);

(b) incorporating a "reasonableness defence"; or

(c) defining the meaning of "ensure", including to provide that the requirement is satisfied if specified reasonable steps are taken.

R4.4: The live export regime be amended to focus direct and close regulatory scrutiny, and punitive consequences, on substantive matters and that this be triggered in regard to operational compliance obligations in defined circumstances that warrant such regulatory involvement. For example, where evidence demonstrates either:

(a) significant non-compliance;

(b) lack of integrity, failure to meet behavioural standards; or

(c) systemic issues or a systems failure

4.1 Overview

82. Effective regulatory regimes require clear legislation to guide and support the regulator and to provide certainty and clarity for the regulated parties.

83. In particular, clear legislation defines the objective; the role, expectations and scope of operation of the regulator; and informs its exercise of discretionary powers. It also helps to ensure that compliance obligations are reasonable and that regulated entities understand their obligations and the likely regulatory responses when issues arise.

84. Detailed legislation regarding these elements becomes inherently more important when the regulator must exercise discretionary powers to balance social policy and economic goals to achieve the purpose / object of the regulation.

85. The benefits of setting clear legislation and guidance governing the implementation of regulation is not a new concept and is encompassed routinely throughout best practice regulatory guidance. This was clearly articulated in the *Rethinking Regulation* 2006[vi] report, which led to the Australian Government endorsing a related recommendation (7.14). The report from that review stated:

> "*In the Taskforce's view, given the inherent incentive for regulators to use any discretion in a way that minimises the possibility of adverse events, it is important that legislation, particularly principles based legislation, is explicit about policy objectives and the principles or approaches the regulator should follow.*
>
> - *Where tradeoffs are involved, object clauses in legislation should make clear what balance is sought – for example, the need to pursue identified social or environmental objectives cost-effectively taking into account wider economic interests – and how such a balance is to be achieved*
> - *Principles laid down to guide regulatory approaches should require regulators to use a risk-based approach, with any measures to be targeted at specified problem areas and not designed to eliminate the risk of an event occurring."*

86. Similar sentiments were echoed in the ANAO's *Administering Regulation*[vii] paper, which stated:

> "*to enable a regulator to achieve the Government's desired policy objectives and respond effectively to regulatory risk, the objectives of the regulatory regime should be clearly outlined in the supporting legislation or legislative instruments and communicated to key stakeholders."*

87. These fundamental features of good regulation are particularly important to the livestock export industry, which faces a rapidly evolving and complex network of Acts (*Export Control Act* 1982 (Cth) (**ECA**), *Australian Meat and Live-stock Industry Act 1997* (Cth) (**AMLI Act**)), regulations, orders and policies at the Commonwealth level, coupled with obligations to the laws of the various jurisdictions within Australia and overseas.

88. The primary model for the regulation of all exporter activities stems from the licence and conditions placed on that licence through the AMLI Act, ECA and associated regulations and orders. In addition, exporters are regulated through the placement of conditions on the different approvals, variations and other discretionary actions related to the export process.

89. ESCAS was developed and inserted into this existing licence framework and adopted in an extremely pressured and short timeframe – particularly for such substantive legislative change. As a result, it is only mentioned in the *Export Control (Animals) Order* 2004 (Cth) (**ECO**), specifically in connection with applications for export, and compliance with any and all aspects of ESCAS is therefore elevated by the operation of the *AMLI (Conditions on live-stock export licences) Order* 2012 (**AMLI Order**) and ECO to be a condition of the licence under the AMLI Act. It is hence subject to that highly punitive compliance structure,

including under s9 of the ECA (see later in this chapter for detail). This also encompasses the largely unfettered discretion of the Secretary to make written orders in connection with export of live-stock under s17(1) of AMLI Act.

90. LiveCorp recognises that as ESCAS is in an Order, it would ordinarily adopt or contribute to the objects of the enabling Act. However, there is an urgent need for additional clarity – and potentially greater separation within the Order – for ESCAS given the:

(a) breadth of the AMLI Act and ECA;

(b) undeniably unprecedented scope of ESCAS; and

(c) mixture of social and economic goals (animal welfare and trade facilitation).

91. Further, many of the most serious challenges currently facing ESCAS outlined throughout this submission ultimately stem from the lack of clarity, guidance and limitations over the regulator's exercise of discretions at the strategic, structural and operational levels and its relative silence on key policy points.

92. All of these issues are readily remedied, as outlined below and there is ample precedent in a broad range of regulatory environments of the clear rationale, value and methods for doing so.

93. LiveCorp understands that the breadth and flexibility provided for ESCAS within the ECO was considered a necessity when it was introduced given the unprecedented objective it sought to achieve and the short time frames afforded for its development. In turn, the department deserves significant credit for its efforts to construct and, more recently, refine the system and for its consultation with industry throughout that process.

94. However, with five years now passed since the introduction of ESCAS it is time for review and refinement to remedy the problems revealed by that experience. In particular, the broad flexibility provided to the department, in the absence of clear legislative guidance for the exercise of that power, has led to serious inefficiencies and to a disproportionate and inappropriate burden on both the department and exporters.

(a) In particular, there has generally been a reluctance to reduce discretions or flexibility in decision making through policies. Such an approach ultimately dilutes the certainty, predictability and consistency of the regulatory arrangements by enabling indecision, lack of transparency, perceptions of inconsistent or ad hoc decisions, regulatory creep, fluctuating risk appetites and compliance expectations and micro-management.

(b) While some discretion and flexibility for regulators is required, if that allowance is too broad it imposes more than just direct costs and inefficiencies for operational activities, in terms of its limitations on the ability of licensed livestock export businesses to manage compliance risks, justify investments (e.g. infrastructure, systems, personnel), undertake long-term planning or enter into commercial arrangements.

95. This Inquiry is a significant opportunity to entrench good regulatory practices to better enable the regulator to perform its functions and to appropriately support live exporters and Australian agriculture more broadly.

4.2 Clear objective and guidance to balance social and economic goals

A gap in the system

96. A fundamental issue with the current laws is the way in which embedding ESCAS obligations within the ECO (a deceptively small addition), has had such far reaching consequences and in fact driven fundamental changes in the way the live export regulatory regime seeks to achieve the common (and widely accepted) goals of the legislation.

97. The unique nature and regulatory reach of ESCAS within Australian and international law cannot be overstated.

98. In light of that fact, a significant gap in the current ESCAS regulation is the lack of a clear objective and guidance or principles for decision making / discretions and an overt recognition within the live export laws of the regulator's need to balance legitimate social and economic goals, and how this should be achieved.

99. The legislation is silent on the objective of ESCAS which has led to varying expressions and weighting of the possible intended policy outcomes including:

(a) Improving animal welfare in overseas supply chains;

(b) Trade facilitation; and

(c) Providing assurances to the Australian community.

100. In practice, without a legislated objective there is the perception that the regulator has primarily drawn its purpose from the discretion allocated to the Secretary of the department and apparent onerous obligations on exporters by clause 2.44 (2A), which states:

> "(2A) The Secretary may approve an ESCAS if he or she is satisfied that the ESCAS will ensure that live-stock to which it will apply will be transported, handled, slaughtered and subjected to any other related operations in accordance with relevant OIE recommendations."

101. There are a number of failings in this clause which negate its application as an appropriate objective.

(a) In particular, being a discretion – and a broad one based on the Secretary's undefined "satisfaction" – it requires guidance as to what that satisfaction should be in pursuit of.

(b) What little guidance there exists in clause 2.44(2A) is set far too high. For example, the incorporation of 'ensures' (without qualification) wrongly suggests an absolute satisfaction threshold, which is contradictory to administrative law and what is reasonably achievable. As a minimum, an appropriate and achievable objective would at least incorporate wording in the above that the regulator "is satisfied that the ESCAS will ensure**,** as far as practicable, that live-stock to which it will apply…".

There are better options

102. There are many examples of legislation that avoids these failings. The *Fisheries Management Act 1991* (Cth) illustrates that the inclusion of clear guiding objectives in legislation is not a radical concept and it also informs the type of wording that ought to be considered in formulating appropriate objectives for live export laws.

103. The fisheries regulatory regime demonstrates an existing and sophisticated set of objectives (see excerpt below - with LiveCorp highlighting) that prescribe those matters

that the Minister and regulatory body (i.e. the Australian Fisheries Management Authority (**AFMA**)) must pursue or have regard to in performing its regulatory functions.

***FISHERIES MANAGEMENT ACT* 1991 (CTH)**

Section 3 - Objectives

1. The following objectives must be pursued by the Minister in the administration of this Act and by AFMA in the performance of its functions:

   (a) implementing efficient and cost effective fisheries management on behalf of the Commonwealth; and

   (b) ensuring that the exploitation of fisheries resources and the carrying on of any related activities are conducted in a manner consistent with the principles of ecologically sustainable development (which include the exercise of the precautionary principle), in particular the need to have regard to the impact of fishing activities on non target species and the long term sustainability of the marine environment; and

   (c) maximising the net economic returns to the Australian community from the management of Australian fisheries; and

   (d) ensuring accountability to the fishing industry and to the Australian community in AFMA's management of fisheries resources; and

   (e) achieving government targets in relation to the recovery of the costs of AFMA.

2. In addition to the objectives mentioned in subsection (1), or in section 78 of this Act, the Minister, AFMA and Joint Authorities are to have regard to the objectives of:

   (a) ensuring, through proper conservation and management measures, that the living resources of the AFZ are not endangered by over exploitation; and

   (b) achieving the optimum utilisation of the living resources of the AFZ; and

   (c) ensuring that conservation and management measures in the AFZ and the high seas implement Australia's obligations under international agreements that deal with fish stocks; and

   (d) to the extent that Australia has obligations:

      (i) under international law; or

      (ii) under the Compliance Agreement or any other international agreement;

   (e) in relation to fishing activities by Australian flagged boats on the high seas that are additional to the obligations referred to in paragraph (c)—ensuring that Australia implements those first mentioned obligations;

   (f) but must ensure, as far as practicable, that measures adopted in pursuit of those objectives must not be inconsistent with the preservation, conservation and protection of all species of whales.

104. These objectives help to insulate the fisheries regulatory process from the vagaries and pressures of activism, political pressure, differing personalities / philosophies within AFMA or government and corporate lobbying. AFMA's Webpage notes that in pursuing these objectives it:

> "*must place equal emphasis on all of the objectives and not pursue some at the expense of others. However, varying degrees of weight and emphasis may be given*

to a particular objective depending on the circumstances. This position has been confirmed where AFMA's approach to pursuing these objectives has been tested before the courts."

105. Similar wording as that highlighted in the example above is found throughout many regulatory regimes, including those that must grapple with balancing high risk activities (including to human health) and competing social and economic factors. For example, radiation safety legislation is extensive, at Commonwealth and State level, and contains clear guiding principles. By way of example, the objects of the *Radiation Act* 1990 (NSW) include:

> "*to secure the protection of persons and the environment from exposure to ionising and harmful non-ionising radiation to the maximum extent that is reasonably practicable, taking into account social and economic factors and recognising the need for the use of radiation for beneficial purposes*."

Application to live export laws

106. Inclusion in live export laws of a similarly detailed and clear objective and associated principles clause, informed by examples such as the above, would be invaluable for the department and exporters to clearly define why the regulation exists and to guide how the substantive provisions relating to ESCAS should be interpreted and applied.

107. The additional benefit that a well worded objective clause and associated principles would provide is – as the *Rethinking Regulation* report indicated – explicit recognition that there are trade-offs involved, clarity on what balance is sought and how that balance is to be achieved.

108. For example, ESCAS has multiple legitimate goals that need to be overtly acknowledged and balanced, including achieving acceptable animal welfare outcomes in overseas supply chains, facilitating trade, minimising the impacts on the ongoing profitability and competitiveness of export businesses (and Australian exports) and supporting international relationships / food security.

109. Given the central role to the scope and interpretation of regulatory oversight, inclusion of refined objectives and principles should also consider incorporating the following ESCAS elements.

110. These elements are commonly referred to as the "four pillars" and they have evolved from the original Industry Government Working Group and government Regulatory Impact Statement (for the 2011 order amendment) articulations to the current formulation of absolute objectives found on the department website:

(a) **Animal welfare:** animal handling and slaughter in the importing country conforms to World Organisation for Animal Health (OIE) animal welfare recommendations.

(b) **Control through the supply chain:** the exporter has control of all supply chain arrangements for livestock transport, management and slaughter. All livestock remain in the supply chain.

(c) **Traceability through the supply chain:** the exporter can trace all livestock through the supply chain.

(d) **Independent audit:** the supply chain in the importing country is independently audited.

111. Laws that clearly articulate objectives and guidance around the exercise of discretion and balance of different goals do not avoid appropriate regulatory oversight, or sanctions, but

rather adopt a necessary and widely acknowledged fundamental mechanism to help enable balanced and effective regulation.

112. The challenge in balancing these multifaceted, and to an extent competing, interests or objectives is not to be underestimated, despite it being relatively common-place and arguably the reason much regulation exists. Nevertheless, this issue is faced and appropriately dealt with across a range of high risk or high stakes sectors, including animal welfare, human health, food safety, protection and natural resource management.

113. The widely recognised need to balance objectives that include social policy also raises important questions about where the cost implications should be borne. That is particularly the case for livestock exports where the social objective relates to the Australian public, with no direct mechanism for the value of that social policy to be borne by either the Australian public or overseas end-user.

114. Striking an appropriate balance between social and economic objectives requires a strong regulator, with a clear remit and role to operate in an environment of almost perpetual dissatisfaction or challenge from some sector of the community.

(a) In such an environment, there are clear benefits to the regulator from the government providing greater levels of guidance and clarity on purpose and discretionary scope to support and underpin challenging decisions.

(b) The regulated entities – the exporters – also benefit through clearer objectives and increased predictability in decisions and a reduced exposure to decision makers responding reactively to socio-political pressures, for example through increased intervention and micromanagement, lowered risk appetite or unreasonable expectations of performance.

4.3 The importance and need for reasonable limits on discretion

<u>The well recognised problem with too much discretion</u>

115. As noted by well-respected academic lawyer, Kenneth Davis, who has written extensively on discretionary powers, the:

> "*greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favouritism may influence decisions, and where the imperfections of human nature are often reflected in the choices*".[viii]

116. Similarly, the Australian judiciary has long recognised the risks of overly broad regulatory discretion and typically narrowly construe any discretion conferred by legislation. In particular, Australian courts "will not ordinarily regard a statutory discretion, the exercise of which will affect the rights of a citizen as absolute and unfettered".[ix]

117. In short, while regulatory discretion is important, it quickly becomes inefficient and even counterproductive, resulting in serious injustice, if the law fails to appropriately guide and constrain it.

118. Two principal and widely accepted legislative approaches to achieve that goal and to remove harmful ambiguity are:[x]

(a) elimination of unnecessary discretionary power (e.g. adoption of formal standards, reliance on quality assurance / equivalence); and

(b) better control of necessary discretionary power (e.g. detailed regulatory rules, plans and policy for level of scrutiny and regulatory action).

Scope of existing discretion in regulation of live export

119. Due to the structure of the live export legislation, as briefly mentioned earlier, compliance with any and all aspects of ESCAS is a condition of a livestock licence under the AMLI Act. As a contravention of licence conditions is an offence under the AMLI Act, any breach of ESCAS, whether administrative or substantive, can potentially (through the complex web of regulation) expose the exporter to a criminal conviction, substantial fine and possibly imprisonment. The Secretary is also afforded largely unfettered discretion to make written directions or orders to be complied with by exporters of livestock. The key sections within the live export regulatory regime relating to these elements are outlined below:

(a) ESCAS is contained within Part 2 of the ECO, most notably in order 2.42A which states what an ESCAS must include.

(b) Compliance with the ECO, and therefore ESCAS, is a condition on live-stock export licences, by virtue of order 3 of the AMLI Order.

Australian Meat and Live-stock Industry (Conditions on live-stock export licences) Order 2012

3 Condition on live-stock export licences

The holder of a live-stock export licence must comply with any relevant provisions of the *Export Control (Animals) Order 2004*

Note Under subsection 17(1) of the *Australian Meat and Live-stock Industry Act 1997*, the Secretary may make written orders, not inconsistent with regulations made under that Act, to be complied with by the holders of export licences. Under subsection 17(5) of that Act, an export licence is subject to the condition that the holder must comply with orders made under section 17.

(c) The contravention of a licence condition is a strict liability offence under section 9 of the ECA, and punishable on conviction by a fine not exceeding $50,0000.

Export Control Act 1982

9 Contravention of licence conditions etc.

(1) Where a licence or permission granted under the regulations is subject to a condition or restriction to be complied with by a person, the person shall comply with the condition or restriction and, if the person fails to do so, the person is guilty of an offence punishable on conviction by a fine not exceeding $50,000.

(2) An offence under subsection (2) is an offence of strict liability.

(d) If an exporter contravenes a licence condition either intentionally or recklessly, they are also in contravention of section 54(3) of the AMLI Act, and if convicted, can face imprisonment for 5 years.

Australian Meat and Live-stock Industry Act 1997

54 Export of meat or live-stock without export licence etc.

….

(3) The holder of an export licence must not contravene a condition of the licence either intentionally or being reckless as to the condition.
Penalty: Imprisonment for 5 years

Note Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

(e) As the note entails in s3 of the AMLI Order, s17(1) of the AMLI Act also provides the Secretary with the unfettered discretion to make orders and written directions in connection with the export of live-stock.

Australian Meat and Live-stock Industry Act 1997

17 Licence also subject to compliance with orders and directions under this section

(1) The Secretary may:

(a) by legislative instrument, make orders, not inconsistent with the regulations, to be complied with by the holders of export licences; and

(b) give written directions, not inconsistent with the regulations, to be complied with by the holder of an export licence.

…

120. As such, the unconstrained discretion of the regulator's powers arise from requirements of the Secretary to take account of conditions on the licence, and the breadth of conditions on live export laws, as well as clauses regarding the imposition of any conditions the Secretary sees fit.

121. This affects the regulatory oversight and response at all stages of the live export operations and licence process, from ESCAS approval through to suspension and cancellation of licences. This is illustrated by the below examples.

(a) <u>ESCAS Approval</u>

(i) There are no limits to the matters to which the Secretary may have regard to when deciding whether to approve an ESCAS. Section 2.44(2B) of the ECA allows the Secretary, without limiting the matters, to have regard to not only whether the ESCAS addresses the specified requirements in s2.42(a), but it may also have regard to the exporter's record in adherence to approved ESCASs and compliance with approval conditions, as well as "*any other relevant information of which the Secretary is aware*".

(ii) Sections 2.44(4) - (5) of the ECA also allows the Secretary to approve an NOI, CRMP and an ESCAS subject to a condition, including "*any other matter the Secretary considers appropriate*".

(b) Revoking / Varying ESCAS Approval: Pursuant to section 2.46A(3) the Secretary may revoke or vary an approved ESCAS if "*not satisfied*" that the livestock will be dealt with in accordance with the approved ESCAS, or that the exporter has not complied with any conditions in the approval or a previous approval under the ECO. While this already affords the Secretary broad discretion in regards to its "satisfaction" of ESCAS compliance, this section also states that the circumstances in which the Secretary may revoke or vary an approved ESCAS is not limited to those circumstances.

(c) Varying / Suspending / Cancelling Approved Export Program: Similarly, the Secretary may vary, suspend or cancel the approval of an export program for a number of reasons, including if it is of the opinion that the suspension or cancellation is "*necessary to maintain the health or welfare of the relevant live-stock*" (sections 2.49 - 2.50, ECO).

(d) Revoking Export Permits: Section 2.61 of the ECO provides that the Secretary may revoke an export permit if there is "*reason to believe*" that a condition of an export permit has not been complied with, or that a "*relevant circumstance*" has changed. The "*reasons to believe*" for the purposes of this section are demonstrably broad, and capture circumstances where an exporter has not complied with:

(i) *any* conditions to which a live-stock export licence for the live-stock under AMLI Act was subject; and

(ii) *any* requirements under that Act that otherwise relate to the export of the live-stock.

(e) Issuing Show Cause Notices: The Secretary is also afforded significant discretionary powers to issue a show cause notice to licence holders if it has "*reasonable grounds for believing*" that certain circumstances exist, such as the licence holder has ceased to be a person of integrity or competent to hold the licence. In doing so, it may have regard to the extent to which the holder has complied with any requirements for or under the ECA, including any conditions or restrictions on the licence (sections 23(1) - (1A), AMLI Act).

(f) Cancellation / Non-Renewal / Suspension of Licence: Where show-cause notices have been issued, the AMLI Act also allows the Secretary to cancel, non-renew or suspend a licence if is "*satisfied*" that certain circumstances exist (section 24, AMLI Act). It may also reprimand the holder of the licence.

122. In such circumstances as the above, it is evident that the Secretary is able to exercise its unfettered discretion to regulate the lowest level of operations by imposing conditions on a licence or ESCAS, such as those matters which an ESCAS application must detail, such as:

(a) ports of arrival;

(b) feedlots; and

(c) access to premises.

(section 2.42A, ECO).

123. Noting the above structure, there remains a broad discretion for the Secretary – particularly in the absence of prescribed standards – to determine what is required within the ESCAS and what needs to be provided to meet both the administrative approval process and compliance expectations.

124. In the absence of guidance in the regulation, the department has developed informal principles, which includes internal materials and guidance published on its website, upon which ESCAS is based. These materials and principles are not legally binding and reflect the department's interpretation of its obligations for regulatory oversight and non-compliance management relating to the four pillars of ESCAS.

Implications for live export laws

125. The absence of appropriate limits or sufficient guidance on the scope and exercise of the Secretary's (department's) discretion creates fundamental and wide reaching problems for regulatory oversight and action.

126. It is largely perceived by exporters that the department interprets this broad discretion as being essentially unfettered, particularly with regard to conditions it may impose on approved ESCAS to satisfy whatever concerns it may have at the time and related assessment and management of alleged non-compliances.

127. This has particularly significant implications for creation of avoidable inefficiencies and regulatory burden on all parties to administer, police and comply with regulatory requirements.

128. It sits at the heart of the rationale for many of the interrelated issues and recommendations addressed in this submission, including quality assurance (chapter 6) and formal adoption of standards (chapter 7), which help to avoid or limit the following impacts discussed later in this submission:

(a) excessive / inappropriate micro-management;

(b) unreasonable compliance expectations;

(c) regulatory creep; and

(d) fluctuating risk appetite.

129. In reality, notwithstanding the apparent unfettered discretion afforded by live export laws, there are very real limits on the appropriate exercise of the Secretary's (department's) discretion due to the operation of administrative law principles and constraints typically imposed by the courts. However, those limits should be readily apparent on the face of the legislation.

130. The fact that they are not, creates enormous difficulties for the regulator and industry, as per the impacts summarised above, including the potential for challenging decisions due to uncertainty from the department's need to interpret ambiguous legislation.

131. Accordingly, there is a real need for refinement of live export laws to articulate clear limits and guidance on department discretion, as outlined in detail below by reference to relevant issues and recommendations.

4.4 Unreasonable compliance expectations

Good regulation is reasonable and achievable

132. Reasonableness is a core principle of administrative law that exists to help achieve natural justice for the regulated and to avoid regulation being developed or administered that cannot be complied with.

133. The principle of reasonableness also inherently precludes the application of an absolute requirement or expectation on a regulated party. Absolutes such as 100 per cent

compliance (infallibility) or achievement of zero risk are not achievable or reasonable for any regulatory situation.

134. There is an abundance of literature on this point. There is also a long standing tradition, not only in Australia, across a diverse range of regulatory regimes of the courts not construing provisions so as to impose absolute obligations.

135. Regulation that can reasonably be complied with is fundamental to its legitimacy and to driving voluntary compliance towards achievement of the policy objective. Unreasonableness is a strong deterrent to compliance.

136. Reasonableness and achievability are particularly important for ESCAS, as the exporter is prima facie tasked to "ensure" voluntary adherence / compliance of overseas third parties to regulatory obligations.

(a) The levers available to exporters to improve the rate of compliance by overseas entities through voluntary means are limited and there are very few genuine coercive means available to an exporter.

(b) The risk factors for lower rates of compliance by overseas entities are also more significant because of differing perceptions of legitimacy and reasonableness. In short, given there can be no direct regulatory obligation under ESCAS, compliance may represent for some entities primarily an unwelcome and unnecessary imposition on their commercial activity.

137. Within such a framework, it is impossible for even the most diligent exporter to avoid ESCAS non-compliance at approved facilities at some time. To require or expect eradication of non-compliance is unreasonable and simply cannot be achieved and is a key driver of the substantive and unfair burden currently imposed on the live export industry.

138. This issue is exacerbated where a micro-management approach is adopted, which has arguably been the case for ESCAS (see later in submission). However, despite these expectations, exporters have and continue to the best of their abilities comply with the obligations set out under ESCAS.

Implications for live export laws

139. Reasonable control over an outcome is also a significant question, given even without fault or culpability and having taken reasonable actions (e.g. to develop and administer systems), the exporter ultimately has little genuine control over the actions of a third party entity or particularly individual. These elements are much more pronounced issues for ESCAS where an indirect approach is applied (e.g. through regulation of the exporter) and there are challenges from a lack of direct ownership of the animals or control over the individuals in charge of them.

140. Ultimately, the basic fact is that exporters cannot warrant the infallibility of a third party and must not be unreasonably held to account for it, particularly where there is the potential for criminal sanction as a result of third party non-compliance.

141. However, external groups benefit from the portrayal that compliance with ESCAS requires infallibility and that this is a reasonable expectation. Such portrayals of compliance also seek to promote out of context that any non-compliance is a failing of the regulator and the exporter, worthy of escalating punitive measures or criminal sanctions.

142. The corresponding challenge from this interest group / socio-political rhetoric is that the negativity can affect the culture of the department and the relationships with the exporters (and in turn with importers / facilities) and encourage lower risk appetite and increased micro-management.

143. Unfortunately, as noted above, the lack of an objective and the various instances within live export laws and policies of an apparent insistence on infallibility (e.g. clause 2.44 (2A) - that "ESCAS will ensure" animal welfare outcomes) do not help to instil reasonableness or to rebut an expectation of infallibility. It also supports unrealistic and opportunistic challenges to industry integrity and regulator competence.

144. It is recognised in this context that although the law is not explicit, the department certainly is aware of its administrative law obligations. It is also recognised that the genesis of the implied or stated regulatory and policy expectations of infallibility (e.g. the compliance categorisations that consider one or 1,000 sheep outside of a supply chain to be a critical non-compliance) was the environment during its development. The pressure and emotion in 2011 was such that the exposure felt by the government to non-compliance was extreme and its tolerance extremely close to zero risk. This may have arguably been necessary and helped initial implementation but as the industry has changed such an implication becomes an unreasonable burden for the industry.

145. Overt incorporation of reasonableness in the legislation is particularly important in industries with strong social sensitivities and active interest groups. Doing so acknowledges that reasonableness is a key element to ensuring proportionate decisions and setting achievable expectations and helps ensure that it is a central part of regulatory decision making and policy development. Similar principles arise on the need for associated policies to overtly promote realistic expectations from the system (and not infallibility).

<u>This reflects the approach of many other regulatory regimes</u>

146. The call for overt acknowledgement and inclusion of reasonableness principles and standards in live export laws is not a novel concept. It has been widely adopted throughout Australian legislation, including regulatory regimes governing high risk activities with significant consequences for others (e.g. health & safety) if the duties and obligations are not met.

147. To the contrary, its absence is highly unusual in regulations that seek to impose broad non-prescriptive legal obligations (e.g. to ensure animal welfare objectives are met).

148. For example, national occupational health and safety (**OHS**) laws were recently enacted in most Australian states, with the aim of harmonising OHS laws nationwide. At the core of the legislation is the imposition of a number of general health and safety duties on a wide range of workplace participants.

149. Prior to this, most state legislation sought to impose strict liability obligations, which included that employers "ensure" the health, safety and welfare at work of their employees.[1] However, that legislation also afforded employers with a defence of reasonable practicability and lack of control. For example, section 53 of the *Occupational Health and Safety Act 1983* (NSW) provided it would be a defence for the person to provide that:

> "(a) it was not reasonably practicable for him to comply with the provision of this Act or the regulations the breach of which constituted the offence; or
>
> (b) the commission of the offence was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision".

150. Live exports are not afforded any such protection by the current legislative regime.

[1] For example, see s 15(1), *Occupational Health and Safety Act 1983* (NSW)

151. The effect of the harmonisation of the OHS laws effectively reversed this onus of proof, so that it will generally be upon the shoulders of the prosecuting authority to illustrate why it was reasonably practicable for the employer to adopt such measures, rather than the employer proving, by way of a defence, that it was not reasonably practicable. As such, the strict liability obligation to "ensure" safety has been replaced with a reasonable standard of care resembling that of common law negligence.

152. For example, although not under harmonised national laws, Western Australian OHS laws similarly incorporate direct reference to what is practicable and does not utilise absolute terminology such as unqualified use of *ensure* or *must*.

> ***Occupational Safety and Health Act 1984 (WA)***
>
> s22(1) An employer **shall, so far as is practicable**, provide and maintain a working environment in which the employees of the employer (the employees) are not exposed to hazards …
>
> s23(1) A person that designs, manufactures, imports or supplies any plant for use at a workplace **shall, so far as is practicable**…"
>
> s23(3) A person that manufactures, imports or supplies any substance for use at a workplace **shall, so far as is practicable, ensure** that adequate toxicological data in respect of the substance and such other data as is relevant to the safe use, handling, processing, storage, transportation and disposal of the substance is provided …"

153. A further illustrative example, is the way in which the Australian Capital Territory has overtly defined the meaning of "ensure", in relation to another very high risk sector, dangerous substances. In those laws, a useful definition has been incorporated in the regulations to clarify that the requirement to "ensure" is satisfied if the person takes reasonable steps to minimise the risk. The relevant legislation then subsequently sets out what the regulator must consider when assessing whether reasonable steps were taken.

> ***Dangerous Substances (General) Regulation 2004*** **(ACT), regulation 6**
>
> Meaning of ensure
>
> (1) This section applies if a provision of this regulation requires a person to ***ensure*** that something is or is not done in relation to a dangerous substance.
>
> (2) The requirement is satisfied if the person takes reasonable steps to eliminate the hazards, and eliminate or minimise the risks, that might result if the requirement were not met.
>
> (3) Subsection (2) does not limit the ways in which the requirement may be satisfied.
>
> **********
>
> ***Dangerous Substances Act 2004*** **(ACT), section 16**
>
> *Reasonable steps* for a risk
>
> (1) A regulation may prescribe what are, or are not, ***reasonable steps*** in relation to a risk.
>
> (2) However, if a regulation does not prescribe what are, or are not reasonable steps in relation to a risk, all of the following must be considered in working out whether ***reasonable steps*** have been taken to minimise the risk:
>
> (a) the seriousness of the risk;
>
> (b) the current state of knowledge about -
>
> (i) the hazard giving rise to the risk and the risk itself; and
>
> (ii) any ways of eliminating the hazard or minimising the risk;

(c) the availability and suitability of ways to eliminate the hazard or minimise the risk;

(d) the cost of eliminating the hazard or minimising the risk;

(e) anything else prescribed by regulation.

154. The *Mines Safety and Inspection Act* (1994) (WA) (**MSI Act**) is another example of legislation governing a high risk industry which incorporates a "so far as is practicable" limitation on the requirement to ensure certain matters (e.g. the major duty to provide and maintain a working environment in which employees are not exposed to hazards (see s 9)).

155. Similar to above, the word "practicable" is defined to mean reasonably practicable, and prescribes that regard is to be had to a number of factors, including:

(a) the severity of potential injury or harm;

(b) the state of knowledge of injury or harm, or the risk thereof; and

(c) the state of knowledge about means of removing or mitigating the risk or harm, and the availability, suitability and cost of doing so.

156. The above examples illustrate effective options to incorporate reasonableness into legislative obligations. Live export legislation would benefit greatly from a similar approach. Not only would this make the legislation clearly accord with the long standing tradition, not only in Australia but also the United Kingdom and Canada, of not construing provisions to impose absolute obligations, but it would also:

(a) reflect the way the law would interpret any challenge to the obligations in any event;

(b) provide certainty on the true scope of the obligations; and

(c) reduce substantive inefficiencies for the department and live exporters due to unnecessary or inappropriate, overly onerous controls, delays and challenges to regulatory decisions, which would also tie up all parties involved in red tape.

4.5 Balanced punitive and remedial regulatory approaches

157. The livestock export regulation is based almost entirely on a command and control model of regulation where ASEL and ESCAS are authoritative norms, requiring continuous close scrutiny and where any failure to meet them equates to a non-compliance requiring punishment. That approach is adopted without differentiation between substantive and operational matters.

158. Although, in practice, the department often seeks to operate in a more remedial manner particularly in relation to ESCAS, the regulatory basis still remains structured almost primarily on punitive approaches.

159. While a command and control approach may align with some regulatory structures where parties have significant control over the regulated activities and a reasonable ability to influence outcomes, it does not necessarily suit ESCAS as effectively.

160. For ESCAS, a structure that incorporates and balances both punitive and remedial approaches would better reflect the challenges of managing third party actions overseas to achieve compliance and support a continuous improvement approach.

161. This is not to suggest that command and control does not have a place in ESCAS. Rather, it is a critical component of almost all regulatory regimes. However, it must be targeted at significant matters that warrant substantive regulatory responses – for example, those that

represent significant risks to the objects of the legislation or reflect a failure to meet required standards of behaviour, lack integrity etc.

162. By contrast, continuous improvement and a remedial approach are best targeted at largely operational matters – which aligns with what both ESCAS and ASEL entail. This structure could then be supported where relevant by appropriate QA programs and formal standards (as outlined in chapter 6).

163. To effectively balance these two approaches, the legislature must carefully consider and establish a defined meeting point where the remedial / systems level oversight of operational matters transitions to closer scrutiny of substantive matters.

164. This is achieved by identifying clear triggers and escalation points for matters that warrant closer regulatory scrutiny and the potential imposition of serious regulatory controls or punitive consequences (as defined by the regulations). These could, for example, include where evidence demonstrates matters of:

(a) significant non-compliance;

(b) lack of integrity or failure to meet behavioural standards; or

(c) systemic issues or a systems failure.

165. Importantly, establishing such a balanced approach does not avoid or diminish regulatory oversight. Rather, it enables the regulatory focus to be maintained at a systems level for operational matters, with resources freed to better manage and target substantive regulatory issues.

166. Considering the above, it is apparent that a regulatory system which solely or heavily relies on command and control will struggle to effectively support the department and exporters in achieving the outcomes desired under ESCAS.

167. This is particularly the case when the characteristics of ESCAS are taken into account – including the extra-jurisdictional nature of the outcomes it seeks to achieve, its strong social objectives and the need to indirectly regulate through exporters to influence the actions of a third party.

168. By placing exporters in the position of responsibility, it puts them in the dubious position of having their own compliance, risk management and business stability placed in the hands of an overseas commercial third party.

169. As outlined later in this submission (chapter 9), the imposition of this secondary liability is unprecedented, particularly given the potential for criminal sanction, which makes it wholly unsuited to a command and control regulatory model; and quite possibly unenforceable if regulatory controls or sanctions based on secondary liability were ever challenged.

170. A related impact from the adoption of a command and control approach to ESCAS has been micromanagement and the lack of differentiation between administrative / operational matters and substantive matters in terms of the regulator's expectations and involvement.

171. Such an approach also has little benefit at the operational or administrative level, other than to add unnecessary costs and increase the likelihood of failures to comply.

172. Command and control regulation is also naturally perceived in the negative by almost all parties (regulator, exporter, importers, overseas governments and the community) and the focus on non-compliance does little to manage overseas perceptions of sovereign intrusion and is counterproductive to continuous improvement.

5. The importance of risk appetite

5.1 Impact on regulatory discretion

KEY PROPOSITIONS

P5.1: Regulated entities are entitled to have confidence that the regulatory environment is stable and the approach of the regulator is predictable, evidence based, proportionate and in accordance with well accepted administrative law principles of due process and natural justice.

P5.2: Lack of reasonable legislative limits on broad discretionary regulatory powers within the socially sensitive livestock export industry increases the potential for risk appetite to inappropriately influence the regulatory approach, including the imposition of regulatory controls or enforcement actions.

P5.3: Changeable risk appetite and unreasonable sensitivity of regulatory oversight creates significant avoidable uncertainty and inefficiencies, for both the department and industry, as well as disproportionately punitive direct cost impacts for industry and encouragement of regulatory creep.

RECOMMENDATIONS

R5.1: The legislature should prescribe clear guidance and limitations on the exercise of broad discretions conferred on the department to insure against susceptibility to, or undue influence by, external perceptions and risk appetite.

173. Within a regulatory system such as livestock export where discretionary powers are extremely broad, if not unfettered, there is a significant potential for risk appetite to vary and influence the level and approach to regulatory scrutiny and subsequent imposition of regulatory controls or enforcement actions.

174. This is particularly apt to livestock export, which faces persistent activism overtly aimed at banning the industry that takes strategic advantage of regulatory sensitivity to risk appetite. For example, promotion of the misconception of ESCAS infallibility is used to support claims that any and all non-compliance is a failing of both the regulator and industry.

175. In a highly discretionary regulatory regime such as live export, persistent negative pressure can have profound impacts on how the department interacts with exporters.

176. It potentially increases the risk of inconsistent or disproportionate regulatory oversight or action. In the absence of clear parameters, naturally risk adverse regulators will inherently lean towards lower risk appetite, stricter enforcement and greater micro-management.

177. The significance and potential impact of risk appetite on regulators is well accepted. The Productivity Commission noted in its *Rethinking Regulation* report that:

> "*the risk aversion exhibited by regulators…..is to be expected in an environment where any adverse event within the regulator's field of influence is held up publicly as a 'failure', while any benefit impacts on market performance that a regulator may have are not directly observable and go unremarked. Hence the incentives facing most regulators are to err on the side of being strict in their enforcement activities…*"

178. The role of good regulation is not to be susceptible to, or unduly influenced by, emotive concerns:

"Be careful not to be distracted by the symptoms of a problem or media interpretations of it. Identify the underlying cause of the problem, its seriousness and your capacity to deal with it."

"Remember: regulation cannot eliminate risk entirely; sometimes it just shifts risk. Our role as policy makers is to provide advice to governments about acceptable levels of risk—taking into account the possible consequences—and how much it will cost the community to reduce or eliminate that risk."

"It's natural for media or lobby groups to focus on controversial or emotive aspects of potential policy decisions, but is the cost of regulating in proportion to the real-world risk? Can risk be eliminated entirely? Who should pay? How much risk is acceptable under the circumstances?"

(Australian Government Guide to Regulation)

179. Regulated entities should be able to have confidence that the regulatory environment is stable and the approach of the regulator predictable, evidence based, proportionate and reflective of a genuine risk.

180. External perceptions must not be allowed to materially influence good regulation.

181. The consequences of a changing risk appetite can be significant and are challenging for businesses seeking to establish commercial arrangements, invest in infrastructure or commit to long term programs, which all rely on predictable decision making.

182. The issue is not necessarily that risk appetite and regulatory oversight is expected to be static, but that the regulatory features adequately protect against oversensitivity and support, as far as practical, predictable and proportionate regulation in accordance with well accepted administrative law principles of due process and natural justice.

183. It is also recognized that risk appetite is not only a factor relevant to the regulator, but also the regulated entities. In this regard, the department is faced with a range of different business structures and risk tolerances which it must manage and address for the benefit of the broader industry. In this context, these entities have varying risk appetites and that their actions can of themselves influence the appetite of the department in its dealings with others.

5.2 Implications for good regulation of the live export industry

184. For livestock exporters, unreasonably changeable risk appetite and sensitivity of regulatory oversight can create significant avoidable and often punitive direct cost impacts and inefficiencies which are dealt with later in the submission, in particular regarding micro-management.

185. It is noted that the department has recently refined / adopted a risk based regulatory approach, particularly in terms of administrative decisions, enforcement and compliance.

186. Although this reflects an informal policy commitment, this approach offers the opportunity for improved resource allocation by the department and a more targeted focus on areas of highest risk, but only if the potential impacts of changing risk appetite are appropriately stabilized.

187. The increased sensitivity of broad discretions to risk appetite warrants the adoption of clear legislative guidance and limitations on the exercise of that discretion, with appropriately prescriptive elements. This will help stabilize the impacts of risk appetite and support progressive reforms to minimise micro-management, prevent regulatory creep and better separate operational and substantive risks and compliance requirements.

188. In addition, the department must also ensure that within that regulatory framework it overtly addresses the issue of differentiating and weighting subjective risks (perceptions) and objectives risks.

(a) In some circumstances, public or special interest group concerns can create pressure for new regulations or a lower risk appetite among the community and politicians. This pressure can lead to a disproportionate perception of risk and regulatory response.

(b) In relation to ESCAS in particular, where there is a lack of clear policy intent, objectives or guidance for discretionary powers, the regulator is not well protected from pressures to respond to adverse events because of societal or political pressure or perceptions of a 'failure.' This is a driver for it to adopt a lower risk appetite and to resort to greater micro-management.

189. Risk appetite is a fundamental driver of micro-management and it can and does apply from the most senior to the most junior levels of organisations. The greater the inherent discretion within the law for regulatory oversight of all aspects of industry, for example without differentiation between operational and substantive provisions, the greater the potential for resultant inappropriate, inefficient and overly burdensome micro-management.

190. Broad discretionary powers within a socially sensitive industry such as livestock export, which experiences significant volatility and reduced risk appetite, also exposes the regulator to pressure to increase regulation into new areas or to add layers of regulation to existing regulation ('regulatory creep'). This "regulatory creep" relates to regulatory oversight, including imposition of controls, over matters that are not overtly authorised or required by the regulations. There are concerns within industry that the risk of regulatory creep is manifesting in the regulation of the live export industry because of its sensitivity in the media and political spheres.

191. Further, with the discretions allocated to the Secretary delegated down through hierarchies of officers the risk appetite can be strongly influenced by individual interpretation of what risk appetite is held by more senior officials. More broadly there is also significant potential that those exercising delegation discretions will feel personally exposed to scrutiny for their decisions if something occurs and this can push them to adopt a low risk appetite and to trend to micro-management.

192. There are signs, with recent and commendable reforms by the department to explore such things as approved arrangements for ASEL and export certification and the risk based regulatory approach, that there is a desire to change the role of the department from the focus on micro-management to substantive matters.

193. Those efforts deserve the support and guidance of clear legislation. Enshrinement of appropriate well-recognised features in law, such as those outlined later in the submission, is critical to define the limits of discretion and insure the regulatory response from the impact of changing risk appetite.

194. Further, it is also noted that many of issues of risk appetite can be minimised or avoided through the establishment of systems which establish clear boundaries between operational and substantive matters – such as QA systems.

6. Enabling the regulator: Recognising quality assurance and equivalence

KEY PROPOSITIONS

P6.1: The department faces significant logistical and evidential challenges to maintain appropriate regulatory oversight, with limited resources, and to ensure that it has appropriate assurances of the reliability and independence of evidence obtained and relied upon.

P6.2: Legislative reliance on independent quality assurance and express recognition of equivalence in other systems or jurisdictions, with a clearly defined "meeting point" of the interface with regulatory oversight, is frequently utilised to enhance regulatory scrutiny and:

(a) support more efficient, reliable, evidence based and transparent decision making;

(b) insure against undue influence of changing risk appetite;

(c) substantially reduce regulatory burden;

(d) provide reliable assurances of systems compliance; and

(e) enable regulators to avoid unnecessary micro-management and focus resources on substantive regulatory issues.

P6.3: The live export regulatory regime stretches departmental resources but does not formally adopt or recognise independent quality assurance programs or equivalence as demonstrating compliance with relevant objectives and outcomes, including ASEL and ESCAS.

RECOMMENDATIONS

R6.1: The legislation enshrine approval and reliance on independent quality assurance programs, to a particular standard and clearly defined scope, to address relevant departmental logistical challenges, enhance efficiencies and ensure "best evidence" is available to support regulatory scrutiny and decision making.

R6.2: The live export regime incorporate mechanisms to formally recognise or adopt equivalence of appropriate standards, codes or regulatory regimes in other jurisdictions as demonstrating - in whole or part - compliance with (or exceedance of) relevant obligations, including ASEL and ESCAS.

R6.3: The legislature clearly identify and prescribe a "meeting point" between direct regulatory oversight and reliance on QA or equivalence to enable regulatory focus to be maintained at a systems level, where appropriate, and to define how any interaction or information flow is to be managed between these systems.

6.1 Efficient regulation based on independent best evidence

195. Regulators are frequently under-resourced and overstretched which creates challenges for regulatory decision making, including having to rely on incomplete or unreliable evidence. This can particularly be the case where there is limited legislative guidance for the exercise of broad regulatory discretion and an associated wide ranging scope of regulatory oversight.

196. For example, within ESCAS the department faces significant logistical challenges to maintain oversight of operational matters in overseas markets and ensure that it has appropriate assurances of the reliability and independence of evidence obtained and relied upon.

The value in legislated reliance on third party systems

197. Enshrinement in legislation of reliance on independent quality assurance (**QA**) or third party verification systems, or alternatively express recognition of equivalence in other systems or jurisdictions, is frequently utilised in public sector regulatory regimes to support regulator decision making.

198. Where it occurs, appropriate scrutiny of relevant matters is enhanced, not avoided. In particular, this approach:

(a) helps provide best evidence support for regulatory decision making by overcoming expertise and/or logistical (capacity / resource) constraints;

(b) provides assurances of systems compliance that the regulator can rely on with confidence; and

(c) enables regulators to avoid unnecessary and / or counter-productive micro-management and focus their resources on substantive regulatory issues (e.g. by identifying matters that trigger the need for close regulatory scrutiny).

199. This approach is often implemented through the mandating in legislation (typically regulations) of the use of approved independent QA systems to address or undertake certain functions to a particular standard as defined in the legislation.

200. The benefits of this approach are significant.

(a) It supports more efficient, reliable, evidence based and transparent decision making.

(b) It provides greater certainty to industry and supports the regulator in the exercise of its statutory function, in particular by significantly reducing the risk of challenge to regulatory decisions and allowing it to focus resources on substantive matters and the true objects of the regulations.

(c) It helps insure the regulator and industry from inappropriate impacts on regulatory scrutiny and approach by changing risk appetite.

(d) It substantially reduces a significant burden on the regulator and generates efficiencies by taking advantage of economies of scale and logistical / technical expertise.

201. This approach is almost universally to be preferred over;

(a) ad hoc reliance on information of varying pedigree and completeness that a regulator may obtain from industry or third parties; or

(b) a regulator stretching valuable scarce resources across a myriad of logistical challenges and often a lack of (or limited) expertise on discrete aspects of industry.

202. As indicated earlier and perhaps not surprisingly, the potential role for QA or third party systems within the livestock export industry was identified within the Farmer Report and further expanded in the department's *ESCAS Report*:

(a) "*The Farmer Review recommended that industry develop a through-chain quality assurance system to complement the government's regulatory compliance programs. This could help reduce the regulatory burden imposed by the government upon industry. An industry-managed assurance system may also facilitate more efficient and effective management of off-shore supply chain participants that are outside of Australia's regulatory reach. If developed, such a system could provide an alternative way for exporters to meet ESCAS principles, provided it was underpinned by an appropriate statutory framework. Such a framework would allow the regulator to audit and verify the operation of the assurance system and step in should the industry managed system fail."*

203. Under a regulatory compliance regime adopting such an approach, the legislature would generally identify or prescribe key features that an independent QA system must exhibit and that are matched to the particular regulatory needs for that industry and meet the logistic and expertise requirements that facilitate appropriate regulatory oversight. This is widely employed in Australian regulation as illustrated later in this chapter.

<u>The need for regulatory clarity on "meeting point"</u>

204. The legislature would generally also be responsible for clarifying and prescribing in legislation the scope of reliance it is prepared to place on independent QA or recognition of equivalence in other jurisdictions. This is a significant source of the efficiencies to be gained, because it essentially determines the extent that the regulator will separate itself from direct scrutiny of operational compliance and focus its resources on substantive compliance matters.

205. Where the legislature determines the "meeting point" of direct or close regulatory oversight and reliance on QA and equivalence, and how that interaction is managed, is critical to its ability to effectively and efficiently support regulatory oversight and decisions.

206. Good legislation should ensure that the meeting point provides the regulator with reliable, independent assurances and information to have confidence that:

(a) appropriate systems are in place and functioning properly to satisfy potential regulator concerns about key matters, obviating the need for direct regulatory scrutiny; and

(b) it will receive relevant information about any significant non-compliance or more substantive matters that warrant its closer regulatory scrutiny or action.

207. Typically, the meeting point aligns with operational regulatory obligations and for the regulatory focus on those operational matters to be maintained at a systems level. This also usually aligns with modest regulatory penalties that overtly reflect the operational nature of those obligations, with matters subject to more substantive penalty usually warranting continued close and direct regulatory oversight.

(a) Unfortunately, the current lack of clarity in the live export regulatory regime about the availability of potential criminal penalties or regulatory sanction for breaches unnecessarily complicates this issue.

(b) As outlined in chapter 7 of the submission, there is also a need for appropriate differentiation between possible penalties for operational and substantive breaches. Once in place, that would further support alignment of the meeting point, and reliance on QA, with operational matters.

208. Incorporation and reliance on QA in the regulation of live export, including identification of the appropriate meeting point, should be designed to relieve the department from direct and close oversight of the many largely operational matters that also pose significant logistical problems for both the regulator and industry.

209. This would encompass many, if not most, of the matters within the ECO and would include ESCAS, due to its operational nature. The identification and where this meeting point falls must be clearly captured in the legislation to ensure the regulator, the QA program operator, and the regulated entities are all fully aware of where each party's roles and responsibilities lie.

210. Recognition of appropriate QA systems and clear characterisation of the meeting point, entrenches efficiencies, enhances the regulatory function and provides certainty to industry. If the legislature fails to clearly identify and characterise the meeting point, these benefits are unlikely to eventuate and the uncertainty could undermine the effective, efficient and sustainable operation of any QA system.

6.2 Opportunities for recognition of equivalence

211. Recognition of equivalence allows for a government to expressly accept alternative regulations, standards or codes in other jurisdictions or frameworks – potentially even at a market or country level – as meeting its own regulatory requirements.

212. Recognition of equivalence is widely used across a number of other industries, including those of high risk, and can deliver benefits such as reduced duplication, increased flexibility and greater efficiency in achieving the objectives of regulations.

213. For livestock export, the potential exists to establish a structured and legislated framework for recognising alternate animal welfare, control or traceability standards, codes, regulations or systems as being equivalent to or exceeding ESCAS requirements.

214. The importance of considering a structured system for recognising equivalence in international jurisdictions under ESCAS is significant, including due to a combination of the following:

(a) Australia's trading partners are all members of the OIE and should be working towards adopting its animal welfare recommendations. As ESCAS is based on the OIE animal welfare recommendations it will increasingly become duplicative with systems and regulations in these countries;

(b) Consumers and societies globally are increasingly placing significance on animal welfare and governments in turn are legislating and developing systems to address these social concerns. Over the longer term, the need for ESCAS should diminish;

(c) The most effective mechanism to achieve long-term and global animal welfare change and, achieve the most efficient and cost effective assurance for the Australian community, is through countries developing their own animal welfare systems and this should be enabled and encouraged by Australian legislation.

(d) Overseas systems and structures for monitoring and enforcing animal welfare will generally (subject to various caveats) be more effective at administering regulation / objectives in that jurisdiction.

215. While it would be a strong enabler for Australia to step back in some markets, it is recognised that if done on a country basis – rather than a systems basis, for example – there may be the potential for trade or WTO complications. These details can be addressed in due course and do not negate the value and appropriateness of the general proposition.

216. Further, bilateral agreements, recognition and regulation which treat different countries separately are not of themselves unusual within regulatory frameworks.

(a) For example, within the live export policies there has been variously Memorandums of Understanding required as pre-requisites for trade as well as country specific Orders introduced following welfare issues relating to Egypt and South Korea.

217. The issues and avoidable costs / inefficiencies with not differentiating between markets and the balance of impact and benefit was starkly highlighted in the *ESCAS Report* in relation to Japan.

> "*In addition, the pre-existing tight regulation of livestock welfare and food safety in Japan means importers and feedlot and abattoir operators have had to simultaneously deal with multiple regulatory arrangements. Commercial parties have to accommodate ESCAS auditing and reporting alongside meeting pre-existing Japanese domestic regulatory requirements.*
>
> *Implementation of ESCAS in Japan has demonstrated that the current uniform approach to ESCAS in all markets can make the process difficult even for well-prepared exporters and importers. This is more pronounced in markets that already have strict requirements for high standards of animal welfare where ESCAS imposes an additional level of regulation. For Japan, it is unclear whether the additional ESCAS regulations have resulted in any discernible improvements in animal welfare.*"

218. It must be considered a perverse outcome of the current regulatory approach if – as the report states – the difficulties in implementing ESCAS are "*more pronounced in markets that already have strict requirements for high standards of animal welfare where ESCAS Imposes an additional level of regulation.*"

219. The ESCAS Report also noted the challenges of the 'one-size-fits' all model as follows:

(a) "*The ESCAS framework applies a single consistent system to all importing countries, regardless of the significant differences in terms of species exported, transportation method, seasonality, and demand drivers that apply. The 'one-size-fits-all' approach of ESCAS <u>does not allow importing countries' regulations or positive improvements made by exporters or markets to be taken into account.</u>*"

220. Importantly, equivalence does not need to be total to be acceptable and systems can recognise only certain parts or elements – for example, recognising animal welfare equivalence but relying on other systems to provide assurances of control and traceability.

221. For example, under an equivalence recognition structure the Australian Government could accept that cattle exported to the USA which are slaughtered in facilities within the American Meat Institute audit program, designed by Dr Temple Grandin, are equivalent and the exporter then only needs to evidence within its own systems that appropriate control and traceability arrangements in place. It is noted that depending on the nature and approach this example could also be considered recognition of QA (highlighting some of the similarities of the two approaches).

222. It is also noted that the introduction of regulation recognising equivalence of codes, standards, systems or markets should be outcomes focused. This will provide reasonable accessibility and avoid excluding valid standards, systems or markets based on operational or process based inconsistencies (e.g. where the specific ESCAS Animal Welfare Standard does not align perfectly with an alternative standard).

223. Instead, assessments of equivalence should focus predominantly on how regulations or systems in overseas jurisdictions satisfy ESCAS / OIE outcomes or performance criteria. This general proposition is enshrined in the OIE principles for animal welfare in its Terrestrial Animal Health Code[xi]:

"*That equivalent outcomes based on performance criteria, rather than identical systems based on design criteria, be the basis for comparison of animal welfare standards and recommendations*."

224. In summary, there is no reason why the live export regulatory regime should not seek to recognise equivalence with overseas markets as demonstrating compliance or evidence with the objectives and outcomes of ESCAS.

225. The merit of recognising equivalence is well established. There are many different legislative mechanisms to achieve this recognition, including for example to empower the Minister to deem certain markets equivalent, or not, as the case may be based on defined factors. Such deemed market equivalence need not be absolute and any deficiencies could be dealt with by legislative direction that appropriate mitigation strategies address those issues.

6.3 Micro-management of regulatory oversight

Issues facing the industry

226. Any discussion of quality assurance and equivalence necessarily should consider the impacts of micro-management and the blurring of substantive and operational administration and compliance management. In particular, so as to clearly draw out the efficiencies and benefits that can be achieved by allowing for the government regulator to target its scrutiny and intervention at a higher level (by reliance on other systems or jurisdictions).

227. One of the key challenges with micro-management, is that it can be enshrined in policies (or legislation) through the application of a particular expectation, threshold or risk appetite and have wide ranging efficiency impacts across the regulated entities.

228. The micro-management of the industry in the policy sense tends to exhibit itself through structures that require the department to approve, assess or be comforted by something.

229. The day-to-day administration of livestock export particularly in terms of approvals and compliance responses are routinely affected by micro-management. The impacts at this level are derived from the department setting its discretionary thresholds for decision making at high levels and requiring exporters to provide increasingly detailed and absolute assurances and evidence to meet those expectations.

230. Micro-management is enabled by the broad discretions afforded the regulator but its exercise over all levels and aspects of regulation reflect a low risk appetite and the belief that without the department's intervention and review the system will fail.

231. The exercise of these discretions in a manner which allows micro-management is further enabled by the lack of clear guidance or limitations to direct what is relevant but also to avoid the department unnecessarily and inefficiently focusing on non-substantive issues.

232. This has inevitably led to a broad range of avoidable, significant and direct inefficiencies and costs on exporters at almost all stages of the live export process.

233. Examples of some of the inefficiencies that can be attributed to micro-management and the failure to effectively separate administrative and substantive management of regulatory performance, broadly include:

(a) Costs and delays in waiting for approvals.

(b) Repetitive inquiry into administrative and operational details.

(c) Time and cost in gathering further information.

(d) Time, cost and delay in implementing conditions or additional requirements and evidencing this to the department.

(e) Duplicative auditing processes and dilution of the effectiveness of independent auditing.

(f) Impacts of unsubstantiated allegations on further approvals and the risk of opportunistic activism through delays.

(g) Inability to source livestock for export until approval for an NOI and CRMP are approved and an ESCAS applies to the livestock (through the Order 2.02 (b) – this should be amended in legislation as it is contrary to business practice and primarily causes unnecessary time constraints and pressure for the regulator, the exporter and producer suppliers).

234. Micro-management also imposes significant avoidable costs and undesirable outcomes on the department. In particular, micro-management is a costly and inefficient application of the department's resources which would be better directed to an oversight role focused on responding to substantive issues (e.g. escalated from the operational system), but also it shifts the compliance risk to the department rather than placing it with the exporter as the regulated party. For ESCAS, the department is then faced with the challenge of managing compliance risk without the access to the site (being based in Australia), expertise (particularly in how to achieve control or traceability outcomes) or reliable information required to justify effective decisions and responses.

<u>Options to help ensure appropriate regulatory oversight</u>

235. As outlined in 4.5, close regulatory scrutiny should be directed at substantive matters, with largely operational regulatory obligations addressed by regulatory review of systems (e.g. supported by appropriate QA or formal standards).

236. Rather, substantive issues related to the exporter's conduct in seeking to reasonably comply with the operational regulatory requirements that equate to serious issues of integrity, competence / fault or culpability (and therefore indicate a lack of commitment to ESCAS and fitness to hold a licence) should be the remit of the licence conditions.

237. Key features of such an approach incorporate the following:

(a) Regulatory oversight and scope of discretion focused on substantive matters (e.g. that represent significant risks to the objectives of the legislation or reflect a failure to meet required standards of behaviour, lack integrity etc.)

(b) Regulatory oversight and action focused on operational matters, such as ESCAS systems and compliance, triggered only where evidence (e.g. from QA programs) suggests either:

(i) significant non-compliance; or

(ii) systemic issues or a systems failure,

that warrants imposition of serious regulatory controls or punitive consequences, as defined by the regulations (e.g. show cause).

(c) Recognition of appropriate QA systems which can enable the regulatory focus to be maintained at a systems level, because it provides reliable and independent assurances on the various operational matters and systems in place (i.e. satisfy regulator concerns). Any regulatory scrutiny or action triggered by systemic or serious non-compliance / integrity issues would in turn be supported by the same reliable independent QA information (i.e. regulatory decisions or actions based on "best evidence").

238. For ESCAS, a step back to macro management will rely on re-setting the responsibility for risk of operational non-compliance to the regulated entity (whereas now the regulator holds elements of the operational compliance risk and management) and providing exporters with the mechanism to manage administrative and operational matters through their own or industry systems.

239. In this regard, the legislature needs to consider what triggers need to be in place to draw in departmental direct oversight and intervention and these should be clearly stated and defined. For example, the department may only need to intervene with an exporter where operational non-compliance is of a critical nature (and to encourage self-reporting this should be focused on remedial support and continuous improvement, rather than punishment) or where certain non-compliance is indicative of a substantive integrity or competence issue (for example, where the exporter is culpable or has failed to diligently manage an approved system). The challenges in obtaining reliable information to support such a step away from the operational compliance issues is to ensure that the department has access to reliable information on which to base its responses.

240. QA programs can provide some assistance in this regard. These programs are not intended to, and do not, override a regulator's oversight or decision-making. Instead, it is to ensure the regulator has access to and can rely on best evidence, allow it to quality control, remove the need for micro management, and allow it to focus on the more substantive matters which require a regulator's oversight (macro management).

6.4 Legislative Adoption of Quality Assurance Programs

241. There are many regulatory structures and bodies that rely on QA systems and recognize equivalence in other regimes or jurisdictions, including for industries that have high societal, safety and political interest.

242. As outlined in greater detail in Annexure 3, this chapter summarises illustrative examples of legislative QA program recognition as a mechanism to assist with good regulation of industry, including in high risk industries such as biosecurity, livestock management, and alcohol and drug testing for road users. It includes examples of overt recognition of equivalence in other jurisdictions as a way to comply with local requirements.

243. This demonstrates that the benefits of quality assurance and recognition of equivalence, along with formal adoption of standards and codes, are recognised widely across a growing number of industries. This is reflected in ongoing refinement of various legislative regimes, aimed at reducing red tape, updating references and aligning requirements.

(a) *Biosecurity and Agriculture Management Act 2007* (WA) (**BAM Act**)

(i) The BAM Act, which is designed to provide effective biosecurity and agriculture management for Western Australia, expressly allows the Minister or the Director General to make arrangements with a corresponding Minister or administrator (i.e. persons responsible for the day to day administration of a corresponding law) recognising QA schemes approved or established under the BAM Act.

(ii) QA schemes are defined broadly under the BAM Act as schemes relating to animals, agricultural products, potential carriers, animal feed or fertilisers that are "designed to assure that" they meet certain criteria, for example that they are of a particular quality or grade, or have been treated in a particular way.

(iii) The administration of, and compliance with, those QA schemes is regulated by the *Biosecurity and Agriculture Management (Quality Assurance and Accreditation) Regulations 2013* (WA), for example, by setting out the circumstances in which accreditations can be

cancelled or suspended, and the relevant offences (such as for contravening an accreditation condition).

(b) *Motor Vehicle Standards Act 1989* (Cth) (**MVS Act**)

(i) The MVS Act also illustrates regulator reliance on the expertise of third parties. It relates to the application of uniform vehicle standards to new vehicles when they are introduced into Australia, and also regulates the first supply to the market of used imported vehicles.

(ii) Amongst other things, the Minister may approve a corporation as a registered automotive workshop (**RAW**) to undertake certain tasks in reliance on RAW expertise. Regulatory oversight and control is retained by review of reports issued by the RAW prior to granting approval.

(iii) To be approved, RAWs must meet a number of criteria specified under the MVS Act and associated regulations, including to have a quality management system in place.

(iv) The quality management system must be certified under JAS-ANZ, which provides internationally recognised accreditation services, and meet standard ISO 9001:2000, which specifies:

A. requirements for a quality management system where an organisation needs to demonstrate its ability to consistently provide product that meets customer and applicable regulatory requirements; and

B. aims to enhance customer satisfaction through the effective application of the system.

(v) The Minister may vary, cancel or suspend an approval held by a registered automotive workshop if, for example, the workshop has failed to observe determined procedures and arrangements, or the workshop has contravened a condition of the approval.

(c) *Livestock Management Act 2010* (Vic) (**LMA**)

(i) Another legislative instrument which recognises QA in the agricultural industry is the LMA, which regulates livestock management in Victoria.

(ii) Livestock operators that participate in an approved QA program are exempt from the requirement to conduct a systematic risk assessment of the prescribed livestock management standards, or to comply with offence provisions under the regulations in relation to that activity.

(iii) The benefits of the system were identified in the Explanatory Memorandum to the Livestock Management Bill 2009, which stated that it "…*recognise[s], as part of an effective co-regulatory system, those commercial and existing industry compliance arrangements, including quality assurance programs, which successfully operate to demonstrate effective controls and ongoing compliance with relevant Standards*".

(iv) The Minister maintains oversight and ultimate control, with the ability to revoke, suspend or cancel approved compliance arrangements,

impose conditions, or require audits of an approved compliance arrangement.

(d) *Transport Operations (Road Use Management) Act 1995* (Qld) (**TORUM Act**)

(i) The TORUM Act aims to effectively and efficiently manage road use in Queensland. This includes breath and saliva tests for road users, for which it relies on expertise in testing specimens.

(ii) It formally recognises an analyst certificate (appointed under the *Health Act 1937* (Qld)) as evidence of these matters, and confirmation that all QA procedures for receipt, storage and testing were complied with. It also recognises that the police officers, as the usual officers who retrieve the samples, do not have the requisite expertise to test for these matters.

6.5 Legislative Recognition of Equivalence

244. Legislative recognition of equivalence is commonly used in other regulatory regimes to minimise duplication and achieve efficiencies. There is considerable merit in considering how it could be best utilised in the ESCAS framework.

245. The following are examples, within Australia, of legislative regimes where recognition of equivalence has been adopted:

(a) *Dangerous Goods Safety Act* 2004 (WA) (**DGS Act**)

(i) The regulation of dangerous goods in Western Australia illustrates the way in which recognition of equivalence can be incorporated to meet regulatory obligations addressed at minimising important risks.

(ii) As the following extract demonstrates, regulations under the DGS Act expressly permit a person to comply with "alternative safety measures" (as defined) in place of specific regulatory requirements, provided those measures result in equal or lower risk than compliance with the primary regulatory requirements. If they do not result in equal or lower level of risk, the person is taken to be contravening the regulations.

DGSE Regulations

6. Alternative safety measures, meaning of

(1) This regulation applies if a provision of these regulations says that alternative safety measures may be complied with instead of other requirements referred to in the provision (such as those of an Australian Standard) (primary requirements).

(2) A person who is required to comply with primary requirements in relation to the storage, handling or transport of an explosive may instead comply with alternative measures if -

(a) complying with the alternative measures results in a level of risk from the explosive to people, property and the environment that is equal to or lower than the level of risk that results from complying with the primary requirements; and

(b) the person makes and keeps a written record of the alternative measures and why they result in the equal or lower level of risk.

(3) If alternative measures with which a person complies, or purports or intends to comply, do not or will not result in the equal or lower level of risk referred to in subregulation (2)(a), the person is to be taken, for the purposes of the Act and in

particular section 47 of it, to be contravening or about to contravene these regulations.

(iii) This "equivalence" is not limited to particular alternative measures or jurisdiction. In that regard, compliance can be achieved by reliance on alternative measures that have been established in international jurisdictions, provided it meets relevant risk mitigation thresholds.

(b) *Mines Safety and Inspection Regulations 1995* (WA) (**MSI Regulations**)

(i) Another example of legislation that formally recognises equivalence in high risk industries is the MSI Regulations. In particular, regulation 5.4 requires the design, construction and testing of any electrical equipment to be installed or used in a hazardous area, to have been certified by the manufacturer in accordance with either AS 2380, or an equivalent standard in another country, approved by the State mining engineer.

MSI Regulations

5.4. Hazardous areas

Each responsible person at a mine must ensure that the design, construction and testing of any electrical equipment to be installed or used in a hazardous area has been certified by the manufacturer as being in accordance with -

(a) AS 2380; or

(b) an equivalent standard in another country that has been approved in writing by the State mining engineer for the purposes of this regulation.

Penalty: See regulation 17.1

(ii) The MSI Regulations also usefully allows the State mining engineer to exempt a person or mine from a particular requirement in two circumstances:

A. where they are satisfied that there is substantial compliance with the requirement; or

B. where they are satisfied that compliance with the requirement would be unnecessary or impracticable.[xii]

(iii) Such exemptions may be granted subject to such conditions the State mining engineer thinks fit and specifies in the exemption.

(iv) As an illustration, the State mining engineer could therefore exempt a person or mine from ensuring compliance with AS/NZS 2865:2001 under regulation 4.2 in relation to work carried out in a confined space at the mine, if satisfied that compliance with this standard is unnecessary or impracticable, or that there is substantial compliance with the standard. Substantial compliance could arguably be illustrated by showing compliance with a similar international standard.

(c) *MVS Act*

(i) In addition to adoption of QA models, the MVS Act also allows the Minister to determine vehicle standards by incorporation of standards produced by a number of organisations, including international organisations.

MVS Act

7A. Incorporation of documents setting out standards

In determining vehicle standards, the Minister may incorporate documents that set out standards:

(a) produced by the Economic Commission for Europe, the International Electrotechnical Commission, the International Organization for Standardization or Standards Australia or by any other organisation that is determined, by legislative instrument, by the Minister; and

(b) in force from time to time.

...

(ii) Thus, the MVA regulatory regime overtly and formally recognises that international standards and related materials may in fact be of a similar or greater standard than those currently available in Australia, and therefore the approach in other countries may be adopted and relied upon to demonstrate compliance with the Australian regulatory obligations, where appropriate.

7. Non-compliance and enforcement

KEY PROPOSITIONS

P7.1: The live export regime provides no (or minimal) guidance on what is sufficient to meet various regulatory obligations, including ESCAS, or on how the department must exercise its discretion in non-compliance assessment and enforcement.

P7.2: The failure of the legislature to differentiate between operational and substantive non-compliance, to constrain departmental discretion and prescribe conduct that meets relevant obligations (particularly for operational obligations) has embedded micro-management and low risk appetite into routine administration and non-compliance interactions with exporters.

P7.3: An effective approach, used in many regulatory regimes, is to combine detailed regulations with formal adoption of regulatory instruments, such as codes of practice, to clarify for the regulator and the regulated:

(a) compliance expectations and minimum standards that should be met; and

(b) the reasonable scope of potential liability for third party actions, including by reference to issues of control, culpability and having appropriate risk management systems.

P7.4: Exporters face a risk of regulatory action, or sanction, in circumstances where the live export regime provides no guidance on the relevance or impact of fundamental issues of control, culpability, foreseeability, reliability of evidence or whether the non-compliance was substantive or operational.

P7.5: The department typically imposes pre-emptive conditions on exporters as a precaution while allegations are being investigated and before any relevant breach has been fully established. This takes place in an environment of low risk appetite and can have significant detriment to exporters.

P7.6: Judicious reliance on codes of practice and/or incorporation of similar principles in regulations, placing the onus on the regulator to demonstrate a sufficient basis for burdensome regulatory action, is an important and well recognised method of alleviating the risk of disproportionate and pre-emptive regulatory action.

P7.7: The live export regime does not overtly recognise or provide a formal avenue for redress if departmental controls are believed to have been unfairly imposed and unreasonably caused loss.

P7.8: There is no legislative guidance or differentiation between the severity of non-compliance and potential sanctions or criminal penalties. Live export laws fail to clarify or prescribe appropriate levels of penalties, contrary to the approach taken by many regulatory regimes, including in high risk industries.

RECOMMENDATIONS

R7.1: The legislation be amended to incorporate clear prescriptive parameters on what represents non-compliance and what the consequences will be, including by formal adoption of standards or codes of practice.

R7.2: Reform of the compliance assessment and enforcement legislative framework should, as a minimum:

(a) maintain a strong link between licence approvals and serious issues indicative of a failure to meet fundamental obligations on exporters (integrity / incompetence), including broad discretion for the department to address those matters;

(b) decouple operational non-compliance (including ESCAS) from licence and export approvals, supported by formal adoption of codes of practice to limit regulatory discretion and prescribe a focus on systems compliance, with clear triggers to escalate departmental involvement; and

(c) remove third party supply chain participant non-compliance from direct departmental intervention or oversight, supported by codes of practice and a prescribed focus on proactive risk management and systems compliance.

R7.3: The live export regime should also deem compliance with relevant standards or codes of practice as being sufficient:

(a) to meet relevant regulatory obligations; and

(b) evidence of compliance, which prohibits the department from pre-emptively taking regulatory action, or imposing controls, unless or until it has proved otherwise.

R7.4: The live export regime incorporate clearly defined escalating penalty levels and criminal sanctions and prescribe appropriately matched proportionate penalties for particular breaches. This should include separating penalties for operational non-compliance (e.g. ESCAS) from breaches of substantive provisions (e.g. misleading conduct).

7.1 Overview: key issues and options

General principles

246. As described earlier in the submission, virtually all aspects of the livestock export regulatory regime are affected by key issues such as the regulator's unfettered discretion, the broad scope and lack of guidance from the regulations and absolute obligations imposed on regulated entities.

247. The impact on non-compliance assessment, classification and enforcement is essentially a slightly different manifestation of those same issues. However, due to the highly punitive nature of the legislative regime (as described in Chapter 4), the implications of these impacts can be particularly significant.

(a) For example, they create a number of problems, inefficiencies and liabilities, which include uncertainty, varying expectations of compliance by the regulator, perceptions of inconsistent application of controls and questions over the correlation between breaches and the controls applied.

248. Under the current regulatory framework, an exporter is required to "satisfy" the Secretary prior to export that animals will be handled, slaughtered and otherwise treated in accordance with OIE animal welfare recommendations, including demonstrating control and traceability of exported livestock.

249. A failure to then meet the ESCAS approval – of almost any description (e.g. minor or major; administrative or substantive) – is a non-compliance, which triggers a departmental response. While this may result in the department issuing a nil response, the Australian exporter is still named on the Commonwealth website as having non-compliance.

250. This involves the department itself assessing the non-compliance, conducting an investigation if necessary and determining an enforcement response. Actions by the department can include the imposition of various regulatory controls, as well as issuing show cause notices or referring to the Commonwealth Director of Public Prosecutions for assessment.

251. Unfortunately, the legislation is essentially silent on how the department is to approach these steps or the framework it is to follow.

252. There is also no legislative guidance or prescribed standards on what is sufficient to meet various obligations or how the department will exercise its discretion in taking action.

253. As outlined below in this chapter, this is contrary to the approach taken in many other regulatory regimes, including those governing high risk industries with strong social policy objectives.

254. Importantly, non-compliance and enforcement is also an area which was identified within the department's *ESCAS Report* for potential reform, particularly referencing "*clearer guidelines for describing and managing non-compliance, and clarifying third party complaint processes*."

Micro-management of the compliance framework

255. Micro-management of non-compliance assessment and enforcement is a significant and unnecessary burden on the resources of the department and exporters. It also has the potential to cause substantial and avoidable detriment.

256. However, the department's interpretation of its broad discretion and exporter compliance requirements has arguably embedded micro-management and low risk appetite into the routine administration and non-compliance interactions with exporters.

257. This is seen in the non-compliance framework which essentially requires the department to categorise, investigate and respond to all non-compliance – regardless of nature, significance or severity. Under ESCAS, auditors have no scope to categorise non-compliance.

258. Further, there is negligible (if any) scope for auditors, exporters or importers / facilities to manage and respond / correct operational or administrative compliance matters without technically requiring department intervention and the associated risk of punitive measures.

259. This approach results in significant inefficiency by establishing parameters that do not limit and, to an extent mandate, the exercise of discretion at all levels, including on minor or administrative / operational matters.

260. Key features of the non-compliance framework which further confound this problem, include:

(a) defining non-compliance categories that include both the risk of non-compliance and actual non-compliance;

(b) characterising non-compliance categories that encompass administrative, operational and substantive levels with no genuine differentiation between them; and

(c) applying a mechanism that provides that a non-compliance by a facility / importer within an exporter's ESCAS is mirrored to the exporter as a non-compliance.

261. In practice, these have resulted in the costly intervention of the department in non-substantive matters and in the day to day operation of facilities. In a sense, this has

arguably also diluted or made redundant the legislative delineation of the government's regulation of the exporter and the exporter's obligation to manage its ESCAS.

Live export non-compliance options

262. The structures outlined above are counterproductive and prevent the exporter from engaging genuinely in a system that will reward good faith effort to support the overarching objectives of the live export laws, particularly those of ESCAS. They also provide a disincentive to the establishment of effective risk management and continuous improvement systems and self-reporting.

263. Consistent with many other regimes, the regulations should provide clarity about what conduct will be sufficient to meet relevant obligations, particularly for operational obligations. For ESCAS, the focus should also be targeted at exporters establishing and diligently administering systems that minimise relevant risks (as far as reasonably practical) of any failure in traceability or control and of exported livestock being subject to handling or slaughter that does not meet OIE recommendations.

264. Features of an improved structure for the compliance and enforcement framework should consider at least distinguishing separate broad categorisation of non-compliance, such as:

(a) Substantive non-compliance: This categorisation should be clearly identified in legislation (e.g. as is already the case in the AMLI Act for certain matters) and be strongly linked with licence and export approvals. This category should encompass only issues of a sufficiently serious nature that they call into question the suitability of the exporter to continue to hold a licence. The regulator should maintain broad discretion to assess and address these matters.

(i) For example, *substantive non-compliance* should be related to serious issues of integrity or gross incompetence which are proportionate to the potential punitive and severe response options available (e.g. show cause notices, loss of licence and imposition of conditions on the licence).

(ii) *Substantive non-compliance* should also not ignore operational matters, but it should instead focus on compliance at a systems level. For example, deliberate or gross failure by an exporter to establish, maintain and administer minimum systems to demonstrate reasonable compliance with relevant standards (e.g. ASEL and ESCAS).

(b) Administrative and operational non-compliance by the exporter: This categorisation should be decoupled from the licence and export approval framework, with the focus on oversight of the exporter's performance in maintaining appropriate systems to manage reasonable compliance with relevant standards (ASEL and ESCAS). Direct or close regulatory scrutiny, and licence / export approval implications, would be triggered if issues are sufficiently serious or escalated.

(i) A framework and approach for operational non-compliance should build from persuasive, restorative and remedial approaches to punitive (if of a serious nature).

(ii) Changes to live export laws should incorporate codes of practice to guide standards of conduct and risk management expected of operational compliance.

(iii) This structure would allow for greater management of minor operational non-compliance without direct departmental intervention,

help ensure proportionality and consistency of enforcement, eliminate unnecessary micro-management and generate significant efficiencies. This would also enable exporters to utilise approved QA systems to demonstrate effectively systems.

(c) Importer / facility non-compliance (with exporter ESCAS obligations): Non-compliance / non-conformance with an exporter's ESCAS by importers or facilities should not be subject to departmental intervention or direct oversight. Instead, it should focus on enabling proactive risk management by the commercial parties, by allowing a corrective action / continuous improvement approach to be fostered within and between the exporter, importer and facilities.

(i) The regulatory framework for ESCAS must overtly acknowledge and segregate within the definitions of non-compliance a level (e.g. pertaining to risks, administrative or minor operational matters) that relates to the importer or facility's adherence or compliance with the exporter's ESCAS system.

(ii) This is important to address overseas perception that ESCAS is unreasonable, that Australia is intervening with their operations and to enhance the overseas supply chains' ownership over their own performance / compliance. It is important in providing exporters with the flexibility needed to actively and self-reliantly drive compliance and performance within their ESCAS.

265. Providing clarity within the regulations of non-compliance levels and of conduct that is sufficient to meet relevant operational obligations, will provide certainty and allow the regulator to macro manage instead of micro manage the industry. This will greatly reduce the regulatory obligations on the regulator and increase efficiencies.

266. To target the regulator's resources to the management of substantive non-compliance and thus those warranting greater enforcement, the adoption of standards and / or codes of practice should be considered.

267. Standards and codes of practice could be used to divorce the more substantive duties (e.g. those in the ECA and the AMLI Act) from largely operational and administrative matters.

268. This approach would allow distinctions to then be clearly drawn between the significant sanctions for breach of substantive duties (e.g. for misleading conduct) from those applicable to largely operational matters (e.g. ESCAS), by clearly identifying proportionate and appropriate penalties.

269. Such an approach is not novel and has been adopted in a number of regulations concerning high-risk industries, with the regulation of mine safety in Western Australia a notable example, as outlined further later in this chapter.

7.2 Assessment of non-compliance: lack of legislative guidance

270. The livestock export laws are silent on non-compliance guidance, with limited (if any) controls over the Secretary's discretion to take action as it sees fit. This is particularly problematic when factoring in the absolute obligations imposed on exporters (discussed above in chapter 4).

271. In particular, notwithstanding the extraordinary reach and ambitious scope of ESCAS, there is no detail in the regulations, or any specifically prescribed code of practice / standard, to clarify how the regulator must interpret compliance matters and how obligations on exporters will be interpreted in that context.

272. The broad reference in the discretion of the Secretary in the ECO to approve an ESCAS based on OIE recommendations effectively nominates these guidelines to that de facto position for animal welfare.

273. However, these guidelines are not of themselves sufficient to provide the clear legislative guidance on compliance and have required further interpretation and development by the department and industry to achieve a more workable form.

274. The most notable gap at this point in the development of ESCAS is that there is no guidance, standard or code of practice relating to the pillars of traceability and control.

275. It is firmly recognised by LiveCorp that these are difficult topics for which to provide or develop a standard or code of practice and that there will always be a need for flexibility to allow for different approaches given the variation across importers, exporters and markets and the ongoing innovation in this space.

276. However, it is also true that these pillars of ESCAS are essentially operational matters which lend themselves to a systems-based risk management approach and the associated macro-regulatory approach.

277. Also relevant to the topic of assessment of non-compliance, the department has made publicly available its Guideline for the Management of Non-Compliance (the Guideline) since around the time of ESCAS implementation.

278. This Guideline is primarily an internal guide for the department but is generally viewed externally as the relevant reflection of the regulator’s interpretation of the legislation.

279. While the Guideline provides a useful guide, it has not been updated for some time and is silent on several important areas. This includes guidance on how conduct is to be assessed and how punitive measures may arise and be imposed. It is noted that the department has identified – including in the ESCAS Report – the need for potential reform and refinement in this area.

280. However, as they are now the current Guideline's assessment criterion are broad and it is considered that they do not provide the regulator with sufficient guidance on determining the appropriate outcome or sufficient predictability for the exporter of what that outcome may be. For example, leakage of one animal from the supply chain (whether or not this leakage was reasonably within the exporter's control) is viewed as the same as leakage of 1000 animals, with both capable of being classified as a critical non-compliance which according to the Guideline is a sufficient reason for the regulator to choose from a significant range of penalties:

(a) issue a show cause notice;

(b) suspend or cancel the exporter's licence;

(c) apply conditions to the licence;

(d) vary or revoke the ESCAS approval;

(e) refuse to approve future NOI or ESCAS; or

(f) refuse to approve an ESCAS which includes a particular supply chain.

281. It is unreasonable that leakage of one animal from a supply chain, which could have occurred for a number of reasons outside an exporter's control (including theft) can result in show cause notices or suspension / cancellation of the licence.

282. The status of the Guideline and its application has also led to uncertainty for exporters as to how their non-compliances will be assessed and the penalties which will result.

283. There is also currently no recognition within the Guideline of any proactive actions taken by the exporter to identify and address any non-compliances. However, it is noted that in practice this is a relevant consideration taken into account by the department.

284. An effective way to address the above mentioned issues, is the adoption of regulatory instruments such as standards and codes of practice to effectively clarify compliance expectations for the regulator and the regulated. Such an approach would also require broader input and collaboration and provide stronger legal status and protection for the regulator and industry (i.e. as opposed to the current internally focused Guideline). As outlined below in this chapter, formal adoption of standards and codes of practice provides:

(a) clear practical guidance on how to comply with either general duties under Acts or specific duties under relevant Regulations;

(b) without being prescriptive, practical guidance on practices that can be used to mitigate relevant risks or meet broad duties; and

(c) a practical means of achieving any code, standard, rule, provision or specification relating to relevant regulatory obligations.

285. Compliance with such instruments is not mandatory, but is often relied upon, including by courts, as representing the minimum standards which should be met.

286. In this regard, prescribed standards detailing relevant elements of ESCAS that need to be complied with are important to provide clear expectations to exporters of what is required.

287. Coupled with clear prescriptive legislative parameters on what represents non-compliance, they can also provide strong guidance to the regulator for the exercise of it discretionary powers and in setting compliance expectations (e.g. by reference to compliance with the standard).

288. This concept is commonly utilised for animal welfare regulation, but is also common in other sectors. Under such an approach, adherence to a prescribed code of practice or standard is recognised as meeting the compliance expectation for the regulatory purpose. In some cases, this can provide a defence against punitive or criminal action – for example, within Australia's animal welfare legislative system compliance with standards or codes of practice can prevent a person in charge of an animal from being subject to criminal prosecution for cruelty.

289. It is also noted that this approach has been adopted, in a manner, for the administration of ASEL by the department.

290. ASEL is a prescribed standard for animal welfare under the AMLI Act, covering sourcing of livestock to delivery to the overseas market. It is detailed, prescriptive and recognised as the standard that must be achieved to demonstrate compliance with animal welfare requirements.

291. Within such a structure, compliance with ASEL – although not explicitly recognised as such – is a strong platform for demonstrating that reasonable steps to meet required standards have been taken should an animal welfare issue arise (e.g. a reportable mortality). This has been enhanced further through the recent introduction of Approved Arrangements (as per other export commodities) which introduces a compliance assurance system for ASEL requirements (e.g. including auditing and monitoring exporter's systems).

292. Codes of practice and relevant standards are also important to clarify the reasonable scope of an exporter's potential liability for third party actions – for example by tying it to issues of control, culpability and having appropriate risk management systems. For

ESCAS, adopting these concepts would help to stabilise ESCAS as a largely operational regulatory obligation and embed an appropriate common expectation and predictability between the department, exporters, Parliament and the community.

293. In addition, the current non-compliance structure provided for in the regulator's Guideline does not provide for any differentiation between the risk of non-compliance and actual non-compliance. This not only leads to micro-management but also expands the need for subjective judgments of risk likelihood and potential impact.

294. Standards and codes of practice can also be useful in this regard, by providing guidance on the assessment of risks which largely mirrors, or at least informs, the regulatory approach to risk assessment in support of compliance and enforcement activities. These instruments can then also be regarded as persuasive evidence of what is known about a risk or what is reasonably practicable in the circumstances to mitigate risk.

295. The regulatory approach taken in mining and other general employment situations in Western Australia (which is outlined in chapter 7.6) is a useful example of how formal adoption of codes of practice or standards has been effectively used in this manner. For example:

(a) The Code of Practice on Safeguarding of Machinery and Plant (2009), provides general guidance on the identification and control of safety and health hazards and risks associated with guarding of machinery and plant. As such, the regulator has access to the risk management strategies set out in this Code and thus considered appropriate, which can guide its assessment of non-compliances.

(b) This also enables the regulator to assess whether appropriate management systems are in place to manage the particular risks identified in this Code, rather than micro-managing each and every issue which those management systems must address.

(c) As an illustration, the Code identifies factors for the regulated entities to consider in identifying machinery and plant hazards, including activities to undertake to identify not immediately obvious activities, such as testing noise levels and using particular risk assessment techniques such as Failure Mode Effect Analysis. This level of detail is much more suited to a code of practice as opposed to incorporating directly into legislation, and thus requiring regulator micro-management.

296. The use of standards and codes also supports the identification of an appropriate meeting point for regulatory oversight with reliance on assurance (QA) systems (or alternatively an Approved Arrangements style structure) to provide evidence of compliance with the standards. For example, allowing an independent third party to take on the immediate or day-to-day administrative oversight, which in turn informs and supports department regulatory oversight of any substantive matters arising that warrant regulatory scrutiny and possible action. Such systems introduce consistency and provide the practical implementation interface for the standard.

7.3 Regulatory controls: the need for clarity

Imposition of regulatory controls

297. Departmental oversight of the live export industry, particularly to address apparent non-compliance, most often involves imposition and enforcement of regulatory controls. The Secretary can exercise broad powers to impose conditions and halt planned export at various stages of the approval process, with controls directed at a particular consignment or market. Potential severe criminal sanctions also arise and are dealt with in chapter 7.4.

298. The main touchstone for any controls imposed on an exporter's operations (typically on an approved ESCAS) is simply that they should "satisfy" the Secretary that animals will be handled, slaughtered and otherwise treated in accordance with OIE animal welfare recommendations, including to demonstrate control and traceability of exported livestock. For example, under the ECO:

(a) an approved NOI or CRMP may be cancelled, varied or resubmitted if the Secretary becomes aware (either through that exporter or otherwise) of a change relevant to a proposed export (s 2.46);

(b) an approved ESCAS may be revoked or varied if the Secretary is not satisfied that the livestock will be dealt with in accordance with the approved ESCAS, or if the exporters has not complied with any conditions in the approval (s 2.46A);

(c) an approved export program may be suspended or cancelled if a 'relevant circumstance' has changed or the Secretary considers it is necessary to maintain the health or welfare of the livestock (s 2.50);

(d) a permission to leave for loading may be suspended if there are reasonable grounds to believe that there has been a relevant change in any circumstance relating to the export (s2.57); and

(e) an export permit may be revoked if there is reason to believe that a condition of an export permit has not been complied with, or that a 'relevant circumstance' has changed (s 2.61).

299. There are good practical reasons for the department to have some discretion to enable it to respond appropriately to changing circumstances, but the absence of appropriate codes of practice, or detailed regulations, on how the department will (or must) exercise its discretion creates the same problems outlined throughout this submission.

300. In general terms, the regulations and codes of practice should closely prescribe, or remove, the discretion for largely operational matters and reserve a broader discretion to more substantive matters. As outlined in this chapter below, that is the common and successful practice applied in other regulatory regimes.

301. Any regulatory action must be proportionate and evidence based, no matter at what stage of consignment preparation it is imposed or enforced. In the absence of required legislative clarity, exporters may face significant "de facto" penalties through the imposition of regulatory controls which they believe are disproportionate or unnecessary. Strict conditions have been applied within the current system and the exporters can be penalised significantly through such things as last minute delay or variation of an ESCAS, suspension of relevant arrangements and direct compliance costs that severely impact the business.

302. In addition to immediate and direct costs and adverse impacts on exporters, there can also be significant flow-on detrimental consequences, including:

(a) impact on pricing of live-stock;

(b) broader commercial implications from potential failure to meet contractual obligations; and

(c) damage to exporters' (and Australia's) long-term relationships with key markets.

303. The live export regime also does not overtly recognise or provide a formal avenue for redress if an exporter considers that departmental controls have been unfairly imposed and unreasonably caused loss.

(a) Potential legal remedies for inappropriate regulatory action, for example on the basis it was outside the department's power or was an unreasonable exercise of that power, are an inefficient, costly and uncertain avenue to seek redress.

(b) Government schemes are also available to remedy quantifiable financial loss caused by "defective administration", but these are administered by the relevant department and any decision to compensate is at that department's discretion. This raises obvious difficulties in obtaining an independent fair hearing of any grievance.

304. In each of the above cases, the threshold to hold the department accountable for claims of inappropriate decision making is high. In short, exporters have limited protection in law against potential departmental misapplication of broad discretionary powers and it is incumbent on the legislative regime to provide sufficient clarity and certainty to limit that risk, as outlined above.

Protection against pre-emptive (de facto) regulatory sanction

305. In addition to providing clarity of obligations of exporters and a defence against punitive or criminal action, compliance with codes of practice or standards can also provide legislative protection against de facto pre-emptive punitive regulatory sanction while alleged non-compliance is being investigated.

306. It does so by reversing the onus of proof and placing the onus on the regulator to properly support any concerns proposed to affect the exercise of its discretion, by being deemed to be evidence of compliance until the contrary is proved.

307. For example, as this submission identified earlier, the TORUM Act provides that certification and reliance on quality assurance testing "*is evidence of those matters… until the contrary is proved*", which is a template for how this issue could be resolved and illustrates that such an approach is not new to regulation in Australia.

308. Exporters often face significant "de facto" pre-emptive regulatory sanction, based on concerns about an unproved allegation or where an alleged breach is outside their control.

(a) For example, industry has indicated that the department will generally impose conditions on exporters as a precaution while allegations are being investigated and before any relevant breach has been established. This approach adds cost and is likely to reflect the regulator's risk appetite, its discretion to broadly impose conditions and its interpretation of the absolute requirements under the ECO (i.e. that the Secretary is satisfied that the export will ensure animal welfare outcomes).

(b) Imposition of conditions late in the preparation process in circumstances where there has not yet been any finding against an exporter is also purported to be a not uncommon occurrence which can severely penalise exporters through increased delay or compliance costs that dramatically impact particular consignments and the business more broadly (and which cannot be passed on in the purchase pricing).

309. The department outlined its approach in the *ESCAS Report* where it indicated that if it determines there is "*credible evidence of non-compliance*" it will conduct two actions being:

(a) Commencement of a full investigation; and

(b) "*the department determines whether immediate action needs to be taken while an investigation occurs. Actions can include applying additional conditions to existing or upcoming exports, requiring further information before permitting any further exports to a particular facility or supply chain, or in the most serious cases suspension of a facility or supply chain from any use"*

310. The reason such pre-emptive regulatory action represents a "de facto" sanction is because of the significant detriment to the exporter that typically accompanies it, as briefly outlined above.

311. The imposition of conditions while an investigation proceeds and prior to a decision that sanction or penalty is warranted is contrary to well established administrative law principles of fairness and regulatory sanctions. As such and noting the above, where pre-emptive sanctions are to be applied, there needs to be clear and defendable justification in light of the potential costs and liabilities that may ensue.

312. Judicious reliance on codes of practice and/or incorporation of similar principles placing the onus on the regulator to demonstrate sufficient basis for burdensome regulatory action is an important and well recognised method of minimising the risk of disproportionate and pre-emptive regulatory action.

7.4 Criminal Sanction: appropriate differentiation and clarity of penalties

313. As discussed throughout this submission, the operation of the current live export laws is to make any breach, whether of a substantive AMLI Act provision or an operational aspect of the ECO, a breach of a licence condition.

314. This exposes the exporter to potential criminal prosecution and substantial penalties, including imprisonment, for any contravention, whether substantive or operational. If prosecuted, there is also little clarity about the likely range of available penalties because the live export laws essentially do little more than identify maximum penalties applicable to broad categories of obligations.

315. Key penalty provisions are:

(a) Section 54(3) of the AMLI Act, which states that if a condition of a licence is contravened (intentionally or recklessly), the penalty is 5 years imprisonment (or as noted, an appropriate fine imposed by the court under subsection 4B(2) of the Crimes Act 1914).

(b) Section 9 of the ECA, which provides that failure to comply with a condition or restriction of a licence is an offence punishable on conviction by a fine not exceeding $50,000. This offence is one of strict liability.

316. There is no legislative guidance or differentiation between the severity of non-compliance and potential sanctions or criminal penalties. While breaches of some licence conditions may be severe, under the current framework most are merely operational.

(a) For example, currently the contravention of any licence condition, regardless of the nature of the condition, attracts the same potential maximum criminal penalty as exporting livestock from Australia without a licence (s 54 AMLI Act).

(b) Due to the operation of s 3 of the AMLI Order, if an NOI fails to set out such things as importer or international transport details (Order 2.41, ECO), or fails to set them out correctly, this is arguably a contravention of a licence condition which triggers a maximum possible penalty of a $50,000 fine or, if done intentionally or recklessly, 5 years' imprisonment.

(c) Failing to provide the Secretary with written particulars of a prescribed event or circumstance (e.g. of a prior conviction), or that the licence holder is no longer regarded as an approved supplier of live-stock by a foreign government (contrary to s 16 of the AMLI Act and r 20 AMLI Regulations)) attracts the same maximum penalties.

317. This situation is undesirable and highly unusual in such a highly and closely regulated industry. It creates enormous uncertainty and difficulties for industry, including a risk of disproportionate regulatory investigation and a disincentive to self-reporting and continuous improvement.

(a) Minor operational non-compliance should not be capable of supporting prosecutions or show cause notices, unless there is something about their nature, frequency or severity that triggers relevant substantive concerns, such as to bring into question the integrity of the licence holder.

(b) Substantive penalties do not reflect the type of non-compliance that results from a failure to adhere to operational obligations, including those under ESCAS, which frequently includes matters over which exporters have no culpability or reasonable control.

318. As is the case in many regulatory regimes, including those that address high risk industry (e.g. workplace safety), it is appropriate to separate operational breaches (e.g. ESCAS) from substantive provisions (e.g. misleading conduct), and to clearly identify proportionate and appropriate penalties that better reflect the particular non-compliance to which they relate.

319. A useful illustration of where this approach has been implemented in legislation governing a high risk industry is the MSI Act and the MSI Regulations.

320. The MSI Act clearly defines escalating penalty levels (level one to four), which are then specifically nominated throughout the legislation as being applicable to breaches of particular duties under the MSI Act. Obligations under the MSI Regulations are subject to a separate “general penalty”, which is equivalent to the lowest penalty under the MSI Act. The level of clarity is such that the penalty applicable to each Regulation, or duty under the MSI Act, is specifically identified within that provision.

321. As a result, in addition to absolute clarity of which penalties apply to breach of any provisions under the Act or Regulations, the potential penalties for breach of MSI Regulations obligations are completely divorced from sanctions for breach of the MSI Act.

322. In addition, the more important substantive (overriding) duties under the MSI Act attract higher penalties than discrete duties, which in turn are greater than those applicable to the MSI Regulations, which relate to essentially operational matters and universally attract the lowest applicable penalty, if any.

323. This illustrates also how a similarly appropriate penalty regime would support the identification of an appropriate meeting point for regulatory oversight and reliance on such things as QA systems. In short, divorcing significant sanctions for breach of substantive duties from those applicable to more operational matters would naturally align with also divorcing direct regulatory oversight of those matters.

324. The MSI Regulations and MSI Act also recognise lower penalties for first offenders, as opposed to subsequent offenders. Under the MSI Act, imprisonment is only an available penalty if the offence includes gross negligence on the part of the offender.

325. The severity of potential sanction under the live export regime, particularly given its current potential application to any and all breaches of obligations, is revealing when considered in light of the MSI Act penalty levels.

(a) For example, contravention of a licence condition contrary to section 54 of the AMLI Act (including breach of ESCAS) can see a licence holder face a maximum 5 years' imprisonment, if it was contravened intentionally or recklessly.

(b) In contrast, an individual convicted of causing death or serious harm under the MSI Act faces a maximum 2 years' imprisonment (and a $250,000 fine), but only if gross negligence was involved. If no gross negligence, there is no prospect of imprisonment under the MSI Act and a lower financial penalty applies. Higher financial penalties apply to corporations and non-employees, where relevant.

7.5 Benefits to fair, efficient and effective regulation

326. The benefits of live export laws adopting an approach consistent with the above (e.g. the use of standards and codes) should not be underestimated. They are wide-ranging and capable, if implemented appropriately, of improving almost all aspects of current regulatory oversight and action.

(a) Consistency, flexibility and durability: This approach enables and ensures a robust and considered evolution of regulations, with overt industry and independent consultative input, while providing confidence in the appropriateness and consistency of regulatory scrutiny and enforcement of obligations.

(i) For example, under the BAM Act, the Minister is required to consult with public authorities, community and producer organisations, as well as other persons likely to be affected by or interested in the regulations or code of practice, prior to making regulations or issuing or approving a code of practice.

(ii) Providing the Minister with the power to approve relevant codes and for regulations to adopt any code, provides certainty of expected conduct to achieve objects addressed by relevant codes and helps to ensure the standards and codes are practical, achievable and in line with relevant objectives and current practices.

(iii) It is also a significant attraction for the live export industry that standards and codes of practice require formal consideration, consultation and sign-off at senior government level, because it helps to protect them from short term risk appetite influences.

(b) Increased Transparency (strong legislative steer): This is a key element in successful and efficient regulation of challenging circumstances, such as those outlined above.

(i) For example, each of the above examples illustrate in different ways how detailed and clear prescriptive guidance through the adoption of standards or codes can be efficiently incorporated into legislation to provide certainty on what is required of regulated entities and what they can expect from regulatory oversight.

(ii) This highlights the importance of proper regulatory design that focuses on transparency and follows specified regulatory principles to guide the incorporation of relevant standards and development of codes.

(c) Admissible / persuasive evidence of appropriate conduct: It is also relevant that they are widely accepted (by the legislature and courts) to be persuasive (admissible) evidence of what is reasonable in any assessment or characterisation of alleged non-compliance.

(i) On straightforward operational matters, this will largely reflect practical steps. However, the guidance to be gained on risk assessment and mitigation is also significant.

(ii) In particular, it provides a strong basis for the department to assess conduct against what is reasonably practical and appropriate, in assessing or characterising alleged non-compliance and deciding on any regulatory action.

(iii) In most cases, following an approved code of practice would be expected to achieve compliance with regulatory duties, particularly for operational matters, such as ESCAS compliance, where there is less scope for the circumstances to influence what is appropriate.

A. Codes of practice provide regulators and regulated entities with clear and detailed guidance on what matters will or should be taken into account, including in accordance with an appropriate risk assessment process.

B. This is invaluable for all parties in ensuring consistency and transparency in the regulatory oversight of regulations and, in particular, for assessment and characterisation of any non-compliance.

(d) Relieve unnecessary burden on regulatory bodies: Appropriate adoption of codes and standards enables regulatory oversight to shift from detailed scrutiny of compliance with prescriptive obligations to scrutiny of evidence of having appropriate systems and processes in place to ensure systematic management of those obligations.

(i) For example, as previously noted in the submission, MVS Regulations require regulated bodies to have a quality management system in place that meets standard ISO 9001:2000 and is certified by an accredited certification body to a certain defined scope.

(ii) The adoption and development of relevant codes or standards outlined above does not negate regulatory discretion, but rather clearly defines its scope with regard to those matters addressed in the codes, in particular by helping to definine what represents sufficient conduct to meet certain obligations while enabling the regulator to focus on more substantive matters arising from systemic or serious failures to meet those obligations.

(e) Participation and self-regulation: A central feature of much Australian legislation is to encourage responsible participation. For example, laws typically require institution of structures and procedures to manage risk, which is aimed at enabling increased self-reliance, self-regulation and responsibility on the regulated entity.[xiii]

(i) For example, under OHS laws, notwithstanding the obviously high stakes risks that exist, the regulatory environment '*increasingly demand(s) that the employer delivers the appropriate level of risk management. This may be required through evidence of safety policies, risk assessments, safety plans and auditing. It is further evident in measures requiring employers to use competent persons or services to deliver these things*'.[xiv]

(ii) If this is the approach adopted for workplace safety, including adoption of codes and standards to guide regulators and employers, it is difficult to see how live export raises risks of greater social or welfare significance sufficient to warrant a different approach.

(f) Incentive to "do better": Formal adoption of relevant standards also supports a continuous improvement focus, which is a well-recognised aim of good regulation.

(i) Using the national OHS law reform as an example, removing vague and strictly construed obligations where employers must ensure the safety of its employees (i.e. absolute liability) and replacing it with clear guidance on what obligations may be met and an emphasis on a reasonable standard of care, creates an environment where employers are actively required to consider how best to meet those requirements and improve the safety of its employees.

(ii) The paradigm shift to guided self-regulation, via required QA systems and compliance with relevant standards and codes, therefore has the primary benefit of influencing management to focus on their organisational means to assess and manage risks and lead to improved performance.[xv]

(iii) The ESCAS Report also highlighted this as a particular objective of future reforms highlighting that it would look towards "*providing the opportunity for industry to take greater responsibility for proactively managing risks within supply chains.*"

7.6 Legislative adoption of standards / codes of practice

327. As outlined in greater detail in Annexure 4 this chapter summarises illustrative examples of legislative adoption of relevant standards, or codes of practice, to provide greater guidance and certainty for all parties on the nature of relevant obligations and what conduct will be sufficient to meet those obligations.

(a) *The Biosecurity and Agriculture Management Act 2007 (WA) (the BAM Act)*

(i) In addition to recognising QA systems, as outlined in chapter 6, the BAM Act illustrates how legislation governing even significant risks, such as biosecurity, incorporates and / or adopts standards to effectively and efficiently regulate the industry. There are many examples of this across diverse industries. However, it is difficult to think of a more pertinent example, than one involving agribusiness and balancing various competing considerations while managing risks of such magnitude to public and commercial interests.

(ii) The BAM Act expressly allows regulations and management plans to adopt (either wholly or in part) codes, including codes of practices, standards, rules, quality assurance schemes or other documents, that do not by themselves have legislative effect in Western Australia.

(iii) The Minister may also:

A. issue a code of practice for a number of purposes, including for controlling or keeping declared pests, using and managing chemical products, and carrying out agricultural (or related) activities so as to minimise the risk of an occurrence or the spread of a declared pest; and

B. approve a code of practice issued under another written law, or issued by an industry body, if its purpose accords with those mentioned above.

(iv) The legislation therefore recognises equivalent standards and codes of practices, which increases efficiencies both for the regulator and for the regulated, particularly in circumstances where regulated entities are already complying with those standards, or where the regulator would otherwise have to create new standards to fill a particular void.

(v) There is significant transparency in this process, with the Minister required to undertake consultation with public authorities, community and producer organisations and other persons likely to be affected (or interested) , prior to making regulations or issuing or approving a code or practice.

(vi) There is also recognition in this process that the standards or codes may change as more standards are made available, or as the industry evolves, by allowing codes of practices or standards to be incorporated into regulations (as opposed to Acts), by relying on approved codes of practices, or by issuing further codes of practices.

(vii) To illustrate how this looks in practice, key provisions are extracted below.

BAM Act

Section 190. Regulations and management plans may adopt codes or legislation and other references

(1) In this section -

code means a code, code of practice, standard, rule, specification, administrative procedure, quality assurance scheme or other document, published in or outside Australia by a public authority or other person, including the Minister or the Director General, that does not by itself have legislative effect in this State;

…

(2) Regulations and management plans may adopt, either wholly or in part or with modifications and either specifically or by reference -

(a) any code; or

(b) any subsidiary legislation made, determined or issued under any other Act or under any Act of the Commonwealth, another State or a Territory.

(3) If the regulations or management plans adopt a code or subsidiary legislation, it is adopted as existing or in force from time to time unless the regulations prescribe that a particular text is adopted.

Section 191. Codes of practice

(1) The Minister may issue a code of practice for any or all of the following purposes -

(a) controlling declared pests;
(b) keeping declared pests;
(c) carrying out agricultural activities or other related activities so as to minimise the risk of an occurrence or the spread of a declared pest;
(d) the use and management of chemical products;
(e) the import of permitted organisms and prescribed potential carriers;
(f) the supply and use of animal feed and fertilisers.

(2) The Minister may approve a code of practice issued under another written law, or issued by an industry body or other person, if the code is appropriate for a purpose mentioned in subsection (1).

(3) A code of practice may be approved as existing or in force from time to time or as existing or in force at a particular time.

(4) A code of practice approved under this section may consist of any code, standard, rule, specification or provision relating to a purpose mentioned in subsection (1).

(5) A code of practice issued under this section may incorporate by reference any other code or subsidiary legislation, as those terms are defined in section 190, as existing or in force from time to time or as existing or in force at a particular time.

…

(our emphasis)

(b) OHS Laws (WA)

(i) Two occupational safety regulatory regimes in Western Australia separately regulate mining and other general employment situations. Each provides detailed regulations on operational matters to guide regulators and employers.

(ii) They also formally adopt codes of practice, such as the "Code of Practice: Safeguarding of Machinery and Plant (2009)", to provide:

A. further practical guidance on how to comply with either general duties under the Acts or specific duties under relevant Regulations;

B. without being prescriptive, practical guidance on practices that can be used to mitigate relevant risks or meet broad duties; and

C. a practical means of achieving any code, standard, rule, provision or specification relating to relevant regulatory obligations.

(iii) Relevant to live export, the codes of practice are not limited to technical or practical guidance, but also address recommended and widely accepted means to assess and address risks.

(iv) In that regard they largely mirror, or at least inform, the regulatory approach to risk assessment in support of compliance and enforcement activities.

(v) Codes of practice are admissible in court and are often regarded as persuasive evidence of what is known about a risk or what is reasonably practicable in the circumstances to mitigate risk.

(c) *Dangerous Goods Safety Act* 2004 (WA) (**DGS Act**)

(i) The regulation of dangerous goods in Western Australia is another example of high risk industry being effectively regulated through judicious use of codes of practices and standards.

(ii) Under the DGS Act, codes of practices and standards are approved and gazetted by the Minister for Mines and Petroleum and its associated regulations, for the purpose of providing practical

guidance to persons engaged, directly or indirectly, in storing, handling or transporting dangerous goods.

(iii) Alternatively, some codes of practice or standards are prescriptive, in that they are adopted in their entirety by the associated regulations (e.g. Australian Standards AS 2187.0, AS 2187.1 and AS 2187.2). The ability for regulations to adopt codes is enabled under the DGS Act, with "codes" defined to include a code, standard, rule, specification or other document, *made in or outside Australia*, that does not by itself have legislative effect in Australia.

DGS Act

19. Regulations may adopt codes or legislation

(1) In this section -

code means a code, standard, rule, specification or other document, made in or outside Australia, that does not by itself have legislative effect in this State;

…

(2) Regulations may adopt, either wholly or in part or with modifications -

(a) any code; or

(b) any subsidiary legislation made, determined or issued under any other Act or under any Act of the Commonwealth, another State or a Territory.

…

(d) *Motor Vehicle Standards Act 1989 (Cth) (the MVS Act)*

(i) The submission has discussed the MVS Act in regards to QA systems and formal recognition of equivalence. This Act also enables the Minister to determine vehicle standards for road vehicles or vehicle components by legislative instrument.

(ii) The Minister may (by legislative instrument) determine procedures and arrangements for determining whether road vehicles or vehicle components comply with the MVS Act, such as procedures relating to the testing and inspection of road vehicles or vehicle components.

(iii) Various standards have been determined under the Act in subsidiary legislation, which are collectively referred to as the Australian Design Rules. These are the current national standards for vehicle safety, anti-theft and emissions.

8. Self-Reporting

KEY PROPOSITIONS

P8.1: Legislative provisions that enshrine certain benefits for self-reporting are a common feature of many enforcement regimes, particularly for highly regulated industries such as environment and safety. It is widely viewed as improving compliance and reducing enforcement costs

P8.2: The live export regime currently provides no legislated basis for a different outcome (or treatment of exporters) for self-reported non-compliance to encourage and reward continuous improvement and transparent communications with the department.

RECOMMENDATIONS

R8.1: Recognising the value to the integrity and objectives of the live export regime, the legislature should enshrine clearly outcomes, such as mitigation of sanction severity, for self-report of non-compliance.

328. Currently, there is no legislated basis for a different outcome (or treatment of exporters) whether a non-compliance is self-reported or discovered by other means, unless it materially affects such things as the "integrity" of an exporter.

329. As a result there is no specific protection (or benefit) provided by the live export legislation for self-reporting and, once the regulator is made aware of an issue, it is obliged to investigate and publish the outcome on its website.

330. Rewards and incentives could be used to encourage compliance leaders, with traditional enforcement measures to drive compliance laggards and encourage a positive culture of risk / compliance identification, management, response and transparency. Types of rewards or incentives which could be considered include:

(a) Providing indemnities for voluntary disclosure and correction of non-fraudulent non-compliance.

(b) Offering penalty discounts to good performers when incidents of non-compliance occur.

331. The use of incentives also provides the opportunity to recognise that parties have made good faith efforts to comply, while recognising and accepting that inadvertent violations will occur.

332. Self-reporting is a common feature of many enforcement regimes, particularly for regulatory compliance in highly regulated industries such as environment and safety.

333. It has been said that self-reporting can both improve compliance and reduce enforcement costs.

(a) Enforcement resources are saved because companies who report their non-compliances need not be detected.

(b) Risks to companies is reduced as they bear certain rather than uncertain sanctions.[xvi]

334. However, to induce companies to self-report, it is appropriate to provide them with some incentive (which does not need to be substantial) to self-report in the first place.

335. As an extreme example, the Australian Competition and Consumer Commission (**ACCC**) has an immunity policy which is designed to encourage self-reporting of cartel involvement. This policy confers immunity from ACCC action to the first eligible cartel participant to report involvement in a cartel.

336. Another example is the voluntary Aviation Self Reporting Scheme, established under the *Civil Aviation Act 1998* (Cth) and the *Civil Aviation Safety Regulations 1998* (Cth) (**CASR**) and overseen by the Civil Aviation Safety Authority (**CASA**).

(a) This scheme provides companies / individuals with protection from administrative action, or from paying an infringement notice, in circumstances where they voluntarily report a reportable contravention of the regulations within a specified period of time. However, this protection is only available once every five years.

(b) Usefully, the CASR expressly states the additional purposes of the scheme, as follows:[xvii]

(i) to strengthen the foundation of aviation human factors safety research;

(ii) to identify deficiencies and problems in the Australian aviation safety system; and

(iii) to provide data for planning and improvements to the Australian aviation safety system.

337. Conversely, in the live export industry, exporters may be reluctant to self-report due to the perception that such an action will result in inappropriate punitive, disproportionate or unsupported action from the regulator, with no consideration or acknowledgement that the issue was self-reported.

338. Quality assurance programs can be one useful way of providing some level of protection against self-reporting non-compliances, as it would only notify the regulator of the more substantive non-compliances which are well supported by reputable evidence, and not of minor administrative or suspected non-compliances.

339. Alternatively, incorporating a scheme or allowance into the regulations that recognises self-reporting of substantive non-compliances and requires the regulator to impose a more lenient approach, or at least recognises that the non-compliance was self-reported, may assist in encouraging exporters to self-report, which will in turn may:

(a) identify particular issues and problems within the industry;

(b) improve data collection and analysis of the industry;

(c) reduce regulatory costs in investigating non-compliances; and

(d) reduce company risks in self-reporting by allowing the companies with more transparency into how self-reports will be assessed and which possible regulatory actions may be taken.

340. This should clearly set out the regulatory action which may be taken as a result of the non-compliance recognising that it was self-reported, and set out the purposes and benefits of the scheme, to encourage exporters to self-report.

341. It should also address the specific circumstances of self-report, including the nature of any self-reported breach or suspected breach. For example, an exporter may notify the regulator of a series of suspected breaches (that may later prove unfounded) or of minor

administrative non-compliances with no material impact on the supply chain or animal welfare. It would arguably be unreasonable for this to result in suspension of exports.

342. Whichever approach is taken, any benefit or mitigation for sanction severity that should result from self-reporting should be enshrined in the legislation.

343. Indemnities for voluntary disclosure and correction of certain types of non-compliance would be a strong incentive and protection for self-reporting by entities within ESCAS. In fact, self-reporting was determined to have accounted for 31 per cent of non-compliance reports in the government's ESCAS report, which under the current regime most likely reflects the department's positive messaging that self-identification and treatment of an issue is a relevant consideration to the regulatory response employed.

344. However, self-reporting without a stated assurance of reasonable treatment does rely on trust between the regulator and the regulated. As would be expected, trust fluctuates based on perceptions of fairness and consistency in the regulator's responses and messaging and the quality of the self-reports received by the regulator. This inherently leads to less or more reporting.

345. For ESCAS, significant thought should be given to whether an indemnity for voluntary disclosure and correction should be provided simply because it is such a valuable reporting mechanism in providing a snapshot for the department of the compliance landscape, in informing strategic decision making and in light of its inability to directly monitor or gather information in-market.

346. In terms of the offering of penalty discounts to good performers when incidents of non-compliance occur was raised by the OECD in a paper in 2000[xviii] which highlighted the following:

> "*Internationally the most significant development of this kind is the US Federal Sentencing Guidelines for organisations. These guidelines were promulgated in the US Sentencing Commission (a judicial agency) and went into effect without congressional action. Companies with good compliance programs (defined by certain elements in the Guidelines) are given decreased fines when they commit an offence. Those that do not have in place a compliance programme are placed on probation, and required to implement one. This has spread to many other regulators who are no willing not to prosecute at all if an enterprise can show it has a programme in place that meets USSC guidelines. The Guidelines have had a significant impact on the implementation of compliance policies among US companies generally (irrespective of whether they have had any contact with any regulator). Surveys have found that the Guidelines caused up to 20 % of companies surveyed to introduce for the first time an internal system for ensuring regulatory compliance and up to 45 % to add vigour to their internal compliance system*."

347. The consideration of providing an incentive for establishing a good compliance program against certain criteria and actively administering it (e.g. the development of an effective system to manage the compliance risks for the exporter and the in-market third parties against ESCAS and its diligent operation) might be relevant if, for example, an incentive would provide protection from prosecution under these circumstances.

9. Enforcement: the narrow scope of secondary liability

KEY PROPOSITIONS

P9.1: ESCAS seeks to enforce its objectives by creating a system of strict obligations on exporters to "ensure" traceability, control and animal welfare outcomes in overseas markets, which includes holding exporters liable (including criminally) for the actions of others.

P9.2: Such “secondary liability” is not novel in Australian criminal or civil law. However, it has been strictly confined to limited circumstances that justify its application, particularly where potential criminal liability is involved.

P9.3: As a consequence, the scope of apparent liability on exporters for the actions of third parties under ESCAS is novel (unprecedented), particularly given the absence of any recognised key features capable of justifying its imposition.

P9.4: Possible criminal consequences and significant punitive regulatory outcomes for exporters can arise irrespective of whether or not an exporter had any relevant control, culpability or way to reasonably foresee the risk of non-compliance by third parties.

P9.5: The characterisation and enforcement of ESCAS non-compliance within current live export laws fails to recognise that exporter/importer relationships are fundamentally inconsistent with the key characteristics that justify imposing liability for the actions of others.

RECOMMENDATIONS

R9.1: The legislation should overtly restrict potential exporter liability for non-compliances due to third party actions to events and circumstances consistent with the widely recognised limited scope of secondary liability in Australian law.

9.1 The current ESCAS framework

348. ESCAS seeks to enforce its aspirational objectives by creating a system of strict obligations on exporters to "ensure" traceability, control and animal welfare outcomes for livestock from discharge through to the point of slaughter in the overseas market, which includes holding exporters liable (including criminally) for the actions of others.

349. This arises, in essence, because live export laws deem ESCAS obligations to be a licence condition, including any separate directions or controls imposed on particular consignments. Breach of licence conditions is a strict liability offence under section 9 of the ECA, and potentially an offence under section 54 of AMLI Act.

350. This obliges exporters to warrant compliance of supply chain participants, as the regulatory consequences of any failure to do so include criminal liability. This means that an exporter faces criminal liability for any breach of ESCAS, including those that are purely operational / administrative and attributable to the conduct of others.

351. Criminal consequences can arise irrespective of whether or not an exporter had any relevant control, culpability or way to reasonably foresee the risk of non-compliance. If not a criminal sanction, significant punitive regulatory outcomes are at the department's disposal, including licence revocation or suspension, imposition of conditions on a licence or market / consignment and declining approval of future consignments.

352. This creates a system of highly punitive and strict secondary liability for exporters (and individuals) from the actions of third parties in another country with whom their only

relationship is essentially as contracting parties in a commercial endeavour. Where an importer or third party fails to comply with the obligations under ESCAS, including relevant control, traceability or animal welfare standards, it is the exporter who faces liability, including potential criminal sanctions.

353. The legitimate questions outlined below about the appropriateness of this punitive approach strongly support the merits of adopting a "systems level" regulatory oversight of ESCAS operational matters that focuses on continuous improvement (non-punitive) measures. To be sufficiently robust and reliable, that regulatory scrutiny ought to be informed and supported by good QA systems and the adoption of relevant standards to clarify the reasonable steps that exporters can take to meet their obligations.

9.2 The Legal Perspective

354. The principle of secondary liability is not novel in either criminal or civil law in Australia. The notion of holding one party accountable for the actions of another has been used to achieve public policy objectives and overcome evidentiary limitations.

355. However, as outlined in greater detail in Annexure 5, and summarised in this chapter, secondary liability has been carefully defined and strictly confined to discrete circumstances that justify its application.

356. As a result, the scope of apparent liability on exporters under ESCAS *is* novel, given the absence of any special relationship with supply chain participants and of key features typically required to justify its imposition.

Civil liability

357. Secondary liability (or vicarious liability in certain contexts) for third party conduct arises only in limited special relationships, such as employer-employee and principal-agent, which have the key features of:

(a) Scope: secondary liability is not absolute and requires that a third party committed the wrongdoing within the scope of that relationship.

(i) Courts recognise the difficulty in holding a party accountable for the deliberate and independent acts of employees, because it is difficult to argue that intentional wrongful actions are ever '*in the course of employment*'.

(ii) Conduct must be within a principal's actual or apparent authority and have been (expressly or impliedly) authorised before one can reasonably attribute blame.

(b) Control: conduct that can reasonably be controlled, or that the primary party should reasonably be responsible for.

(i) For example, employers have a right to control the manner in which work is carried out and employees have a duty to obey the employer.

(ii) Control is also inherent in the authority conferred by the principal on the agent, and representation by the agent as acting for the principal, which is what attracts the liability.

358. It is significant for the above special relationships that the duties require the parties to act in their interests of their counterparts and effectively place them "on the same side". This, in conjunction with the control that their counterpart is presumed to have over their actions, validates tying the parties together when it comes to liability.

(a) The employment contract and relationship imports special duties on both sides that do not automatically arise in contracts. Employees have duties of obedience, good faith and fidelity to their employer, while employers have a reciprocal duty to act reasonably.

(b) Similarly, agencies are characterised by fiduciary duties: agents have a strict and unbending obligation of loyalty to the principal and accordingly, an agent is not permitted to act contrary to the interests of the principal.

Criminal liability

359. The involvement of potential criminal sanctions for the actions of third parties significantly raises the threshold before the law will impose secondary liability.

360. The law recognises limited circumstances in which a person can be criminally liable for the actions of others, which requires that there is at least:

(a) knowledge of, or intention to, commit the crime (mental element); and

(b) an element of control (direct or indirect) over the physical criminal act (physical element).

361. Seeking to hold an Australian company criminally liable for the conduct of a third party in a foreign country, whether or not the act is an offence under the foreign country's laws or whether the third party is subject to Australia's criminal law, is complex. However, for simplicity, it can also broadly be viewed, in effect, as seeking to attribute liability as an accessory to an offence.

362. The High Court of Australia, in reviewing the fault elements for accessorial liability, emphasised that an accessory must possess an intention to assist or encourage the principal offender's conduct based on "knowledge of the essential matters". Mere recklessness or wilful blindness will not suffice.

363. Finally, there is a common thread in statutes that seek to create strict or absolute criminal liability. This reflects a focus on the *ability or responsibility* of the accused to adjust his/her behaviour. Crucially, Australian law recognises that where a prohibited act or consequence was the result of a third party over whom the accused had no control and against which the accused could not reasonably have been expected to guard, this will afford a defence to the accused.

> *Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could, in no way affect the observance of the law, their lordships consider that, even where the statute is dealing with grave social evil, strict liability is not likely to be intended.*
>
> The Privy Council in *Lim Chin Aik v R* [1963] AC 160 at 175 (affirmed by The High Court in *Cameron v Holt* (1980) 142 CLR 342).

9.3 Application to ESCAS

364. While exporters can take steps to reduce the risk of ESCAS breaches by third parties overseas, it is impossible to ensure absolute compliance, as outlined in the earlier chapters.

365. LiveCorp is also aware from industry feedback that alleged breaches of ESCAS often relate to apparent criminal activity (e.g. theft of cattle), despite significant efforts to prevent such behaviour (e.g. training and security systems in place). No system is infallible to crime and it is difficult to see how regulation of live export laws can sensibly seek to hold

exporters responsible for a criminal act conducted by a third party. This is especially so in a foreign jurisdiction.

366. The characterisation and enforcement of ESCAS non-compliance and enforcement within current live export laws fails to:

(a) recognise that the exporter/importer relationship lacks key characteristics that ultimately justify imposing liability for the actions of another, namely, control and a special relationship between the parties; or

(b) acknowledge core principles of criminal law which require the offender to have either intended to commit, or actually committed (or both), the offence in order to be culpable.

367. However, the relationship between an exporter and supply chain participants is fundamentally different to those that attract liability. Beyond express contractual obligations, the parties have no implied duties of fidelity or loyalty to each other.

(a) Commercial contracts are in many respects *contrary* to employment fidelity obligations and agency fiduciary duties, because contracting parties tend to operate at arm's length, in their own interests.

(b) An exporter / importer relationship more closely resembles an employer / independent contractor relationship. Courts do not extend vicarious liability to independent contractors because the contractor's act is, by definition, '*the independent function of the person who undertakes the work*'.

368. It is also difficult to see how an exporter would have the necessary intention to aid the commission an offence by supply chain participants. In particular, a common design with the offender and likely receipt of any benefit from the offence appear unlikely, when it is the exporter who will suffer detriment as a consequence.

369. As a result, ESCAS seeks to enforce an anomalous brand of liability on exporters that is both strict and absolute, and which the exporter cannot defend against. The effect of ESCAS is contrary to '*deep-seated psychological and moral convictions'* that liability should be '*attributed to someone on the basis of fault*' because it disregards the ways and means in which fault is incurred.[xix]

370. The use of strict / absolute liability under ESCAS confers no benefit upon the community: strict liability is only an effective deterrent to the extent it is actually possible for an individual to modify the relevant behaviour (in this case of an overseas third party).

371. While it is of vital importance that offenders be punished, it is of equal importance that the laws governing such punishment be both fair and perceived as fair. The unobtainable standard of infallibility that ESCAS requires of exporters for its own actions and those of third parties in another country is inconsistent with existing civil and criminal systems.

10. Impacts on industry: cost inefficiencies and implications

KEY PROPOSITIONS

P10.1: Evidence clearly supports the value and need for implementation of recommendations made to address issues outlined in this submission and demonstrates the significant and avoidable impact on both the department and industry, including:

(a) imposition of inefficiencies, operational and structural costs and regulatory burden on the department and industry; and

(b) lost opportunities for industry, reduced competitiveness and commercial detriment.

10.1 Overview

372. The issues discussed within this submission are interrelated and many factors act together to result in avoidable costs – being regulatory control that is inefficient, inappropriate or unnecessary – for the livestock export industry.

373. One of the most significant factors that affects the livestock export industry is the lack of clarity in the legislation, which in delivering such a broad discretion to the department allows factors such as unreasonable compliance expectations, micro-management, fluctuating risk appetite and regulatory creep to arise.

374. These in turn can influence the policies developed by the department and the day to day administration of the system, where it is often seen by exporters reflected in unpredictability or uncertainty in regulatory decisions or expectations on ESCAS or a consignment.

375. From a commercial perspective, this difficulty in reliably predicting regulatory costs or inefficiencies is a significant risk to the profitability of a consignment and in certain cases (for example, reductions in stocking densities or delays) they can effectively remove any profit from a consignment.

376. This risk exposure to regulatory change arises particularly because so much commercial activity and regulatory preparation occurs before an application is submitted to the department for approval of an ESCAS or approval to export. For example, these activities may include:

(a) Commercial negotiations such as quotations and signing contracts which may identify purchase price, livestock specifications, numbers, shipping date ranges and several other factors.

(b) Engagement or purchase of key infrastructure or investment for the preparation and shipping stages. In particular, exporters will either own a vessel which they are making available for the export or they have chartered a vessel (which can be for years) or purchased space on an aircraft.

(c) Engagement and investment in the implementation of ESCAS or other diligence activities. For example, to comply with ESCAS an exporter (or importer) may have invested in awareness activities, obtaining facility gap analyses, installing infrastructure or traceability systems, training and third party audits.

(d) Obtaining an import permit from the importer –a pre-requisite for submitting the export application documents in Australia.

377. As such, at this point in time there is negligible opportunity to pass costs incurred from regulatory decision through the export supply chain or to factor the true regulatory or compliance cost in the export pricing. This can rapidly erode the profit margin of the export which has profound impacts on the ongoing sustainability of the exporter and the broader trade.

378. This erosion in the profit margin also draws funding away from the exporter and limits its ability to spend and allocate funding to activities focused on animal welfare and minimising compliance risks.

379. One of the challenges with the uncertainty and unpredictability, particular in relation to ESCAS, is that the scope of the discretions provided allows conditions to be applied effectively from the point of application through to when the animal has been slaughtered overseas. This occurs by virtue of section 2.46A (4) of the ECO which states that *"a variation of an ESCAS (including a variation of the conditions imposed) applies in relation to all exports to which the ESCAS applies, including in relation to consignments that have left Australia before the variation takes effect*."

380. Some of the costs that may be incurred by an exporter following submission of its application for approval to export, include:

(a) Delays in waiting for approvals

(b) Repetitive inquiry into administrative and operational details

(c) Time and cost in gathering further information

(d) Time, cost and delay in implementing conditions or additional requirements and evidencing this to the department;

(e) Impacts of allegations of non-compliance on further approvals and the risk of opportunistic activism through delays;

(f) Greater regulatory costs in administering micro elements and taking on greater risk.

381. The following table provides illustrative examples of some of the potential costs:

Factor	**Estimate of costs**	**% of profit and comments**
Demurrage (e.g. caused by delays)	US$15,000 – 50,000 per day	20 – >100 % With low margins, demurrage can rapidly erode any profit and given the size of the costs quickly match and exceed the predictable regulatory costs.
Registered Premise costs (e.g. caused by delays)	$4.50 - 5 per head day for cattle $0.75 per head per day for sheep	10 – 30 % This varies and the impact will depend on length of delay.
Fodder costs for extended RP time	$3.00 per head per day	5 – 10 % This will vary in terms of whether it is incurred or moderated within the RP yarding costs.
Additional testing required due to delays	Depending of the testing and handling required – could be $10 – 50 / head	10 + % Primarily a risk for breeder shipments.
Commercial penalties	Variable depending on contracts / companies.	0 – 25 %

	Examples range between 0 – 25 %	
Short notice engagement of Animal Welfare Officer (in market)	Variable but potentially $400-1000 per day of engagement	
Short notice audit cost	$500 – 1,500 per audit + DAWR review costs (may also include travel costs depending on market)	
Reduction in animals able to be carried on a vessel (e.g. reduced stocking density – 10 %)	Estimates vary depending on the length of charter. Costs may vary between USD10 – 500 / head.	35 - 100% These cost impacts also flow to the producers and service providers as their products and involvement is reduced.
Reduction in stocking density for aircraft (e.g. reduced stocking density or changes to crate configurations – e.g. 10 %)	Variable – e.g. 10 per cent reduction from 200 to 180 could cost US$70,000.	50-100 %
Additional on-board fodder requirements	$560 – 600 per tonne	10 % if fodder is not used & lost
Addition of facility or abattoir to ESCAS (e.g. as precautionary option)	$5,000 per audit and $900 per review by DAWR	
Requirement for AAV	$800 – 1,500 per day	
Requirement for additional accredited stockperson	$400 per day	
Further diligence required of exporter staff in market	$0 – 1000 per day	Variable. This cost is heavily influenced by business structures and whether staff are stationed in market.

382. To further inform LiveCorp's submission to the Inquiry, it engaged the consulting firm EY to analyse and provide a reliable, indicative baseline figure of the direct administrative costs under the current ESCAS arrangements.

383. The figures derived by EY are conservative and focused on the direct, rather than indirect regulatory costs. As such, its costings provide a useful minimum for the current regulatory costs recognising that it would be reasonably anticipated that actual costs would likely be several degrees larger.

384. The EY analysis identified relevant costings which are discussed in detail in the following section, accompanied by LiveCorp commentary. Its report is provided in full at Annexure 2.

10.2 Summary of costs and inefficiencies

385. EY found that "*ESCAS requirements create an additional regulatory cost burden on exporters of **$22.3 million per annum***."

386. It identified that this $22.3 million was "*roughly comprised of administration costs (69%), substantive compliance costs (27%) and ESCAS charges (4%)"*, as summarised below:

Item	Total cost ($million)
Administration costs	15.4
Substantive compliance costs	6.1
Delay costs	n.a.
ESCAS fees	0.8
Total	**22.3**

387. As noted in the EY table the $22.3 million total does not include delay costs attributed to ESCAS (or ASEL etc). EY also noted that while it was extremely difficult to estimate delay costs accurately in the timeframes available, it found that:

(a) "*Assuming that 10 per cent of the 1,139 consignments in 2014-15 experienced a short delay and assuming a $50,000 delay cost per day, this could amount to a total delay costs of $5.7 million per annum across the industry. A conservative 10 per cent reduction in delay costs could then save the industry over $0.6 million per annum. This should not be used as a robust estimate but rather as an illustrative example of the possible magnitude of delay costs.*"

388. In terms of the overall regulatory costs faced by exporters, EY also pointed to a ProAnd Associates report prepared for Meat and Livestock Australia in 2008-09 (pre-ESCAS). It noted that this found even before ESCAS "*regulation costs were equivalent to 18 per cent net receipts (i.e. receipts net of cattle purchase costs) for cattle and 24 per cent of net receipts (i.e. receipts net of sheep purchase costs) for sheep*" in the livestock export industry.

389. EY further estimated that with ESCAS conservatively incorporated (based on the MLA / LiveCorp 2014 estimate), the regulatory costs increase a further 6 per cent for cattle (22% increase) and 5 per cent sheep (20% increase) – as below:

390. Item	Cattle	Sheep
Receipts from export sales	$96,000,000 *(100,000 head @ $960/head)*	$125,000,000 *(1,000,000 head @ $125/head)*
Animal purchase costs	$61,500,000 *(100,000 head @ $615/head)*	$66,000,000 *(1,000,000 @ $66/head)*
Receipts net of purchase costs	$34,500,000	$59,000,000
ESCAS-specific regulatory costs [a]	$900,000 *(100,000 head @ $9.00/head)*	$896,179 *(1,000,000 @ $0.77 - $13/ head)*
Other government influenced costs and chargers [b]	$6,570,445 *(based on escalated ProAnd costs)*	$15,987,460 *(based on escalated ProAnd costs)*
% regulatory costs of net receipts	**22%**	**29%**

[a] LiveCorp/MLA (2014), Development of a risk management and quality assurance program

[b] ProAnd Associates (2012), *Regulatory costs and assistance to the red meat and livestock industry*.

391. However, as EY has used the earlier figures from the 2014 LiveCorp/MLA project which are approximately half its current regulatory cost estimate (of $22.3 million), the actual

regulatory cost imposition from ESCAS within this framework would almost certainly be nearly double (e.g. 28 % and 34 %).

392. In developing its research report for LiveCorp, EY separated its assessment into direct costs and indirect costs, with direct costs (e.g. the $22.3 million figure) relating to administrative costs, substantive compliance costs, ESCAS fees and delays. Each of these categories is outlined in more detail below.

10.3 Administration costs

393. EY defined administrative costs as those incurred in demonstrating compliance with regulations. This included the costs associated with engaging independent auditors.

394. Administrative costs were the costliest compliance activity, representing **$15.41 million** or 69 per cent of total ESCAS compliance costs.

395. The following table outlines the key areas which EY identified as administrative costs:

Item	Total cost ($million)
Audit costs	6.8
Maintaining records of control and traceability	4.2
Engaging expertise to assist compliance with ESCAS	3.2
Engagement with auditors	0.4
Making, keeping or providing records required by the Department	0.4
ESCAS and variation applications	0.3
Preparation of investigation report for non-compliance incident	0.1
Total	**15.41**

Auditing costs and inefficiencies

396. Audit costs within the total were estimated to account for around $6.8 million per annum. This estimate not only included audit fees but also the costs associated with coordinating and following up with auditors, reviewing and proofing audit reports and invoicing.

397. As can be expected, given the costs of audits are significant there is a strong exporter view that duplication must be reduced as far as possible and that they must be able to extract the full value from the audits and the auditing framework.

398. Duplication of audits was a significant cost burden for the industry in the initial phases of ESCAS. A research project completed for LiveCorp and MLA in 2014 estimated that duplication may have been costing the industry around $1.8 million in audit fees over a two-year audit cycle.

399. However, key reforms implemented by the government with the support of industry in the last few years have been beneficial and had some effect including:

(a) Reduced duplication through the introduction of facility, rather than supply chain based auditing;

(b) The opportunity to reduce duplication at common facilities by introducing a policy allowing sharing of audits between exporters (on a facility rather than supply chain basis); and

(c) Reductions in the overall number of audits by recognising facility risk and performance through the introduction of a risk based auditing policy.

400. While audit duplication costs have certainly been reduced by these measures, there is anecdotal evidence that the sharing of audits between exporters is limited outside of Indonesia and as such there remains audit duplication in other markets.

401. This duplication has been identified within department reform activities, however it is generally understood that there are limitations in its capacity to implement the facility based administration approach which would be required to prevent it (for example, due to sovereignty and the inability to directly approve or regulate a facility).

402. The introduction of QA programs would present the opportunity to implement facility based administration and directly remove the costs of duplicative auditing of facilities.

403. Further, EY identified that "*One of the benefits of quality assurance programs is the continuous improvement of processes and operations that usually accompanies participation in these programs. Over time, it would not be unrealistic to assume that this would lead to a reduction in risk across the live export industry with concomitant audit savings. For example, if we assume that currently 30 per cent of facilities are 'low risk' but that after three years under a quality assurance program this would increase to 60 per cent, this may well lead to savings of around* ***$1.6 million per annum*** *for the industry*."

Inability to extract full audit value and disruption to continuous improvement cycle

404. The industry also faces avoidable inefficiencies caused by the disruption of the normal audit and continuous improvement cycles within the ESCAS regime and the resulting inability to fully extract the value of the auditors for the $6.8 million cost incurred.

405. Third party audit models are common within assurance and risk management models and programs and they operate in a manner which reflects normal processes of continuous improvement (e.g. through the issuing of observations and corrective action requests).

406. Within these frameworks, the overall effectiveness of the systems in achieving the outcomes and driving continuous improvement can be strongly supported by structures that facilitate, allow and encourage proactive risk and compliance identification, management and declaration processes.

407. Within ESCAS, both the audit and the continuous improvement processes are minimised or prevented through micro-management and the blurring of operational and substantive matters in terms of performance and compliance management.

408. While ESCAS could conceivably be described as a pseudo-QA system, it struggles due to a range of factors which prevent a direct 'program owner' role being adopted by the government (e.g. it cannot directly regulate facilities / importers). However, it is also inhibited by legislation and policies which prevent or limit normal continuous improvement processes and realisation of the full value of the auditors. These include:

(a) A lack of an effective role for the auditor in resolving risk, conformance and compliance matters or in approvals (e.g. regardless of a successful audit, the department must still assess the audit and approve the facility)

(b) Unreasonable compliance expectations of infallibility

(i) For example, ESCAS expects perfect performance in relation to all non-compliance and risk categories which can discourage proactive identification of risks, implementation of inter-audit systems and self-reporting.

(c) Lack of appropriately scaled and differentiated levels of compliance (e.g. scaled from risks, non-conformance to non-compliance) and the need for the

department to intervene, categorise and investigate in all conformance / compliance matters.

(i) The regulator is embedded too deeply in the operational risk and conformance management processes mandating micro-management and preventing the most suited entities (the importer, exporter and auditors) from overseeing, managing and correcting minor issues.

(d) Lack of incentives or clear policies in support of self-reporting.

409. Such issues minimise the value extracted from the audits completed as well as causing significant inefficiencies and negating effects on the most efficient and effective operation of ESCAS against its objectives.

Maintaining control and traceability

410. EY advised in its report that exporters consistently identified maintaining traceability systems and records as a significant regulatory burden. It noted that "*the exporters interviewed consistently identified maintaining traceability systems and records as a significant regulatory burden. The requirement for individual traceability for cattle and buffalo, in particular, adds significant costs to the supply chain. For example, the MLA's 2014 study identified 12 steps in the traceability process for cattle, from the scanning of electronic identification tags to the maintenance of records by the exporter in Excel, Access or a customised database. In comparison, 10 steps were identified in the traceability process for sheep*."

411. The direct costs from the ongoing task of maintaining control and traceability, EY estimated it to be around **$4.2 million** for exporters per annum. However, it also indicated that:

(a) "*it must be noted that costs varied significantly by exporter depending on the arrangements in place. For example, some exporters undertake the activity in-house. Others, particularly larger exporters, will tend to bring in staff to undertake the function such as supply chain managers, animal welfare officers, and additional lines of reporting. Others still, have outsourced the activity to a third party provider. In many cases, it is difficult to disentangle costs associated with the traceability process from the broader function of the staff member or third party provider.*"

412. Further, EY identified that the traceability process is an area where "*exporters have identified considerable regulatory creep and duplication, with requirements around systems and documentation growing over time, and compliance costs commensurate with this. The use of CCTVs in cattle facilities was one example provided in the interviews of a new requirement imposed within the last two years. In some facilities, particularly in relatively new markets such as Vietnam, the urgency with which the measure has been implemented has caused considerable duplication in areas. For example, one exporter flagged the use of four different traceability systems (including CCTVs) in just one facility within Vietnam*."

413. Duplication in this capacity is significant and introduces a degree of unnecessary administration. However, as indicated by EY and as part of the consideration of the current system – different exporters will establish different systems and a certain proportion of the duplication costs may be unavoidable. Further, as ESCAS develops control and traceability systems are shifting in their categorisation from administrative cost to substantive compliance cost.

414. Despite this, there remain significant costs and inefficiencies from duplication in these systems as summarised by EY:

(a) *"Duplication introduces unnecessary administration for the exporters. While a full analysis of the extent of duplication has not been done, rectifying this could yield significant savings. With service fees for CCTV traceability systems quoted*

*at around **$130,000 per year** by the exporter, the regulatory savings from this one facility in Vietnam alone, could reach up to **$400,000 per annum**."*

415. Another equally important impact is that duplication in traceability systems introduces *"considerable complexity for importers, who have to train their staff to use four different systems and manage these systems separately within one facility. While the Department does not inhibit the sharing of systems across facilities, as with audit activities, exporters seldom cooperate for reasons most often related to time constraints and commercial sensitivities."*

416. LiveCorp notes that in reflecting on the audit duplication and the traceability systems, one of the key causes to the duplication and costs, and also one of the inhibitors to the department resolving it, is the inability to establish a facility based administration / regulatory system.

417. From a traceability and control standpoint, the complexity of navigating multiple exporter's systems is also significant from a logistical / commercial point of view.

418. For example, facilities looking to sell or move livestock must be aware not only if a purchasing facility is ESCAS approved, but also whether it is ESCAS approved for the exporter from which it originally sourced the livestock.

419. This can lead to significant confusion and for a shared facility (e.g. where they have multiple exporters to provide security of supply, competitive pricing and allow movements from / to other supply chains), this could be a considerable burden and increases the risk of human error and non-compliance.

420. To transfer livestock to an approved facility outside of the original exporter's supply chain in compliance with ESCAS requires significant administration in either:

(a) The exporter needing to seek a variation to add the new facility following an initial audit of the approved facility and agreement of contracts with the new facility on control, traceability and welfare requirements; or

(b) The exporter seeking an approval to transfer livestock from its own supply chain to the other exporter's supply chain (with the other exporter's consent).

421. If a facility or importer sells to an approved ESCAS facility that is not within the exporter's ESCAS supply chain / network, a non-compliance is incurred against the exporter. While such a transfer is generally considered a minor non-compliance (because equivalent animal welfare is achieved) under the department's Guideline for Managing Non-Compliance, it must still be reported, assessed, investigated and published.

422. The scale of these inefficiencies were highlighted within the department's *ESCAS Report* which – at the time of its release – identified that **27.1 per** cent of non-compliance under ESCAS had been the movement of animals to a facility approved under an ESCAS for another exporter (or export), but not listed in the approved ESCAS for that exporter (or export).

423. In light of the above, resolving this issue could potentially reduce the compliance workload of the department by more than a quarter and reduce the need to process variations and transfers. There are potentially a number of ways that this could be achieved but a facility based QA program could be one such avenue.

<u>Variations – addition of facilities to an approved ESCAS supply chain</u>

424. EY identified within its assessment that ESCAS applications and variations were estimated to cost around **$300,000 per annum**.

425. Under the Order and the policies established by the department, an exporter must apply and obtain approval to vary its ESCAS supply chain and add a facility.

426. The department indicated in its *ESCAS Report* that variations made up 5 % of its ESCAS document handling. The *ESCAS Report* also noted that a more streamlined approval process had been adopted.

427. An ESCAS approval basically involves applying for a variation by supplying a completed third party audit report of the facility and a signed declaration from the exporter that the facility is within the control and traceability structures for that ESCAS.

428. An exporter may seek to add a facility for many reasons however it is often driven by new commercial opportunities or an existing importer looking for greater flexibility to sell or process its livestock at a facility where a more attractive price / premium can be obtained.

429. The requirement to seek department approval introduces several costs, inefficiencies and somewhat less quantifiable compliance risks. For example, these may include:

(a) Costs to apply to add an ESCAS and respond to further requests for information;

(b) Delay costs while variations are processes (discussed also at 10.5);

(c) Frustration of importers caused by delays and an increased perception of direct government approval of facilities;

(d) Increased compliance risk for the exporter caused by delays if the importer is unable to take advantage of higher prices, incorporate new facilities or potentially address possible welfare issues from lack of available processing capacity; and

(e) Confusion regarding when a facility is approved – e.g. a lack of understanding that following a successful audit, department approval is also required (with associated compliance risks).

430. Removing the need for the department to approve variations (either within the current system or under a QA program) could achieve a significant reduction in burden, inefficiency and complexity. Under the current program, this might be achieved by allowing for a notification rather than an approval process or for the exporter to manage the addition and removal of facilities subject to audit and appropriate compliance expectations.

<u>Administration costs related to non-compliance events</u>

431. EY also highlighted the administrative costs associated with non-compliance events. It noted that:

(a) *"With each non-compliance event, exporters must liaise with importers and facility owners to collect all evidence surrounding the report; analyse the data collected; prepare an investigation report to the Department; and assist the Department with its investigation. This can be a time consuming and costly process, particularly when the required evidence is difficult to locate. For example, the Department found that evidence to establish non-compliance was insufficient for 13 of the 22 third party reports received."*

432. EY estimated that as a result of this activity the "*direct costs associated with the 45 investigation reports alone are estimated at **$0.12 million per annum**. However, this does not include the costs related to the often voluntary and compulsory remediation measures as a result of the incident."*

433. This becomes more significant when consideration is given to the requirement for the department need to categorise and respond to any non-compliance and the lack of a role for the exporter or auditor to resolve these issues independently. These also highlight potential areas where costs and inefficiencies could be reduced by changes to the policies of the department or the enhanced use / recognition of third party systems (such as QA or equivalence).

10.4 Substantive compliance costs

434. EY defined substantive compliance costs as those that directly lead to the regulated outcome. It estimated these costs to be **$6.1 million**. It outlined the following costs as provided by the exporters interviewed for its report:

Item	Total cost ($million)
Infrastructure and other capital costs	2.1
Training costs	1.8
Travel and accommodation costs for staff off-shore	1.2
Negotiation and implementation of contracts with importers	1.0
Total	**6.1**

435. EY identified that there was variation between exporters and markets, including in the ability or willingness for importers to contribute to ESCAS costs and obligations. It also indicated that while there were ongoing costs – such as CCTV service feeds and stunner maintenance fees – it was likely that some of the costs would gradually stabilise and decline over time as supply chains become further established.

436. However, an important component within this space is that annually exporters are investing (conservatively) **$2.1 million** in infrastructure / capital and **$1.8 million** in training, predominantly aimed at improving animal welfare in overseas markets. This is a significant commitment by a commercial sector towards a social objective, particularly one where it is unable to achieve a premium or a return from the sector requiring the regulation/objective.

437. EY also makes some key references in terms of substantive compliance costs about small business stating:

(a) "*It is worth noting that 84 per cent of substantive compliance costs are fixed costs and 64 per cent of direct costs overall are fixed. This means that smaller exporters with smaller supply chains are currently bearing a disproportionate amount of the regulatory burden, relative to larger exporters who can benefit from economies of scale (i.e. are able to spread the costs over a larger number of facilities and animals).*"

438. The above would also be considered likely to inhibit the ability of smaller exporters to feasibly and competitively implement more complex or costly compliance tools such as CCTV systems or in-market managers.

10.5 Delay costs

439. EY defines delay costs as expenses and loss of income incurred in the process of completing an administrative application requirement that prevents a regulated entity from commencing its intended operations. It indicates that in the context of ESCAS application and approval delays may be experienced at the commencement of a supply chain (through the ESCAS application process) and every time a facility or importer is added to the supply chain (through the variation application process).

440. Delay costs can also be experienced through the export application and approval process where ESCAS compliance conditions are applied – for example, as a pre-requisite to exporting to a particular supply chain.

441. EY summarises that:

(a) "*The consequences of delays typically consist of lost income opportunities, standby costs of capital (e.g. demurrage costs) and labour (e.g. animal welfare officers), and costs to maintain the animals (e.g. feed and agistment). There was consensus from those interviewed that that costs associated with delay are not recorded and are difficult to calculate. In many cases, the risk of delay has been incorporated into the operational plans of exporters, thereby avoiding many of the associated financial costs. However, anecdotal evidence suggests that delays cannot always be avoided, with significant impacts to both exporters and ancillary industries. Moreover, where previously an exporter may have had a contingency plan in place to redirect the shipment to another exporter, this has become increasingly difficult under restrictive ESCAS requirements.*"

442. EY used an illustrative example of the delay costs associated with a consignment of 4,000 breeding cattle to China. It noted that

(a) "*Delay costs vary widely depending on a number of factors that vary with each market. For example, the size of the consignment will impact on the size of the vessel required and associated demurrage costs, which can vary between $15,000 and $50,000 per day. The size of the consignment will also impact on animal holding and fodder costs, which are typically charged on a per head basis. For the hypothetical scenario, these costs amount to around $33,000 per day. For each day delayed, additional labour costs may also be incurred from having the services of animal welfare officers, stockpersons, and Australian Accredited Vets on standby. This adds another $1,600 per day, bringing the total delay costs under our conservative scenario to around $50,000 per day.*"

Additional costs	Frequency	Unit cost ($)	Total cost($)
Registered premises	Per head	5	20,000
Demurrage	Per day	15,000	15,000
Fodder	Per head	3.30	13,200
Accredited vet	Per day	800	800
Animal welfare officer	Per day	400	400
Stockperson	Per day	400	400
		Total	**49,800**

443. EY then estimated that

(a) "if *10 per cent of the 1,139 consignments in 2014-15 experienced a short delay and assuming a **$50,000 delay cost per day**, this could amount to a total delay costs of **$5.7 million per annum** across the industry."; and*

(b) *"a conservative 10 per cent reduction in delay costs could then save the industry over $0.6 million per annum. This should not be used as a robust estimate but rather as an illustrative example of the possible magnitude of delay costs."*

444. The EY estimate is a highly conservative figure and it could reasonably be expected that actual delay costs would be significantly higher, taking into account:

(a) The larger vessels which routinely service the industry that would incur daily demurrage costs of over $50,000 a day.

(b) Large consignments which would also incur greater Registered Premise costs from delay (e.g. 50,000 sheep at 75 cents per head / day = $30,000 / day; 20,000 cattle at $5 per head / day = $100,000 / day).

(c) The EY costing does not account for delays related to non-ESCAS issues – e.g. ASEL or protocol matters.

(d) Delays would be reasonably expected to extend over more than one day within a subset of the incidents.

445. A further point which is important to highlight is that the expected ESCAS regulatory cost for a consignment has been predicted using the 2014 LiveCorp / MLA research and current EY estimates to be between $9 and around $18 per head for cattle by sea; and between 77 cents and around $1.40 per head for sheep by sea. Yet, the impost from the delay costs in the illustrative example would be a further $12.50 per head above these expected regulatory costs (per day). This is a significant additional, unpredictable and un-costed burden.

446. To further expand on where some of the specific costs from a delay can come from, it is important to note that a significant part of livestock export is about successfully aligning and coordinating a wide range of variables towards the overarching objective of loading a vessel or aircraft on the day of scheduled export.

447. A failure to be prepared or hold the appropriate approvals to load on the scheduled export date will lead to a range of significant impacts – which at the highest level can mean the deferral of loading until another day, or for aircraft potentially losing the opportunity to export.

448. Failure to load an aircraft which has been booked will have varying degrees of cost depending on what mitigating actions can be taken, and in turn this reflects when the cause of the delay eventuates (e.g. as per the next section, the closer to the scheduled date of export an extra cost is applied the less opportunity to mitigate loss).

449. For a shipment by sea, the variables can be significant – particularly for complex protocols or large shipments – and can include for example actions in relation to:

(a) Berthing space

(b) AMSA approvals / surveys

(c) DAWR ship-focused quarantine checks

(d) Fodder for the voyage

(e) Bedding for the voyage

(f) Expertise for the voyage – AAV and stockmen

(g) Stevedores and other staff for loading

(h) AAV and others for final inspections for health and welfare checks (e.g. against ASEL, commercial specifications and protocol requirements)

(i) Quarantine and protocol requirement completion

(i) This may for example include completing testing within 10 days

(j) Maintenance of the welfare and condition of livestock (minimisation of unnecessary stress, building of condition, inspection etc)

(k) Obtaining DAWR approvals:

(i) Sign off of AAV and accredited stockperson

(ii) AEP and approval to prepare export

(iii) Permission to leave for loading

(iv) ESCAS approvals

(v) Document and animal inspections

(vi) Health certificates and export permits.

450. The above reflects many of the regulatory and commercial factors that need to come together and it is recognised that there are elements on both the exporter and the department side that can lead to delay. Further, it is also recognised that some delay must be considered an inevitable part of the normal exercise of appropriate regulation and factored into business operations, however many of the significant impacts come from late or unexpected inquiry or exercise of discretionary powers which cannot reasonably be predicted, planned or mitigated.

451. Finally, it is noted that because delay is incurred late in the consignment and commercial processes it has the potential to significantly influence the profitability of the consignment.

10.6 Indirect Costs

452. At its most basic level, the greatest strategic cost and inefficiency to the industry is the negating effect that ESCAS has on the interest of importing countries to import Australian livestock if they have different sources available.

453. This is a difficult factor to balance however there are many reasons why importers may choose to look elsewhere for their livestock:

(a) Significant risks to their continuity of supply and hence the security and stability of their businesses;

(b) Requirements for exporters to have detailed information of their commercial businesses;

(c) Risk of delays (e.g. waiting for variations);

(d) Sovereignty issues or concerns (e.g. not welcoming Australian Government insight into businesses or countries);

(e) Failure of the ESCAS framework to align with cultural or in-market commercial factors;

(f) Continual negativity driven by unreasonable expectations of infallible performance;

(g) Costs of complying (paperwork, auditing, infrastructure, training); and

(h) Constantly changing requirements.

454. For exporters there are also costs and inefficiencies at a higher level including:

(a) Difficulty in planning long term investments

(b) Significant potential costs in investing in infrastructure etc to support importer / facility compliance

(c) Overarching direct costs and burden

(d) A negative regulatory and business environment (unreasonable expectations);

(e) Challenges in exercising direct control and unreasonable expectations of performance in this regard;

(f) Compliance risk with Australian government requirements is significant because of unreasonable compliance and the liabilities applied; and

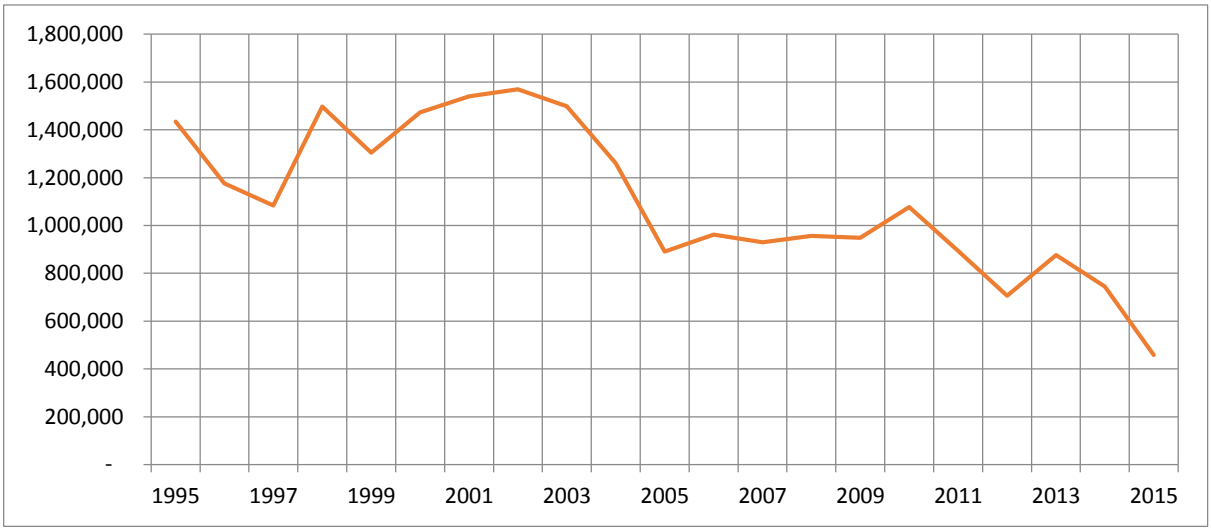
(g) Business continuity concerns (e.g. because of licence risks for even minor non-compliance).

455. The EY report also addressed the indirect costs of ESCAS in its report at Annexure 2. This included a range of issues, including lost opportunity and the negative impacts on Australia's competitiveness from being the only export country actively pursuing OIE implementation.

456. It also provides useful examples in relation to Kuwait and Singapore as follows:

(a) *"Kuwait is another market where Australia has arguably experienced losses of market share due to ESCAS. ESCAS was implemented in Kuwait on 1 March 2012. Two supply chains operate in Kuwait. While Figure 1 shows that sheep volumes from Australia have decreased moderately from the pre-ESCAS period, the burden has fallen disproportionally on one exporter, which has previously specialised in trading Australian Awassi sheep."*

Figure 1 Export volume of live sheep to Kuwait, 1995-2015



Source: Food and Agriculture Organisation of the United Nations [used for the period 1995-2013), MLA (November 2015), Australian Livestock Export Statistics [used for the period 2014-15]

(b) *The Awassi is a rare breed of sheep with unique physiological characteristics that makes it highly desirable in certain Middle Eastern markets and thereby sells at a premium in those markets. The breed was introduced into Western Australia in 1994 at considerable expense (around $40 million) and after a long lead time of research and quarantine (around seven years).*

(c) *ESCAS is incompatible with the traditional livestock and distribution system in Kuwait. In particular, sheep arriving in Kuwait are received by large importers who then sell livestock on to small traders or butchers providing fresh meat to their local areas. These participants, being excluded under the supply chain due to ESCAS, have had no choice but to rely on local stocks or import sheep from other countries.*

(d) *The loss to the industry has been significant. Averaging consignments of around 150,000 heads per annum before 2012, trade has now slowed to around 50,000 sheep per annum. This has made it increasingly difficult for farmers to enter into forward contracts to supply Awassi sheep at a premium ranging from $10 to $15 per sheep. A loss of 100,000 sales would therefore translate into a minimum revenue loss of $1,000,000 per annum, should farmers be forced to sell these sheep on the domestic market or other off-shore markets where they are not as desirable.*

(e) *The last example provided of market loss is Singapore. Unlike other markets, where trade occurs year round, Singapore is characterised by a single export event immediately prior to the festival of Korban. The introduction of ESCAS in Singapore in 2012 created significant uncertainty in a market where the social and financial impacts of a disruption or delay in trade would be devastating. To mitigate against these risks, importers in Singapore have since been forced to diversify their supply chains. In 2013, Australia's market share in Singapore dropped by 50 per cent, and we now compete with Canada and Ireland in a market that was previously uncontested. This example highlights the direct relationship between the uncertainty created by ESCAS for Australia's trading partners and losses in market share for Australian exporters.* "

11. Estimates of potential reform savings

KEY PROPOSITIONS

P11.1: If the recommendations of this submission are adopted, conservative and realistic real world estimates indicate that savings for industry would confidently be expected to be at least **$15 million per annum,** and most likely around or in excess of **$25 million per annum** in direct, indirect and delay costs. A significant impact of those savings would in turn be transferred from regulatory costs to industry profitability.

457. It is difficult with a submission of this scope and within the timeframes available, to precisely define either current costs or the likely magnitude of savings and impacts from reforms proposed.

458. For livestock export, this is further complicated by the degree of variation between the exporters. For example, a relatively small number of exporters (10 – 15) account for more than 90 per cent of exports. However, their activities cover different classes (breeder, feeder and slaughter), species (beef cattle, dairy cattle, sheep and goats), modes (sea and air), logistics (40,000 head compared with 2,000 head cattle ships) and markets (with more than 25 different countries across species). There is also considerable variation in the business structures and the systems, policies and procedures implemented to manage regulatory obligations and commercial operations (e.g. family companies through to listed companies).

459. However, Chapter 10 utilised EY estimates and industry knowledge to outline indicatively some of the costs and inefficiencies which are seen within ESCAS and the broader livestock export regulatory regime.

460. In the context of the Inquiry, the important consideration is what costs and inefficiencies are avoidable within the ESCAS framework and how the recommendations from this submission will reduce or remove them.

461. A particular distinction that LiveCorp has sought to make in considering these matters is the impact on direct costs and the impact on the profit margins.

462. Direct costs are fairly self-explanatory and are outlined in detail within the previous chapter and in the EY report. These costs include the $22.3 million per annum of ESCAS costs and the conservative estimate of $5.7 million per annum in delay costs.

463. Profit margins are an important factor to consider, particularly for the livestock export industry where it is operating on a low margin. The livestock export business model has evolved over many years and has played an important role in achieving strong market share within the competitive global environment. However, it has increasingly been challenged to absorb increasingly high costs of regulatory and compliance obligations into a narrow profit margin business.

464. In turn, the industry has also been challenged by its inability to pass on regulatory costs associated with the social good objectives (such as the $3.9 million per annum invested in infrastructure and training) to customers or the Australian community and the disconnect between the commercial process and the regulatory approval process, which inhibits the ability for most regulatory controls and requirements that arise to be incorporated into pricing, eroding profits.

465. It is also important to outline the benefits of profitability and why it is important to producers, industry sustainability and the successful delivery of the community objectives of ESCAS.

466. Profitability is a key factor for the livestock export industry in:

(a) Providing the means to re-invest in the business, for example to:

(i) Strengthen compliance and risk management systems;

(ii) Engage and invest in animal welfare initiatives with importers and facilities;

(iii) Engage with industry bodies or undertake themselves further research, development and innovation;

(iv) Expand customer base and develop market opportunities;

(v) Invest in long-term infrastructure such as improved quarantine facilities or vessels;

(vi) Form strategic partnerships with parties throughout the supply chain, including producers;

(vii) Allow for greater competition in purchasing livestock and better producer returns; and

(viii) Assist strongly in maintain the health, sustainability and competitiveness of the industry.

467. Importantly, profit margin also provides the much needed flexibility for exporters to successfully negotiate and outcompete overseas competitors, as well as supporting competitiveness in the domestic purchase of livestock.

11.1 Good regulatory features, risk appetite and non-compliance

468. The recommendations relating to chapters 4, 5 and 7 relate strongly to building a structure where there is much greater clarity, certainty and transparency in the regulatory system around how the regulator will administer and manage decisions and compliance issues.

469. Some of the main impacts from these particular recommendations are that they will support:

(a) Increased predictability and certainty in administrative decisions;

(b) Greater clarity on compliance expectations and standards;

(c) Increased clarity on the consequences for non-compliance;

(d) Improved stability in the balancing of social and economic objectives under ESCAS;

(e) Better separation between categories of non-compliance and risks;

(f) Protection from fluctuating risk appetite, regulatory creep and micro-management; and

(g) Achievable compliance obligations and a more appropriate balance between remedial and punitive approaches.

470. It is difficult to estimate with precision the direct cost savings or impact for the industry from implementing these elements, however even taking a conservative approach they would be expected to include a:

(a) 10 – 50 per cent reduction in delay costs, which EY estimated as $0.6 million but which are highly likely to extend upwards of several million dollars per annum;

(b) 10 – 30 per cent reduction in administrative costs, which based on the EY estimate would certainly amount to a very conservative $1.5 million but would be reasonably expected to be closer to $4.6 million per annum.

471. In relation to (b), it is particularly difficult to isolate avoidable administrative costs in the current framework – in part, due to the broad discretionary powers which arguably blur the subjective perception of necessary and unnecessary cost.

472. The direct costs identified by EY are the 'tip of the iceberg' and it would be expected that as many of these recommendations relate to business stability and predictability that as the direct costs are reduced, exporters would see a cascading reduction in indirect or untracked costs (e.g. management or employee time, more accurate quotations, better risk management).

473. For this reason, there is the potential for savings to be closer to 30 per cent and perhaps even between $5 – 10 million.

474. Despite the direct cost savings, it is particularly important to highlight the potential benefits to profitability from increasing the predictability of delays and regulatory decisions, controls and consequences.

475. As was highlighted in Chapter 10, exporters are largely unable to pass these costs on at the point that they are incurred because contracts and pricing have been agreed. For a narrow profit industry this is a significant risk and the recommendations in this submission will provide predictability and stability that should allow exporters to better manage risks, select contracts and set prices to avoid erosion of profit late in the consignment.

476. Chapter 10 also provided an outline of some of the direct costs along with indications of what impact they may have on profit and EY also provided estimates and an illustrative example of how delay can impact on direct costs.

477. Utilising this information and industry information provided to LiveCorp, the following provides a basic example by applying the high conservative EY costing to demonstrate the impact of direct costs on profitability:

(a) If a consignment of 4,000 head of feeder cattle to Indonesia (under ESCAS and with lower margins than breeder exports) has a profit margin of $25 per head, the consignment profit would be $100,000. One day of delay, applying the EY estimate of $50,000 would reduce the profitability of the export by 50 per cent.

(b) If alternatively, the profit margin is $10 per head and the total consignment profit $40,000, one day of delay – based on the $50,000 figure – would completely remove the profitability of the shipment and would instead incur a loss.

478. This example also allows a basis for comparing how other controls could impact (e.g. by applying some of the estimates provided in Chapter 10).

479. Noting the above, it could be reasonably predicted that any reduction in unexpected and un-costed controls, delays or changes (e.g. policies) would not only save significant direct costs, but those direct costs would directly and substantively improve the profitability of the industry by significant percentages.

11.2 Enabling the regulator – QA and equivalence

480. The recommendation to incorporate recognition of QA in the legislative framework for livestock export – as per chapter 6 – presents a significant opportunity to reduce avoidable costs and inefficiencies.

481. The most fundamental premise of both QA and equivalence is that it changes the role of the regulator and removes it from involvement in operational or micro-level decisions and oversight.

482. In other regimes which have adopted QA or equivalence, it presents a substantive opportunity for the government regulator to significantly reduce its costs and improve its efficiency.

483. Most importantly, the adoption of QA (subject to appropriate meeting point etc) provides a separation between substantive and operational compliance, with government focusing its scrutiny on the substantive matters.

484. Within such an arrangement, the third party system would provide the department with the reliable evidential basis and confidence to minimise ESCAS based interactions with exporters and step-out of micro-management of operational administration and compliance matters.

485. The clarification within such a system would also help to avoid the risks of regulatory creep (e.g. less scope to over-regulate), the influence of risk appetite (e.g. less decisions or interpretations required) and enable effective continuous improvement, risk management and self-reporting / declaration structures.

486. In light of the above, the estimates for exporter or industry savings are difficult again to quantify and it is likely that because of the substantive change to how the exporters would interact with the department any direct cost estimate is likely to under-estimate the indirect and longer term savings. These savings would include for example:

(a) Reduced indirect and direct costs from decreased micro-management and regulatory creep;

(b) A more balanced remedial / punitive approach to compliance at the operational level;

(c) Improvements and savings from the introduction of a continuous improvement approach with likely economies of scale developed over time; and

(d) Minimal exposure to risk of unpredictable or inconsistent decision making and subsequent savings from reductions in delays or regulatory controls.

487. In terms of direct costs, it must be recognised that as QA is primarily a different mechanism to demonstrate the same regulatory obligations the substantive compliance costs for the exporter would likely remain relatively static and the administrative savings may be modest. However, QA offers the opportunity to utilise the same funding to deliver better outcomes for government (better independent reliable evidence) and better outcomes for industry (e.g. to take advantage of economies of scale and the expertise of the QA entity).

488. However, there should still be direct cost savings if a QA program was recognised (these will clearly vary depending on its structure) such as:

(a) Removal of duplicative audit costs

(b) Removal of some avoidable control and traceability duplication

(c) Facility based administration and removal of need for variations or transfers

(d) Ability to move livestock freely between approved facilities

(i) e.g. removal of costs related to non-compliance for moving between different ESCAS approved facilities

(e) Reduction in administrative and record keeping costs – for example, by greater use of electronic systems and efficiency gains

(f) Removal of involvement of department in operational non-compliance and risk and the use of effective audit systems

489. Indirectly, QA programs could also allow for facilities or importers to take greater ownership of compliance and conduct business more freely and in closer alignment with their cultural and commercial norms.

490. For equivalence, the savings could also be substantive as in recognising equivalence of a country or an established system (e.g. in another jurisdiction) it could reduce exporter involvement and costs almost in total – as compliance would be a matter for the importer / facility within their jurisdiction.

491. However, because equivalence will rely on the continuing development of welfare systems it is likely that within the next ten years a reasonable estimate of successful recognition would be 0 – 3 countries.

492. Based on the above, it is estimated that:

(a) The potential savings for the government's ESCAS costs from QA programs and equivalence could conceivably be towards the upper limit of 50 – 90 per cent depending on where the "meeting point" is set;

(b) For exporters and industry, the direct cost savings are difficult to estimate but would conservatively be expected to account for a further 30 – 40 per cent in administrative costs – being around $3 – 6 million (and would likely be towards the higher end of that estimate).

(c) The industry would likely see a significant reduction in indirect costs and business improvements from the separation of the operational compliance management from government administration that would – over time – account for a significant benefit anywhere between $5 – 15 million.

(d) Equivalence for a modest market would be reasonably estimated to deliver a saving of 70 or more per cent of the current costs of ESCAS to exporters. The cost saving would vary depending on the market but for 100,000 head of cattle a reduction of 70 per cent would account for around a $0.6 million saving (although the indirect benefits in terms of diplomacy and self-determination would be significant, yet intangible gains).

493. An indicative estimate for the purposes of this report may be that if the recommendations relating to equivalence and QA were adopted the livestock export industry would see cost savings – both direct and indirect – over time of conservatively $8 - 20 million per year.

11.3 Strategic benefits and indirect savings

494. The above sections have focused largely on cost savings, however it is important to also recognise the likely profound upside benefits.

495. This report has outlined in detail a range of benefits which it believes will allow ESCAS to be delivered more effectively and in a manner that will allow the industry to be competitive into the future.

496. For producers and exporters alike, the overarching upside and objective of the recommendations in this report are to try and identify a pathway that:

(a) Retains and builds on the animal welfare gains achieved to date;

(b) Retains livestock export as a healthy industry competing for livestock from producers;

(c) Builds Australia's competitiveness by reducing unnecessary costs;

(d) Minimise the negating influence that ESCAS may have in international countries and customers; and

(e) Allows for a profitable and sustainable industry moving forward over the long term.

497. The potential if this can be achieved – which we believe the recommendations in this report can support – will be the ongoing existence of the industry, greater opportunities to access new markets, better demand in existing markets and the ability to compete strongly while also being the only live export industry actively working towards OIE standards adoption.

11.4 Summary

498. Based on the cost analysis within Chapters 10 and 11, if the recommendations of this submission are adopted, conservative and realistic real world estimates indicate that savings for industry would confidently be expected to be at least **$15 million per annum,** and most likely around or in excess of **$25 million per annum** in direct, indirect and delay costs. A significant impact of those savings would in turn be transferred from regulatory costs to industry profitability.

Annexure 1: Benefits of the Livestock Export Trade

Australia is ideally placed to respond to the demands for livestock globally

The livestock export trade from Australia is essential for Australia and importing countries and plays to the natural advantages of both.

Australia first became a significant livestock exporter in the 1970s when large scale live sheep exports to the Middle East commenced. Although cattle had been exported for decades, the trade started to grow strongly from the 1980s. Over the past decade the trade has ebbed and flowed based on a range of factors, including drought, currency fluctuations and market access restrictions. Markets for Australia's livestock exports are predominantly in South East Asia, the Middle East and North Africa.

Over 100 nations from all parts of the globe are involved in the trade of livestock across international borders. Australia is the second largest exporter of live sheep and fifth largest exporter of live cattle. The Food and Agriculture Organisation of the United Nations estimates the global livestock export trade has grown from around 15 million head in 1961 to almost 70 million head in 2010. Australia competes against the likes of Brazil, Canada, France and several African nations. Australia is responsible for less than 10 per cent of world cattle exports, exporting to around 22 countries.

In 2015, Australia exported over 1.3 million head of cattle valued at $1,465 million. Seventy per cent of Australia's cattle exports went to South East Asia including Indonesia, Vietnam, Malaysia and the Philippines. Indonesia is the largest market for Australian cattle exports, valued at $547 million and this is expected to continue to grow. Almost 1.5 million head of sheep were exported in 2015, valued at $190 million. Most of Australia's sheep exports are to the Middle East (almost 90 per cent in 2015). Australia also exports goats, almost exclusively by air, with over 90,000 head exported to the value of $10.3 million in 2015.

Australia has a unique capacity to supply the very livestock that are demanded by export markets. This unique capacity includes the relatively close proximity to markets in South East Asia and Australia's northern cattle production areas; tropical climatic conditions in the north to raise *Bos indicus* cattle that are ideally suited to markets in South East Asia; our historic surplus of sheep to satisfy Eastern MENA appetites; our freedom from major animal diseases such as foot and mouth disease; and our long standing commitment to animal welfare.

Many countries are heavily reliant on the importation of live animals for a range of reasons: to address food security; rising incomes have allowed the population to demand more protein; the preference of consumers to source freshly prepared meat from local wet markets; the access to cheap livestock feed and labour; and the guarantee it gives to consumers for freshness. In some cases, Australia has a comparative advantage in providing animals ideal for finishing in off-shore feedlots. Australia is the main, or sole, source of imports for some countries and reliable trade is important to our international reputation.

If Australia ceased to supply livestock, it would not simply be replaced by chilled and frozen meat trade. While Australia has developed a significant trade in meat products, the lack of refrigeration and cold chain facilities, as well as strong cultural preferences for freshly slaughtered meat precludes Australia from servicing all of its export markets with processed meat products.

The benefits of the livestock export trade flow through regional Australia and underpin farm-gate returns for livestock

The livestock export industry continues to be an integral sales option for Australian livestock producers and an important contributor to the diversity and success of regional economies.

The livestock export industry in is an important component of the Australian agricultural sector and contributed almost $1.7 billion in export earnings to the Australian economy in 2015. The industry employs 13,000 people, mainly in rural and regional Australia and provides significant employment opportunities to indigenous people across northern Australia.

The importance of the livestock export industry to regional communities is amplified in the north and west of Australia where production has shifted to meet the requirements of export markets for live animals. For many producers in these areas the industry is the only source of income and they supply the majority of live animals for export.

The livestock export industry value chain is complex and relatively long. Up to 30 separate business types, each generating additional value and employing people in both urban and regional Australia have been identified. The businesses that are involved in the industry are often specific to the live export industry, or generate the vast majority of their revenues from live export industry. It is often the foundation of a business which supplies other requirements in remote areas.

In 2011, the Centre for International Economics (CIE) completed an independent assessment of the value of the Australian livestock export industry. CIE analysed how the livestock industry output would change in the absence of the livestock export trade and the impacts this would have for producers, the entire livestock industry, and the communities that rely on it. CIE showed that the livestock export trade significantly increases prices to producers and that in the absence of the trade prices would be 4 per cent lower for cattle; 7.6 per cent lower for lambs and 17.6 per cent lower for older sheep and farm level income would drop by $47 million in the cattle industry and $64 million in the sheep industry.

While the impacts modelled by CIE on prices at saleyards for both cattle and sheep represent a national average, it is acknowledged that the impact would be most acute in regions directly reliant on the trade. For example, in March 2014 the CIE completed a more targeted assessment to look at the impact of the live export of sheep on woolgrowers. This showed that in the absence of the trade, saleyard prices would be 4.5 per cent lower for lambs and 24.2 per cent lower for older sheep. This assessment showed that the absence of the live export trade would have a particular impact on Western Australian wool producers:

- state wool production would fall by 12 per cent
- the farm value of production would fall by $302.3 million (based on 2012 production levels)
- the price paid by processors would default to the price, less transport costs of $25-$30 per head
- saleyard prices could fall by as much as 35 per cent for lambs and 66 per cent for older sheep

The closure of the Saudi Arabian market for live sheep in 2003 was reported in the Keniry Review as having caused an immediate 50 per cent reduction of wether prices in Western Australia. Impacts on cattle producers in northern Australia from the temporary suspension of trade to Indonesia were also significant.

AUSTRALIAN LIVE CATTLE EXPORTS

Australian live cattle exports - volume and FOB ('000) value by key markets								
Country	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Egypt	0	0	56,441	14,589	32,800	0		
	$0	$0	$48,197	$12,268	$24,475	$0		
Indonesia	644,849	772,868	521,002	413,726	278,767	454,152	728,404	618,796
	$410,179	$479,486	$319,343	$275,371	$188,913	$308,290	$ 559,755	$ 547,958
Israel	51,721	36,901	43,212	53,925	50,087	98,320		
	$30,166	$20,676	$28,323	$40,124	$38,485	$72,824		
Vietnam		128	1,427	1,276	3,353	66,951	181,561	311,523
		$468	$1,829	$1,277	$3,071	$54,484	$ 183,283	$ 345,951
China	12,767	32,798	57,418	53,570	55,912	66,573	117,906	81,787
	$25,332	$70,626	$114,413	$118,121	$123,167	$138,928	$ 245,117	$ 182,106
Vietnam /China/Japan from Oct 2015								62827
								$ 86,254
Malaysia	20,263	13,651	17,084	12,287	32,781	47,620		
	$16,010	$10,142	$11,715	$10,350	$23,742	$29,543		
Russia	20,071	2,437	12,538	30,568	38,977	34,584		
	$53,116	$8,833	$27,785	$56,594	$86,691	$54,666		
Philippines	10,791	12,860	16,244	21,708	32,268	19,412		
	$7,514	$7,529	$8,786	$14,095	$21,205	$12,127		
Japan	19,770	16,039	15,041	14,216	11,281	13,639	9,473	6,861
	$17,418	$13,911	$17,899	$19,501	$15,966	$19,878	$ 13,822	$ 10,423
Jordan	830	27,578	19,257	600		11,900		
	$457	$14,586	$10,153	$1,398		$7,150		
Pakistan	4,088	1,704	2,284	2,676	5,156	11,069		
	$9,293	$3,430	$5,199	$6,862	$15,032	$24,744		
Other *	83,360	37,179	169,409	90,244	110,836	26,703	254,858	249,583
	$68,493	$36,782	$139,082	$85,504	$89,859	$32,390	$ 228,960	$ 293,226
Total cattle	**868,510**	**954,143**	**874,916**	**694,796**	**619,418**	**850,923**	**1,292,202**	**1,331,377**
Total FOB value ('000)	**$637,977**	**$666,469**	**$684,526**	**$629,196**	**$606,131**	**$755,024**	**$ 1,203,939**	**$1,465, 920**
* Disaggregated data for smaller markets not yet available for 2014 and 2015. These included in "Other"								

AUSTRALIAN LIVE SHEEP EXPORTS

Australian live sheep exports - volume and FOB ('000) value by key markets								
Country	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Bahrain	716,040	747,827	498,731	344,450	249,741	0	274,865	315,000
	$55,591	$66,359	$53,625	$48,541	$33,366	$0	$ 28,045	$ 35,912
Kuwait	956,276	948,271	1,076,455	956,642	706,644	876,004	744,671	311,571
	$67,663	$77,993	$112,055	$123,246	$78,934	$69,251	$ 71,183	$ 38,537
Qatar	269,116	352,695	321,415	395,752	531,894	560,762	539,250	96,414
	$26,613	$41,223	$40,857	$56,640	$76,756	$49,738	$ 52,604	$ 14,081
Jordan	383,943	470,511	265,986	217,067	327,960	287,792	294,095	154,500
	$26,000	$38,377	$27,901	$27,763	$35,351	$26,642	$ 33,434	$ 15,915
UAE	175,629	130,312	78,747	37,385	33,211	99,795	118,043	419,762
	$12,052	$10,850	$8,722	$5,328	$3,976	$8,770	$ 11,876	$ 48,427
Oman	741,106	289,223	69,073	41,025	19,892	58,476		
	$56,987	$26,672	$8,296	$5,822	$2,023	$4,737		
Israel	36,834	23,400	42,000	56,600	64,007	54,164		
	$2,360	$1,951	$4,686	$6,753	$6,973	$4,860		
Malaysia	26,128	20,588	19,000	15,903	18,864	27,969		
	$2,375	$2,596	$2,719	$2,604	$3,485	$3,118		
Singapore	8,761	7,637	7,401	6,399	3,933	4,772		
	$736	$1,471	$1,339	$1,300	$829	$990		
China		12				3,517		
		$58				$3,779		
Other markets *	1,617,196	1,324,960	1,088,494	731,175	572,211	167	327,531	184,746
	$126,371	$121,770	$115,953	$98,647	$71,421	$231	$ 37,424	$ 37,479
Total sheep	**4,214,989**	**3,567,609**	**2,968,571**	**2,457,948**	**2,278,616**	**1,973,418**	**2,298,455**	**1,481,993**
Total FOB value ('000	**$321,158**	**$322,961**	**$322,527**	**$328,103**	**$279,749**	**$172,115**	**$ 234,568**	**$ 190,352**

* Disaggregated data not yet available for smaller markets in 2014 and 2015. These included in "Other"

AUSTRALIAN LIVE GOAT EXPORTS

Australian live goat exports - volume and FOB ('000) value by key markets								
Country	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
Malaysia	67,705	89,138	64,075	54,332	59,107	55,398	82,725	84,830
	$7,746	$10,516	$8,441	$7,008	$7,614	$6,111	$7,514,524	$ 8,624,446
Singapore	3,389	6,894	8,833	7,996	1,896	16,778	4,229	345
	$307	$690	$642	$957	$144	$1,540	$ 360,740	$ 103,500
Brunei	5,345	1,161	1,694	610	635	1,777		
	$628	$147	$258	$115	$62	$299		
UAE		66				990		
		$38				$285		
Thailand	151		341			50		
	$164		$421			$66		
Other *	3,173	362	2,471	325	242		1,577	5,465
	$346	$101	$584	$328	$294		$ 771,101	$ 1,587,934
Total goats	**79,763**	**97,621**	**77,414**	**63,263**	**61,880**	**75,107**	**88,531**	**90,190**
FOB value	**$9,190**	**$11,491**	**$10,346**	**$8,408**	**$8,114**	**$8,373**	**$8,646,365**	**$ 10,319,880**

* Disaggregated data not yet available for 2014 and 2015. Smaller markets included in "Other"

Annexure 2: Economic analysis to inform LiveCorp submission

EY report providing economic analysis of ESCAS costs and benefits is attached.

Annexure 3: Legislative Adoption of Quality Assurance Programs

Biosecurity and Agriculture Management Act 2007 (WA) (**BAM Act**)

1. The BAM Act is designed to provide effective biosecurity and agriculture management for Western Australia by controlling the entry, establishment, spread and impact of organisms that may have an adverse effect on other organisms, humans, the environment, or agricultural activities, as well as by controlling the use of agricultural and veterinary chemicals.

2. The BAM Act expressly allows the Minister or the Director General to make arrangements with a corresponding Minister or administrator (i.e. persons responsible for the day to day administration of a corresponding law) recognising quality assurance schemes approved or established under the BAM Act.[2]

3. Quality assurance schemes are defined broadly under the BAM Act as schemes relating to animals, agricultural products, potential carriers, animal feed or fertilisers that are "designed to *assure* that" they meet certain criteria, for example that they are of a particular quality or grade, or have been treated in a particular way (our emphasis).[3]

BAM Act

Section 6. Terms used

…

quality assurance scheme means a scheme relating to animals, agricultural products, potential carriers, animal feed or fertilisers that is designed to assure that the animals, plants, agricultural products, potential carriers, animal feed or fertilisers -

(a) are of a particular quality or grade; or

(b) are in a particular condition; or

(c) were produced in a particular area or place; or

(d) were produced in a particular manner; or

(e) have been treated in a particular way; or

(f) are free from a particular organism, chemical residue, contaminant or adulterant; or

(g) comply with particular conditions or requirements;

…

Section 183. Arrangements with corresponding authorities

…

(2) The Minister or the Director General may make arrangements with a corresponding Minister or corresponding administrator respectively about any or all of the following - …

(b) recognising quality assurance schemes approved or established under this Act or a corresponding law;

…

[2] BAM Act, s 183.

[3] BAM Act, s 6.

4. The administration of, and compliance with, those QA schemes are then regulated by the *Biosecurity and Agriculture Management (Quality Assurance and Accreditation) Regulations 2013* (WA).

   (a) For example, these regulations provide when an authorised person may give an assurance certificate in relation to animals, agricultural products, potential carriers, animal feed, or fertilisers for the purpose of exporting out of Western Australia, or moving within Western Australia.[4]

   (b) It also sets out the circumstances in which accreditations can be cancelled or suspended, and the relevant offences (such as for contravening an accreditation condition).[5]

Livestock Management Act 2010 (Vic) (**LMA**)

5. Another legislative instrument which recognises quality assurance in the agricultural industry is the LMA, which regulates livestock management in Victoria.

6. This Act requires all livestock operators to comply with *prescribed livestock management standards* applicable to their particular livestock operation. Operators must also conduct a systematic risk assessment of the prescribed livestock management standards within 6 months of the prescribed livestock management standard, or when the operator commences to carry out the regulated activity.

7. However, livestock operators who are participating in a compliance arrangement (i.e. a quality assurance program or an inspection and certification arrangement) approved by the regulator (the Department of Primary Industries), are exempt from the requirement to conduct the systematic risk assessment, or to comply with offence provisions under the regulations in relation to that activity.[6] This is because the risk assessment would have been performed under the rules of their approved compliance arrangement.

8. The benefits of the co-regulatory system was identified in the Explanatory Memorandum to the Livestock Management Bill 2009, which stated that it "*…recognise[s], as part of an effective co-regulatory system, those commercial and existing industry compliance arrangements, including quality assurance programs, which successfully operate to demonstrate effective controls and ongoing compliance with relevant Standards*".[7]

9. Nonetheless, the Minister maintains ultimate control, as it has the ability to, for example:

   (a) revoke or suspend the approval of a compliance arrangement if it considers there has been a failure to comply with the approved compliance arrangement and the failure is so serious that it cannot be dealt with by increased monitoring requirements under the arrangement;

   (b) suspend an approved compliance arrangement to the extent that it applies to an accredited livestock operator, if satisfied on reasonable grounds that a specified ground for suspension exists;

---

[4] *Biosecurity and Agriculture Management (Quality Assurance and Accreditation) Regulations 2013* (WA), r 7.

[5] *Biosecurity and Agriculture Management (Quality Assurance and Accreditation) Regulations 2013* (WA), rr 12, 17.

[6] LMA, ss 10 - 21.

[7] Explanatory Memorandum, Livestock Management Bill 2009 (Vic) 2.

(c) impose further conditions on an approved compliance arrangement; and

(d) requiring audits of the approved compliance arrangement.[8]

Transport Operations (Road Use Management) Act 1995 (Qld) (**TORUM Act**)

10. The TORUM Act aims to provide for the effective and efficient management of road use in Queensland. This invariably includes breath and saliva tests for road users.

11. In this capacity, it provides for a reliance on expertise in testing specimen of blood or saliva to ascertain the concentration of alcohol, or the presence of drugs or metabolite. It relies on a certificate from an analyst as evidence of these matters "until the contrary is proved", and confirmation that all quality assurance procedures for the receipt, storage and testing of the delivered specimen were complied with.

12. In this regard, it recognises that the police officers, as the usual officers who retrieve the samples, do not have the requisite expertise to test for these matters.

13. An analyst is a person appointed as a State analyst under the *Health Act 1937* (Qld).[9]

14. Importantly, the TORUM Act also expressly recognises that reliance on the certificate by the analyst is sufficient evidence of the concentration of alcohol in the person's blood or the indication of a stated drug or metabolite, until the contrary is proved.

15. We have included excerpts from the TORUM Act below to illustrate how it successfully adopts QA.

TORUM Act

Section 80. Breath and saliva tests, and analysis and laboratory tests

…

(16B) **Certificate by analyst is <u>evidence of stated matters</u>** A certificate purporting to be signed by an analyst and stating -

(a) that there was received at the laboratory of the analyst from the police officer named in the certificate a specimen of the blood, or a specimen of the saliva, as stated in the certificate (the **delivered specimen**) of the person named in the certificate provided by that person on the date and at the place and time stated in the certificate; and

(b) that the analyst or another analyst made a laboratory test of the delivered specimen on the date and at the place stated in the certificate; and

(ba) if a laboratory test of the delivered specimen was done by another analyst - the analyst who signed the certificate -

(i) examined the laboratory's records about the receipt, storage and testing of the delivered specimen; and

(ii) confirms the records show that **<u>all quality assurance procedures</u>** for the receipt, storage and testing of the delivered specimen that were in place in the laboratory at the time of the laboratory test **<u>were complied with</u>**; and

[8] LMA, ss 18 - 20.

[9] TORUM Act, schedule 4.

> (c) that -
>
> (i) if the delivered specimen was a specimen of blood -
>
> (A) the concentration of alcohol in the person's blood indicated by the laboratory test was a stated number of milligrams of alcohol in the blood per 100mL of blood; or
>
> (B) a stated drug or metabolite of a stated drug was indicated by the laboratory test to be present in the person's blood; or
>
> (ii) if the delivered specimen was a specimen of saliva - a stated relevant drug or metabolite of a stated relevant drug was indicated by the laboratory test to be present in the person's saliva;
>
> **is evidence of those matters and until the contrary is proved is conclusive such evidence**.
>
> (our emphasis)

Motor Vehicle Standards Act 1989 (Cth) (**MVS Act**)

16. The MVS Act is another example of a situation where regulators rely on the expertise of third parties in regulating aspects of an industry.

17. The MVS Act applies uniform vehicle standards to new vehicles when they are introduced into Australia, and regulates the first supply to the market of used imported vehicles.

18. In particular, the Minister may approve a corporation as a registered automotive workshop to undertake tasks such as placing a plate on a used imported vehicle once a report is provided to the Minister, and the Minister is satisfied that it is appropriate to grant the approval.[10]

19. In this regard, the regulator is relying on the expertise of the automotive workshops to undertake this task, as opposed to taking on the whole obligation themselves. However, they retain overall control by reviewing the reports issued by the workshops prior to granting approval.

20. A registered automotive workshop is approved if the Minister is satisfied that the applicant meets a number of criteria, including that the corporation and its directors or those in a position to influence the management of the applicant, is a fit and proper person.[11] Additional criteria is also set out in the *Motor Vehicle Standards Regulations 1989* (Cth) (**MVS Regulations**), and includes (amongst other things) that the applicant has a quality management system in place.[12]

21. For this quality management system, the MVS Regulations requires that it:

    (a) meets standard ISO 9001:2000; and

[10] MVS Act, ss 13C - 13D.

[11] MVS Act, s 21B.

[12] MVS Regulations, r 42.

(b) is certified by a certification body accredited for the purpose by JAS-ANZ (the Joint Accreditation System of Australia and New Zealand, which provides internationally recognised accreditation services).[13]

22. ISO 9001:2000 specifies:

(a) requirements for a quality management system where an organisation needs to demonstrate its ability to consistently provide product that meets customer and applicable regulatory requirements; and

(b) aims to enhance customer satisfaction through the effective application of the system.

MVS Regulations

48. Quality management system

(1) For paragraph 42(h), a RAW applicant must have a quality management system that meets standard ISO 9001:2000 (taking into account any transitional arrangements mentioned in that standard).

(2) The quality management system must have a certification issued by a certification body accredited for the purpose by JAS-ANZ.

(3) The scope of the certification must be in accordance with the requirements set out in Procedure Number 24.

(4) In this regulation:

ISO 9001:2000 means the international standard known as *ISO 9001:2000 Quality Management Systems-Requirements* published by the International Organisation for Standardisation, as in force at the commencement of this regulation.

23. Further, the Minister may vary, cancel or suspend an approval held by a registered automotive workshop if, for example, the workshop has failed to observe determined procedures and arrangements, or the workshop has contravened a condition of the approval.[14]

[13] MVS Regulations, r 48.

[14] MVS Act, s 13F.

Annexure 4: Legislative Adoption of Standards / Codes of Practice

The BAM Act

1. This submission earlier discussed the recognition of quality assurance schemes approved or established under the BAM Act.

2. The BAM Act is also a useful example of how legislation (particularly legislation governing important issues such as biosecurity) incorporates and / or adopts standards to effectively and efficiently regulate the industry. There are many examples of this across diverse industries. However, it is difficult to think of a more pertinent example, than one involving agribusiness and balancing various competing considerations while managing risks of such magnitude to public and commercial interests.

3. The BAM Act expressly allows regulations and management plans to adopt (either wholly or in part) codes, including codes of practices, standards, rules, quality assurance schemes or other documents, that do not by themselves have legislative effect in Western Australia.[15]

4. The Minister may also:

   (a) issue a code of practice for a number of purposes, including for controlling or keeping declared pests, using and managing chemical products, and carrying out agricultural (or related) activities so as to minimise the risk of an occurrence or the spread of a declared pest;[16] and

   (b) approve a code of practice issued under another written law, or issued by an industry body, if its purpose accords with those mentioned above.[17]

5. The is Minister required to undertake consultation with public authorities, community and producer organisations and other persons which are likely to be affected by or interested in the regulations or code of practice, prior to making regulations or issuing or approving a code or practice.[18]

6. Regulations made under the BAM Act may also require compliance with a code or a standard prescribed or adopted under the regulations.[19] Currently, there are agricultural standards which are set out this way, and are found in the *Biosecurity and Agriculture Management (Agriculture Standards) Regulations 2013* (WA). These regulations address matters concerning chemical residues, animal feed, and fertilisers.

7. Extracted below are key provisions for circumstances in which standards or codes may be adopted.

[15] BAM Act, s 190.

[16] BAM Act, s 191(1).

[17] BAM Act, s 191.

[18] BAM Act, s 192.

BAM Act

Section 190. Regulations and management plans may adopt codes or legislation and other references

(1) In this section -

code means a code, code of practice, standard, rule, specification, administrative procedure, quality assurance scheme or other document, published in or outside Australia by an public authority or other person, including the Minister or the Director General, that does not by itself have legislative effect in this State;

…

(2) Regulations and management plans **may adopt, either wholly or in part** or with modifications and either specifically or by reference -

(a) **any code**; or

(b) **any subsidiary legislation** made, determined or issued under any other Act or under any Act of the Commonwealth, another State or a Territory.

(3) If the regulations or management plans adopt a code or subsidiary legislation, it is adopted as existing or in force from time to time unless the regulations prescribe that a particular text is adopted.

Section 191. Codes of practice

(1) The Minister may **issue a code of practice** for any or all of the following purposes -

(a) controlling declared pests;

(b) keeping declared pests;

(c) carrying out agricultural activities or other related activities so as to minimise the risk of an occurrence or the spread of a declared pest;

(d) the use and management of chemical products;

(e) the import of permitted organisms and prescribed potential carriers;

(f) the supply and use of animal feed and fertilisers.

(2) The Minister **may approve a code of practice issued under another written law, or issued by an industry body or other person**, if the code is appropriate for a purpose mentioned in subsection (1).

(3) A code of practice may be approved as existing or in force from time to time or as existing or in force at a particular time.

(4) A code of practice approved under this section may consist of any code, standard, rule, specification or provision relating to a purpose mentioned in subsection (1).

(5) A **code of practice issued under this section may incorporate by reference any other code or subsidiary legislation**, as those terms are defined in section 190, as existing or in force from time to time or as existing or in force at a particular time.

(6) The Minister may -

(a) amend a code of practice issued under this section; and

(b) approve a revision of the whole or any part of a code of practice approved under this section.

(7) The Minister may cancel a code of practice issued under this section or cancel the approval of a code of practice.

…

192. Regulations and codes of practice: consultation

(1) Before regulations are made under this Act, or a code of practice is issued or approved, the Minister must, as far as is appropriate and reasonably practicable to undertake, consult with public authorities, community and producer organisations and other bodies and persons which or who appear to the Minister to be likely to be affected by, or interested in, in a significant way, the regulations or code of practice, as the case requires.

(2) Consultation may be undertaken in any way that the Minister thinks appropriate in the circumstances, having regard to the number of persons who will be likely to be so affected or interested.

(our emphasis)

WA OHS Laws

8. The occupational safety regulatory regime in Western Australia currently consists of two separate, but similar, regimes directed at mining activities and other employment situations (not including some additional specialty situations).

9. The Acts set out general 'duty of care' obligations to ensure, as far as practicable, workers are not exposed to hazards or risks. The Regulations define various minimum standards and prescribe more specific requirements of the legislation for a range of activities.

10. The occupational safety regimes provide detailed regulations on operational matters to guide regulators and employers and also formally adopt codes of practice, such as the "Code of Practice: Safeguarding of Machinery and Plant (2009)", to provide:

(a) further practical guidance on how to comply with either general duties under the Acts or specific duties under relevant Regulations;

(b) without being prescriptive, practical guidance on practices that can be used to mitigate relevant risks or meet broad duties; and

(c) a practical means of achieving any code, standard, rule, provision or specification relating to relevant regulatory obligations.

MSI Act

93. Codes of practice

(1) The Minister may approve a code of practice which has been considered by the Mining Industry Advisory Committee, for the purpose of providing practical guidance to employers, self-employed persons and employees and other persons on whom a duty of care is imposed under this Act.

(2) A code of practice may consist of any code, standard, rule, specification or provision relating to occupational safety or health that is prepared by any appropriate body and may incorporate by reference any other such document either as it is in force at the time the code of practice is approved or as it may from time to time subsequently be amended.

(3) The Minister may approve any revision of the whole or any part of a code of practice or revoke the approval of a code of practice.

…

(7) Where it is alleged in a proceeding under this Act that a person has contravened a provision of this Act or the regulations in relation to which a code of practice was in effect at the time of the alleged contravention -

(a) the code of practice is admissible in evidence in that proceeding; and

(b) demonstration that the person complied with the provision of the Act or regulations otherwise than observing that provision of the code of practice is a satisfactory defence.

(8) A person is not liable to any civil or criminal proceeding only because the person has not complied with a provision of a code of practice.

11. Codes of practice are not limited to technical or practical guidance, but also often set out recommended or widely accepted means to assess and address risks.

12. This is particularly significant in a regulatory environment, such as OHS, where regulators will have regard to how conduct compares with the code of practice guidance in assessing or characterising alleged non-compliance and deciding on any regulatory action.

13. Codes of practice do not represent the only acceptable means of achieving a regulatory obligation or standard of conduct, and compliance is not mandatory. In most cases, following an approved code of practice would be expected to achieve compliance with regulatory duties, particularly for largely operational matters where there is often little scope for the particular circumstances to influence what is appropriate.

14. Codes of practice are admissible in court and are often regarded as persuasive evidence of what is known about a risk or what is reasonably practicable in the circumstances to mitigate risk. OHS inspectors frequently refer to approved codes of practice when issuing improvement or prohibition notices.

DGS Act

15. The regulation of dangerous goods in Western Australia is another example of a very high risk industry being effectively regulated through the use of codes of practices and standards.

16. In this situation, codes of practices and standards are approved and gazetted by the Minister for Mines and Petroleum under the DGS Act and its associated regulations, for the purpose of providing practical guidance to persons engaged, directly or indirectly, in storing, handling or transporting dangerous goods.[20]

17. Currently, there are a number of codes of practices and standards which have been approved by the Minister, and available free of charge online from the applicable publisher (e.g. the Department of Mines and Petroleum, or Safe Work Australia). This includes codes of practices for:

(a) blast guarding in an open cut mining environment;

(b) elevated temperature and reactive grounds; and

(c) control of major hazard facilities.

18. Alternatively, some codes of practice or standards are prescriptive, in that they are adopted in their entirety by the associated regulations. The ability for regulations to adopt codes is enabled under section 19 of the DGS Act, with "codes" defined to include a code, standard, rule, specification or other document, *made in or outside Australia*, that does not by itself have legislative effect in Australia.

DGS Act

[20] DGS Act, s 20.

19. Regulations may adopt codes or legislation

(1) In this section -

code means a code, standard, rule, specification or other document, made in or outside Australia, that does not by itself have legislative effect in this State;

…

(2) Regulations may adopt, either wholly or in part or with modifications -

(a) any code; or

(b) any subsidiary legislation made, determined or issued under any other Act or under any Act of the Commonwealth, another State or a Territory.

…

19. An example of the regulations adopting standards (one of many) is the adoption of the Australian Standards AS 2187.0 - 1998, AS 2187.1 - 1998, and AS 2187.2 - 2006 concerning the storage, transport and use of explosives in the *Dangerous Goods Safety (Explosives) Regulations 2007* (WA) (**DGSE Regulations**) as standards which must be met by licence holders. These standards are expressly referred to throughout the DGSE Regulations. For instance, a holder of an explosives storage licence must store any explosive in a magazine that complies with the requirements of AS 2187.1 section 2, or alternative safety measures.[21]

MVS Act

20. We discussed the MVS Act above in regards to QA models and formal recognition of equivalence. In addition, this Act allows the Minister to determine vehicle standards for road vehicles or vehicle components by legislative instrument.[22]

21. The Minister may (by legislative instrument) determine procedures and arrangements for determining whether road vehicles or vehicle components comply with the MVS Act, such as:

(a) procedures relating to the testing and inspection of road vehicles or vehicle components; and

(b) inspection of steps in the manufacture of road vehicles or vehicle components.[23]

MVS Act

7. Minister may determine vehicle standards

The Minister may, by legislative instrument, determine vehicle standards for road vehicles or vehicle components.

…

9. Procedures for testing vehicles

The Minister may, by legislative instrument, determine procedures and arrangements for determining whether road vehicles or vehicle components comply with this Act, being procedures relating to:

[21] DGSE Regulations, r 90(1).

[22] MVS Act, s 7.

[23] MVS Act, s 9.

(a)	the testing and inspection of road vehicles or vehicle components; or
(b)	the inspection of steps in the manufacture of road vehicles or vehicle components; or
(ba)	the testing and inspection of materials, machinery, appliances, articles or facilities used in the manufacture of road vehicles or vehicle components; or
(c)	the operation of facilities used in the carrying out of any testing and inspection referred to in paragraph (a), (b) or (ba) and the assessment of those facilities by inspectors appointed under section 25; or
(d)	the keeping of records relating to the manufacture, testing or inspection of road vehicles or vehicle components and the examination of those records by inspectors appointed under section 25.
…	

22. Various standards have been determined under the Act in subsidiary legislation, such as the *Vehicle Standard (Australian Design Rule 38/04 - Trailer Brake Systems) 2013* (Cth) and the *Vehicle Standard (Australian Design Rule 31/03 - Brake Systems for Passenger Cars) 2013* (Cth). Collectively, these standards are referred to as the Australian Design Rules, and are the current national standards for vehicle safety, anti-theft and emissions.

23. The MVS Regulations then allow the Minister to approve a vehicle component, road vehicle, or partly assembled road vehicle as complying with particular national standards or relevant parts of particular national standards.[24]

[24] MVS Regulations, r 4.

Annexure 5: Enforcement of "Secondary Liability"

Civil Law Perspective: Problems with the current approach

The requirement for a special relationship

1. Secondary liability (or vicarious liability in certain contexts) is implied only in limited special relationships, such as employer-employee and principal-agent, as well as in some legislation, such as the duty provisions in the *Criminal Code Act Compilation Act 1913* (WA) and the *Competition and Consumer Act 2010* (Cth).

2. In the employment context, vicarious liability allows an employer to be held liable for wrongdoings of employees. Even in that context, vicarious liability is not absolute: it must be shown that the party who committed the wrongdoing was an employee, and that the wrongdoing was *committed in the course of employment*.[xx]

3. The need for these boundaries are particularly important in the context of intentional wrongs. The High Court has recognised the difficulty in holding a party accountable for the deliberate and independent acts of another party, because it is difficult to argue that intentional wrongful actions are ever '*in the course of employment*'.[xxi] Principles of vicarious liability require it to be limited to events that an employer could reasonably control or should reasonably be responsible for.

4. Similarly, in principal / agent relationships a principal will only be held liable for the wrongdoings of the agent when the agent is acting *within the boundaries of the agency relationship*, that is, with the principal's actual or apparent authority. Again, this limitation in the scope of liability reduces the principal's liability to acts which (s)he has authorised (expressly or impliedly) and therefore acts for which one can reasonably attribute blame.[xxii]

The requirement for control

5. Central to the need for a special relationship and recognition of clear boundaries on secondary liability is the presence of control over the third party's actions.

6. There is sense in requiring control, because it is unfair policy-wise to make a party liable for the actions of others over which he or she is unable to exercise some significant degree of control.[xxiii]

7. The heart of an employee/employer contract is the right of the employer to control the manner in which the work is carried out.[xxiv] It is this control that justifies the imposition of vicarious liability in the workplace.[xxv] The employee has a duty to obey the employer.

8. A similar justification underpins secondary liability of principals in an agency relationship. An agency relationship is characterised by delegation by the principal, control of the principal over the agent and representation by the agent as acting for the principal.[xxvi] Control is inherent in the authority conferred by the principal on the agent, which is what attracts the liability.

Lack of a 'Special' Relationship

9. ESCAS ignores the general need for a special relationship before importing secondary liability. The relationship with supply chain participants lacks the fidelity or loyalty to justify imposition of secondary liability.

10. The employment contract, and the relationship of confidence and trust that ought to exist between an employer and an employee, imports special duties on both sides which do not automatically arise in contracts. Employees have duties of obedience, good faith and fidelity to their employer, while employers have a reciprocal duty to act reasonably.[xxvii]

11. In a similar vein, the agency relationship is characterised by fiduciary duties: agents have a strict and unbending obligation of loyalty to the principal and accordingly, an agent is not permitted to act contrary to the interests of the principal.

12. At law, these special duties of employees and agents are recognised as creating a relationship of trust and confidence distinct from a normal contracting relationship. The duties require that agents and employees act in their interests of their counterparts, and consequently have the effect of placing the parties 'on the same side'. This, in conjunction with the control that their counterpart is presumed to have over their actions, validates tying the parties together when it comes to liability.

13. Similarly, it is argued that because agents and employees are bound by their respective duties to act in furtherance of their counterpart's goals, it is justifiable that the party who stands to benefit from the relationship (i.e. the employer or the principal) is also the party who carries the burdens and liabilities. This is known as 'enterprise risk' reasoning.

14. The relationship between independent contracting parties is fundamentally different. Beyond express contractual obligations, the parties have no implied duties of fidelity or loyalty to each other. Contracting parties do not occupy fiduciary positions, nor assume fiduciary duties.[xxviii]

15. In fact, the nature of a commercial contract is in many respects *contrary* to both the fidelity obligations in employment relationships and the fiduciary duties found in agency relationships, because contracting parties tend to operate at arm's length, in their own interests.

16. As the High Court noted in *Northern Sandblasting v Harris*[xxix], the reason vicarious liability is not extended to independent contractors is because the contractor's act is, by definition, '*the independent function of the person who undertakes the work*'.

Criminal Perspective

17. The involvement of potential criminal sanctions for the actions of third parties significantly raises the threshold before the law will impose secondary liability.

18. The common thread in statutes that seek to create strict or absolute criminal liability is the *ability or responsibility* of the accused to adjust his/her behaviour in compliance. Crucially, Australian law recognises that where the criminal act or consequence was the result of a third party over whom the accused had no control and against which the accused could not reasonably have been expected to guard, this will afford a defence to the accused.[xxx]

> *Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could, in no way affect the observance of the law, their lordships consider that, even where the statute is dealing with grave social evil, strict liability is not likely to be intended.*
>
> The Privy Council in *Lim Chin Aik v R* [1963] AC 160 at 175 (affirmed by The High Court in *Cameron v Holt* (1980) 142 CLR 342).

19. The law recognises limited circumstances in which a person can be criminally liable for the actions of others, which requires that there is at least:

    (a) an element of control (direct or indirect) over the physical criminal act (physical element); and

    (b) knowledge of, or intention to, commit the crime (mental element).

20. Seeking to hold an Australian company criminally liable for the conduct a third party in a foreign country, whether or not the act is an offence under the foreign country's laws or whether the third party is subject to Australia's criminal law, is complex. However, for simplicity, it can also broadly be viewed, in effect, as seeking to attribute liability as an accessory to an offence.

21. Accessorial, or accomplice, liability is the reverse of strict / absolute liability. It arises where the person who does not physically perform the offence is nonetheless held criminally responsible because they knew of, encouraged, aided or received a benefit from the commission of the offence.[xxxi]

22. In essence, in order for a company to be held liable as an accessory it must be proved beyond a reasonable doubt that the company aided, abetted, counselled or procured the commission of an offence by another person, and that they had the intention to do so. In short the alleged accessory must:

    (a) have been linked in purpose with the principal offender and by words or conduct did something to bring about, or render more likely, the commission of the principal offence;[xxxii] and

    (b) be an intentional participant in the conduct.[xxxiii]

[i] Mick Keogh and Adam Tomlinson, Australian Farm Institute. *Australia risks missing a big livestock export and animal welfare opportunity*. Farm Institute Insights, Volume 10, No.3, August 2013.

ii Commonwealth of Australia 2015, *Exporter Supply Chain Assurance System Report*. CC BY 3.0.

[iii] Australian Government Department of Agriculture and Water Resources, *Regulation Impact Statement – Approved Arrangements for Livestock Export*, RIS ID: 18445, October 2015.

[iv] Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2014, *The Australian Government Guide to Regulation*.

[v] Council o Australian Governments. *Best Practice Regulation – A guide for ministerial councils and national standard setting bodies.* October 2007.

vi Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January.

[vii] Commonwealth of Australia, Australian National Audit Officer, *Administering Regulation: Achieving the Right Balance, Better Practice Guide*, June 2014.

[viii] K Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969), v.

[ix] *FAI Insurance Ltd v Winneke* (1982) 151 CLR 342 per Mason J at 368.

[x] K C Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969), referred to in R Creyke, J McMillan and M Smyth, *Control of Government Action: Text, Cases & Commentary* (4th ed, LexisNexis Butterworths, 2015).

[xi] World Organisation for Animal Health – OIE, *Terrestrial Animal Health Code*, 2015.

[xii] MSI Regulations, rr 1.4 - 1.5.

[xiii] David Walkers, 'Workplace Arrangements for OHS in the 21st Century' (Working Paper presented at the *Australian OHS Regulation for the 21st Century'* conference, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20-22, 2003), page 3

[xiv] David Walkers, 'Workplace Arrangements for OHS in the 21st Century' (Working Paper presented at the *Australian OHS Regulation for the 21st Century'* conference, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20-22, 2003), page 4

[xv] David Walkers, 'Workplace Arrangements for OHS in the 21st Century' (Working Paper presented at the *Australian OHS Regulation for the 21st Century'* conference, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20-22, 2003), page 3

[xvi] L Kaplow and S Shavell (1994), 'Optimal Law Enforcement with Self-Reporting of Behavior', *Journal of Political Economy*, 102, 583.

[xvii] CASR, r 13.335.

[xviii] Organisation for Economic Co-operation and Development, *Reducing the risk of policy failure: challenges for regulatory compliance*, 2000.

[xix] Vines, Prue, 'New South Wales v Lepore; Samin v Queensland; Rich v Queensland: Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability' (2003) 27 *Melbourne University Law Review* 612, 626.

[xx] Elizabeth Grace and Anna Matas, 'School's Still Out on Vicarious Liability' (Corporate Publication, 21 June 2013), 1.

[xxi] See the High Court in *Lepore v NSW*

[xxii] G E Dal Pont, 'Agency: Definitional challenges through the law of tort' (2003) *Torts Law Journal* 1, 2.

[xxiii] G E Dal Pont, 'Agency: Definitional challenges through the law of tort' (2003) *Torts Law Journal* 1, 13.

[xxiv] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16

[xxv] G E Dal Pont, 'Agency: Definitional challenges through the law of tort' (2003) *Torts Law Journal* 1, 6.

[xxvi] G E Dal Pont, 'Agency: Definitional challenges through the law of tort' (2003) *Torts Law Journal* 1, 12.

[xxvii] Joellen Riley, 'Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?' (2003) 16 *Australian Journal of Labour Law* 1, 6.

[xxviii] See *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414

[xxix] (1997) 188 CLR 313 at 330 (Brennan CJ).

[xxx] See *Mayer v Marchant* (1973) SA Full SC

[xxxi] Halsbury's Laws of Australia [130-7220].

[xxxii] *R v Russell* [1933] VLR 59 at 66-7; approved in *Giorgianni v R* (1985) 156 CLR 473 at 480, 493-4 per Mason J.

[xxxiii] *R v Coney* (1882) 8 QBD 539; *Mills* (1985) 17 A Crim R 411.