

NO WINNERS IN THE SUSPENSION OF THE LIVESTOCK TRADE WITH INDONESIA

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Abstract

In June 2011, the Australian Government temporarily banned all live export to Indonesia in response to footage released of the inhumane slaughter of cattle. The ban, although apparently legally justified, was a commercially unwise decision causing immediate hardship to cattle farmers, exporters, and arguably Indonesian consumers. The complex legislative framework for the live export trade failed to clearly define roles and responsibilities of the relevant parties in the export trade, and contributed to the lack of compliance and the resulting ban. Though an interim framework for export control has since been implemented, this is but a temporary fix. It is not sustainable as it does not adjust to a dynamic situation. It is not surprising that Indonesia is looking to become self-reliant in beef supply in the next few years. It should, however, be noted that the Australian government has never intended to prevent Indonesia from becoming self-sufficient and has actively supported the move. The issue at hand is the clear failure of Australian public policy decision-making. Whether legislative reform in Australia will make any difference and save the northern Australian cattle industry depends on the Government's ability to convince that a new legal framework, such as a ban of bans, can prevent such an occurrence in the future.

I INTRODUCTION

The Australian Government's controversial move to indefinitely ban live cattle export to Indonesia in June 2011 evidently failed to serve any real purpose. It also showed the government's lack of a defensible and evidence based public policy capability when confronted by

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the demands of divergent interest groups. Animal rights activists complained that this should have happened sooner, whilst farmers and exporters were faced with a sudden loss of income. Furthermore, it can be argued that Indonesia should have been warned of the unilateral decision to halt a food supply, to enable plans to be put into place to gain self-sufficiency sooner or look for alternate sources.

In Australia the industry was concerned about the evident lack of consultation prior to the ban. This article, while acknowledging the existence of animal rights issues, focuses on the commercial and legal aspects of the ban. It is argued that despite domestic legislation and trade agreements in place, the government did not follow a set protocol, which is customary when bilateral trade issues require attention. While the government acted prematurely, the inevitable message from Indonesia is not surprising that it is looking to accelerate future self-reliance or a more reliable trading partner, as evidenced by its response in December 2011.¹

It is argued that the Australian government's reaction to the demands of one interest group has now been exposed as 'policy on the run'. Rational behaviour would and should have dictated that despite the fact that Australia has some market power in live export Indonesia has the ability to move to a beef supply where Australia is neither the only, nor the cheapest global beef producer. Furthermore, the decision to suspend trade was made while Foreign Minister Kevin Rudd was overseas.² In addition, there was a notable failure to consult state governments and industry about the potential impact of the ban, for which Agriculture Minister Ludwig was criticized.³ A meeting of the nation's agricultural ministers in Perth agreed that 'any future major changes to the regulation of live animal exports on animal welfare grounds would be made after council and industry consultation'.⁴ The Indonesian response to cut almost half the beef imports from Australia in 2012, although too ambitious, certainly sent a strong message to the federal government and 'will reopen the bitter dispute between the federal government and beef producers over the way the ban was handled'.⁵

1 See Greg Earl, 'Jakarta to Cut Cattle Imports', *The Australian Financial Review* (Australia), 16 December 2011, 7.

2 Milanda Rout, 'Agricultural Minister Promises to Consult Industry in the Future', *The Australian* (online), 15 July 2011 <<http://www.theaustralian.com.au/news/nation/agriculture-minister-promises-to-consult-industry-in-the-future/story-e6frg6nf-1226094902698>>.

3 Ibid.

4 Primary Industries Ministerial Council, Communique 20, 14 July 2011, 1 <http://www.mincos.gov.au/__data/assets/pdf_file/0010/1942525/pimc-20-communique-14072011.pdf>.

5 Earl, above n 1.

This article will in particular examine the legal framework which governs live cattle exports specifically to Indonesia. Part II explores the economic effects on the live cattle export industry, including the financial impact of the ban. Part III details the circumstances surrounding the ban and its responses. Part IV addresses the inability of the industry bodies to cope with monitoring requirements. Part V outlines the legislative framework for the trade. In Part VI the underlying policies involved in the live cattle trade are explored. Part VII details the framework modification, which allowed the trade to resume. Part VIII addresses the various reviews of the trade and the resulting reform recommendations, to prevent future occurrences of such a situation. Part IX concludes that the government's 'knee-jerk' reaction showed a flagrant disregard for proper procedure and commerciality. Clearly, the government did not follow a process which was systemic and inclusive, especially considering the fact that two of the 12 abattoirs listed in the ABC program 'are in Nusa Tenggara which did not process cattle from Australia, and another one in Lampung, that has been closed for a while'.⁶

II THE EFFECT OF THE BAN

A *In Australia*

The cattle export industry supports around 11,000 jobs across related areas including transport, stevedoring, quarantine services and feed lot management.⁷ The ban came at an inopportune time, as the cattle season reached its peak. There were an estimated 40,000 head of cattle on the road, in holding depots or on their way to Indonesia.⁸ With no abattoirs in northern Australia, and no alternative markets, cattle producers were left in a vulnerable position.⁹

Indonesia is Australia's largest export market for live cattle, accounting for 60 per cent of all Australian cattle exports in 2010.¹⁰ This equates to around 520,000 head of cattle in a trade worth around

6 The University of Adelaide, Indo-Pacific Governance Research Centre: Policy Brief Issue No 5, June 2011, 4.

7 Peter Alford and Matthew Franklin, 'Jakarta Fights Live Cattle Export Ban', *The Australian* (online), 9 June 2011 <<http://www.theaustralian.com.au/national-affairs/jakarta-fights-live-cattle-export-ban/story-fn59niix-1226072019409>>.

8 Ibid.

9 Ibid.

10 Australia Indonesia Business Council, 'AIBC Position on Live Cattle Exports to Indonesia', *Independent Review Into Livestock Export Trade Submissions* (19 July 2011) 1. <http://www.livestockexportreview.gov.au/submission_received/australia_indonesia_business_council>.

\$330 million annually.¹¹ Most of the cattle are reared on stations in northern Australia, with live export the lifeblood of the cattle industry, especially considering that over 50 per cent of Northern cattle farms rely on exports to Indonesia.¹² The financial implications of the ban were accordingly substantial. The Australian Bureau of Agricultural and Resource Economics and Science ('ABARES') estimated that in the short term more than 300 people lost their jobs and 375,000 head of cattle were stranded in Australia between June 24 and July 1, 2011.¹³ This figure would have inevitably increased as the trade ban continued. The problem was compounded by the fact that many top end cattle farms can only operate in the dry season, meaning that 12 months of trade was potentially lost.¹⁴

The Government felt obligated to provide compensation for those affected, promising to provide farmers with \$3 million in government assistance for up to 13 weeks.¹⁵ Additionally it was later agreed that in partnership with the state and territory governments, a subsidised interest rate on new loans of up to \$300,000 for two years to farm and service industry businesses like transporters, heli-musterers and agents involved in the live export trade, would be offered. Furthermore, grants of up to \$5,500 would be made available to pastoralists for financial advice and training.¹⁶ These compensation measures were merely a 'drop in the ocean' and will not cover the years of financial hardship likely to follow from the ban and its associated staggered resumption of trade at an unsurprisingly lower volume.

The Department of Foreign Affairs and Trade acknowledged the significant impact which would be felt by northern businesses and individuals and appeared to be countering this by 'collecting information on this impact, in consultation with state and territory governments, industry groups, and with those affected'.¹⁷ However the suspension had a broader

11 Lanai Vasek, 'Indonesia Says Ban on Live Cattle Exports may be Discriminatory' *The Australian* (online) 8 June 2011 <<http://www.theaustralian.com.au/national-affairs/cattle-industry-and-coalition-condemn-ban-on-live-exports-to-indonesia/story-fn59niix-1226071750628>>.

12 The University of Adelaide, Indo-Pacific Governance Research Centre, above n 6, 3.

13 Larnie Statham, 'Elders to Resume Cattle Exports' *Herald Sun* (online), 29 July 2011 <<http://www.heraldsun.com.au/business/elders-to-resume-cattle-exports/story-fn7j19iv-1226104462769>>

14 Jock Laurie, National Farmers Federation President, quoted in Vasek, above n 11.

15 Milanda Rout, 'Live Cattle Trade Ban Could Cost 1000 Jobs', *The Australian* (online), 28 June 2011 <<http://www.theaustralian.com.au/national-affairs/live-cattle-trade-ban-could-cost-1000-jobs/story-fn59niix-1226083056030>>.

16 Hon Joe Ludwig, Minister for Agricultural, Fisheries and Forestry, 'Additional Support for Cattle Industry as Live Trade Resumes' (Media Release DAFF11/205L, 10 August 2011) <http://www.maff.gov.au/media_office/media_releases/media_releases/2011/august/additional_support_for_cattle_industry_as_live_trade_resumes>.

17 Department of Agriculture, Fisheries and Forestry, Australian Government, Statement to the Senate Committee, *Inquiry into Animal Welfare Standards in Australia's Live*

impact as it immediately affected Australia's reputation as a reliable supplier of livestock.¹⁸ It appears obvious that 'collecting information' after the ban was implemented is of no use in alleviating the problem of stranded cattle, nor repairing the damage to the reputation as a reliable supplier. Although the government appears to think that 'the measure of a bilateral relationship is not whether there are problems, but how we handle them',¹⁹ clearly the initial animal welfare issue was poorly handled, without taking the ripple effect of a trade ban properly into consideration.

B *In Indonesia*

With Australia currently being the exclusive provider of live cattle to Indonesia, and supplying 25 per cent of total beef requirements, the ban on trade unsurprisingly had a significant impact on the availability of beef to Indonesian consumers, and the viability of abattoirs. It must be noted that other countries such as Brazil and China also export live cattle and potentially can take the place of Australia as a supplier of live animals. Furthermore Indonesian abattoirs were openly committed to improving animal welfare outcomes, compatible with World Organisation for Animal Health (OIE) standards, throughout the supply chain.²⁰ However the speed of improvements was very slow. It also is well known that Indonesia is aiming to be self-sufficient in beef by 2014, posing a threat to Australia's exports.²¹ The ban created a further impetus for Indonesia to reduce the 'volatility and uncertainty' of reliance on Australia.²²

Export Markets, 10 August 2011 <<http://liveexports.gov.au/news/daff-statement-to-senate-committee-100811>>.

- 18 Bill Farmer, 'Independent Review of Australia's Livestock Export Trade' (31 August 2011) xii <http://www.livestockexportreview.gov.au/_data/assets/pdf_file/0018/2030625/independent-review.pdf>.
- 19 Milanda Rout, 'Cattle Ban was Badly Handled, says DFAT' *The Australian*, October 24, 2011 <www.theaustralian.com.au/national-affairs/cattle-ban-was-badly-handled-says-dfat/story-fn59niix-1226174557920>.
- 20 Department of Agriculture, Fisheries and Forestry, above n 17; Richard Willingham and Tom Allard, Ban on Live Cattle Trade to Indonesia, *The Age* (online), 8 June 2011 <<http://www.theage.com.au/national/ban-on-live-cattle-trade-to-indonesia-20110607-1frdg.html>>.
- 21 Australia Indonesia Business Council Submission, Department of Foreign Affairs and Trade, '*Opportunities for Economic Integration under an Indonesia-Australia Comprehensive Economic Partnership Agreement*' May 2011, 20 <<http://www.dfat.gov.au/fta/iacepa/submissions/AIBC-IA-CEPA-Submission-31-May-2011.pdf>>. An Initial IA-CEPA Economic Cooperation Project (see further details below), called 'Strengthening Village- Based Brahman Cattle Production Systems In Indonesia', aims to improve Indonesia's cattle breeding performance by transferring knowledge and developing skills that will lead to long term sustainable growth in the Indonesian beef industry. Meat and Livestock Australia/Live Corp and the Australian Government will jointly fund it.
- 22 Peter Alford and Matthew Franklin, 'Jakarta Fights Live Cattle Export Ban', *The Australian* (online), 9 June 2011 <<http://www.theaustralian.com.au/national-affairs/jakarta-fights-live-cattle-export-ban/story-fn59niix-1226072019409>>.

III CIRCUMSTANCES SURROUNDING THE BAN

The issue arose sometime in May 2011 when the Australian Broadcasting Corporation's (ABC) *Four Corners* program aired footage of Australian cattle being cruelly slaughtered in Indonesian abattoirs. In addition to the cruel handling of the animals, it was made apparent that slaughter boxes, funded by the Australian industry, were contributing to the inhumane treatment.²³ A minority public group questioned the government and industry's ability to ensure the welfare of animals exported for slaughter.²⁴

Pressure was put on the Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, from fellow parliamentarians and sections of the general public alike. The initial response, which took two days to implement, was to prepare orders to enforce the suspension of live animal exports to the abattoirs identified in the *Four Corners* program.²⁵

However in a 'significant escalation' of the initial ban on 12 'known rogue abattoirs',²⁶ Senator Ludwig signed the total ban order a few days later.²⁷ The total ban expanded to include live export of cattle, calves, sheep, lambs and goats (except for breeding purposes) to all of Indonesia.²⁸ By enacting the *Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011* the export of livestock to the Republic of Indonesia was prohibited for a period of 6 months.²⁹ The order was made well within the Government's scope under the *Export Control (Orders) Regulations 1982*, which empowers the Minister to make orders with respect to any matter for or in relation to which provision may be made by the regulations.³⁰ The order was intended to 'enable the Australian

23 Willingham and Allard, above n 20.

24 Richard Willingham, 'Video Shows Cattle Cruelty' *The Age* (Melbourne), August 25 2011 <<http://www.theage.com.au/national/video-shows-cattle-cruelty-20110824-ljab6.html>>.

25 Department of Agriculture, Fisheries and Forestry (Cth) 'Live Animal Exports to Indonesia' (Media Release DAFF11/011D, 1 June 2011) <http://daff.gov.au/about/media-centre/dept-releases/2011/live_animal_exports_indonesia>.

26 Willingham and Allard, above n 20.

27 Lanai Vasek, 'Ban on Live Cattle Trade to Indonesia to Last up to Six Months, Joe Ludwig Announces', *The Australian* (online), June 8 2011 <<http://www.theaustralian.com.au/national-affairs/temporary-ban-on-exports-leaves-cattle-stranded/story-fn59niix-1226071488817>>.

28 Ruth Hatten, 'Can We Ban Live Animal Export?' *The New Lawyer*, 28 June 2011 accessed 26 July 2011 at <<http://www.thenewlawyer.com.au/article/Can-we-ban-live-animal-export/530401.aspx>>; *Export Control (Export of Livestock to the Republic of Indonesia) Order 2011* (Cth).

29 Section 4 (1) *Export Control (Export of Live-stock to the Republic of Indonesia) Order 2011*.

30 Regulation 3 *Export Control (Orders) Regulations 1982*. This regulation is itself authorized by the *Export Control Act 1982* (Cth) s 25 (1).

Government to develop a robust regulatory and compliance regime to address concerns regarding slaughter of livestock in Indonesia'.³¹ Specifically, establishing new safeguards for the trade, ensuring there is 'verifiable and transparent supply chain assurance up to and including the point of slaughter for every consignment that leaves Australia'.³² A point to be made is that the cross border aspect was totally ignored. The starting point should have been the bilateral character of the trade and not the ethnocentric view of the government driven by Australian public opinion.

It was claimed that the decision to suspend trade was made 'following serious consideration of the advice and evidence that has been presented to the Government since last Monday'.³³ However Minister Ludwig's lack of consultation with state governments, graziers and Indonesia has been criticised as discussed further below.³⁴

The response to the ban was extensive and came from several interest groups inside and outside the government. Criticism came from the 'labor left, crossbench MPs and animals' rights groups.³⁵ It was said to be 'unthinkable that the government has made its announcement today devoid of any remedies for the cattle and export sectors, especially considering the Indonesian live cattle market represents 47 per cent of our total live cattle trade'.³⁶ The ban was further described as 'an overreaction that punished exporters and slaughterhouses that did the right thing'.³⁷ 'It sends the wrong message by also penalizing facilities that have acted to deliver best practice reform'.³⁸

The Government was further accused of lacking understanding of the 'severe impact it will have on pastoralists in Western Australia'.³⁹ Although it was widely accepted that no one could tolerate the inhumane treatment

31 Explanatory Statement, Export Control (Export of Live-Stock to the Republic of Indonesia) Order 2011 (Cth).

32 Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, 'Minister Suspends Live Cattle Trade to Indonesia' (Media Release DAFF11/174L 8 June 2011) <http://www.maff.gov.au/media_office/media_releases/media_releases/2011/june/minister-suspends-live-cattle-trade-to-indonesia>.

33 Ibid.

34 Rout, above n 19.

35 Vasek, above n 11.

36 Ibid quoting Nationals Leader Warren Truss; also quoted in Alford and Franklin, above n 7.

37 Vasek, above n 11, quoting Senator Barnaby Joyce.

38 Vasek, above n 27, quoting Coalition agricultural spokesman John Cobb and Nationals Leader Warren Truss.

39 Hon Wendy Duncan, Member for the Mining and Pastoral Region quoted in Tony Crook, 'Live Cattle Ban to hit hard, Duncan' (Tony Crook MP Media Releases, June 8 2011) <<http://www.tonycrook.com.au/News/MediaReleases/tabid/73/articleType/ArticleView/articleId/80/Live-cattle-ban-to-hit-hard-Duncan.aspx>>.

of animals, which had been witnessed, it was argued that 'banning the trade outright and with no notice will have immediate and dire consequences on the incomes of many Australians who have been engaged in a legal and government supported industry'.⁴⁰ Further, whilst potentially destroying the Australian cattle industry by banning live exports from Australia, it was 'not going to miraculously stop animal cruelty in Indonesia'⁴¹ if that was the stated intent of the ban. It appears more likely to be a knee jerk response to minority interest group pressure.

It was also put forward that banning exports to all abattoirs denied exporters the opportunity to redirect stock to abattoirs that followed correct processes of slaughtering. It was suggested 'how arrogant and ethnocentric of us, now that we are an educated and affluent country, to pontificate to our near neighbors about how they run their country when their highest priority is quite rightly on the more immediate needs of the people'.⁴²

The Australian Government conceded that 'the resumption of trade with Indonesia will take a concerted effort from the Indonesian and Australian Governments, supported by the industry' arguing that they were 'taking the steps necessary to secure the long-term sustainability of our trade with Indonesia'.⁴³ It is interesting to note that the Government started from the premise, that Indonesia would not have the ability to import cattle from other sources and are dependent on the Australian Governments goodwill to allow exports to Indonesia.

A *Indonesian Response*

Indonesia initially voiced concerns that the ban breached World Trade Organisation ('WTO') rules on discriminatory grounds as the ban applied only to Indonesia, and it was argued that there were several other countries importing from Australia with the same animal welfare issues.⁴⁴ It was threatened that a complaint would be submitted to the WTO presumably arguing that the ban was invalid.⁴⁵

40 Crook, above n 39.

41 Northern Territory Cattleman's Association, quoted in Vasek, above n 27.

42 Crook, above n 39.

43 The Hon. Joe Ludwig, Minister for Agricultural, Fisheries and Forestry, 'International Standard for Live Export Trade to Indonesia' (Media Release DAFF11/181L, 21 June 2011) <http://maff.gov.au/media_office/media_releases/2011/june/intl-standard-live-export-indonesia>

44 Concerns were raised by Mr. Krisnamurthi Bayu, Indonesian Agricultural Vice-Minister and cited by many commentators' including Hatten, above n 28 and in Vasek, above n 11.

45 Noam Shifrin, 'No Legal Solution for Indonesia in Battle at the Live Cattle Corral' *Online Opinion* (online), 22 June 2011 <<http://www.onlineopinion.com.au/view.asp?article=12218>>.

The Indonesian government would likely have had the opportunity to allege that Australia has violated Article 2.3 of the Agreement of Sanitary and Phytosanitary Measures, one of a number of agreements, which bind members of the WTO pursuant to Article XVI.4 of the WTO agreement. Article 2.3 provides that 'Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail'. Therefore, all Australia would need do was to distinguish the conditions in Indonesia from those prevailing in other nations.⁴⁶ Whether that would be possible or convincing is beyond the scope of this article and will thus not be discussed.

Victorian Barrister Noam Shifrin argued that 'Indonesia may also run into trouble in proving that the ban was arbitrary or unjustifiable', as footage would likely demonstrate otherwise.⁴⁷ However, there may still be an argument for the Indonesians in the notion that the ban was arbitrary, as it seemed to have been put in place hastily and in response to pressure being brought to bear on the relevant Minister. However, the Government will no doubt point to the years of correspondence flowing from the Minister's office to relevant industry bodies, urging them to put in place appropriate measures to prevent unnecessary cruelty, additionally pointing to the initial ban only to select abattoirs known to be contributing to the animal cruelty.⁴⁸ The multiple attempts by Australia to change the poor handling of animals, prior to resorting to a blanket ban, would significantly contribute to the argument that the ban was justified.

Even if a claim to the WTO was made, it would hardly have been of any immediate benefit as the average time between initiating what the WTO calls a consultation and a binding decision is one year and three months.⁴⁹

Unsurprisingly the Australian Government, and commentators alike, quickly rejected the discrimination claim.⁵⁰ A spokeswoman from Senator Ludwig's office declared that 'Australia has the right under WTO Rules to take actions to ensure that Australian cattle are treated in accordance with international standards on animal welfare'.⁵¹ No claim was ever made to the WTO by Indonesia.⁵²

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid

50 Ibid.

51 Alford and Franklin, above n 7.

52 World Trade Organisation, Dispute Settlement <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

IV THE INDUSTRY'S SHORTCOMINGS

It has been claimed that the industry bodies, Meat and Livestock Australia ('MLA') and LiveCorp were, for over 10 years, aware of the inhumane slaughter of animals in Indonesia.⁵³ Misleading the government, public and farmers was claimed to be well entrenched. 'Not even MLA's own constituents are accepting claims that they didn't know what was occurring in Indonesia.'⁵⁴ Calls were made for more of the fees paid to MLA by producers and exporters to be invested in Indonesia.⁵⁵

The government and MLA inspectors recently audited the abattoirs in Indonesia to which Australian cattle is supplied. More than three quarters were found not to adhere to world standards for animal welfare.⁵⁶ However, it is not known how many breaches were only of a minor nature. This would inevitably distort the findings. Furthermore, only abattoirs where Australian cattle were slaughtered were audited, which again indicates that the figures supplied are not a reliable indicator of mistreated cattle.

Accordingly in response to the ABC report, the Minister wrote to the Australian Livestock Exporters' Council seeking industry advice on 'ways to improve animal welfare outcomes for the live animal trade and alternative approaches to managing livestock exports'.⁵⁷ The Farmer review did, however, find that 'the activities of MLA have led to improvements in a number of markets in facilities, training and management approaches'.⁵⁸ It is interesting to note that despite obvious shortcomings in the quality of Australian public policy and the fact that policymaking is open to criticism, the solution appears to be to simply commission another review into the matter.

V LEGISLATIVE FRAMEWORK FOR TRADE

As with any international trade, legislative frameworks are required to not only fulfill the domestic requirements, but also to regulate and facilitate the international aspect of the trade. Hence, Australia and, no

53 LexisNexis, 'No Winners With Interim Ban' *Lawyers Weekly*, 22 June 2011 <http://www.lawyersweekly.com.au/blogs/slide_show/archive/2011/06/22/no-winners-with-interim-ban.aspx>.

54 'Australia Ban Live Cattle Trade to Indonesia' *International Business Times* (online), 8 June 2011 <<http://au.ibtimes.com/articles/159068/20110608/australia-bans-live-cattle-trade-to-indonesia.htm>>.

55 Nick Thorne, owner of Cedar Park Export Yards, quoted in Statham, above n 13.

56 Willingham and Allard, above n 20.

57 Department of Agriculture, Fisheries and Forestry, above n 17.

58 Farmer, above n 18, xxiii.

doubt, Indonesia have implemented domestic regulations in relation to the export and import of live cattle. These regulations are simply a matter for each state to implement and enforce. However the real issue is how the two sovereign states regulate the cross border relationship, which can play a crucial role in minimizing potential problems. Whether this issue can be resolved on a government-to-government level needs to be seen.

The Australian regulatory framework for livestock exports involves interaction between commonwealth, state and territory, as well as local government legislation and regulation. This complex interaction is added to by industry codes of practice and standards. Within the multitudes of control, arguably, there is a lack of clearly identified roles and responsibilities for taking regulatory and enforcement action on animal welfare issues.⁵⁹

A Commonwealth

The Australian Quarantine and Inspection Service ('AQIS') administers Commonwealth level legislative instruments. These include the *Export Control Act 1982*; the *Export Control (Animals) Order 2004*; the *Australian Meat and Live-Stock Industry Act 1997*; and the *Australian Meat and Live-Stock Industry (Export Licensing) Regulations) 1998* ('AMLI Act').

Exporters are required to hold a license under the AMLI Act before they are permitted to export livestock. Under the legislation all exports must include adequate planning and risk mitigation measures to ensure adequate animal health and welfare outcomes for all stages of the journey. Plans must detail how the exporter intends to prepare the animals in accordance with the importing country requirements as well as the *Australian Standards for the Export of Livestock* ('ASEL' or 'the Standards'). Exporters must submit a Notice of Intention ('NOI') with the plans to AQIS for assessment and consideration for approval.⁶⁰ Similar requirements to undertake adequate planning and risk mitigation measures are outlined in the *Export Control Act 1982*.⁶¹

A range of compliance measures can also be applied to the activities of the license holding exporter. These include: seeking additional information; application of additional conditions to an export; refusal

59 Ibid xiii.

60 Ibid 19.

61 Department of Agriculture, Fisheries and Forestry, Australian Government, *Australian Position Statement on the Export of Livestock*, November 2006, 9. <http://www.daff.gov.au/__data/assets/pdf_file/0008/146753/gov_position_statement.pdf>.

to approve an NOI; refusal to grant a permission to leave for loading; review or revocation of registration of premises; refusal to issue an export permit; and, criminal sanctions.⁶²

B *State and Territory*

All states and territories have legislation in place covering livestock health, welfare and traceability, which refer to national Model Codes of Practice, covering livestock production and transport. Compliance with these codes is difficult to enforce, owing to the fact they are considered guidelines and accordingly are not mandated under legislation.⁶³

Whilst the ASEL requires that the exporter comply with state/territory animal welfare legislation and animal welfare requirements, state and territory legislation does not in turn reference the ASEL. This further evidences confusion and lack of consistency in the control mechanisms.

VI THE UNDERLYING GOVERNMENT POLICY

Although there are a number of legal policies and agreements affecting the export of cattle to Indonesia, it is not clear that the Australian government expressly breached any by implementing the ban. However, it can be argued that by a unilateral declaration to ban the trade, the Australian government breached the spirit of inter-government agreements.

A *Australian Position Statement on the Export of Livestock*

The Australian Position Statement on the Export of Livestock ('the Position Statement') was developed as early as 2003, as part of the Australian Government's response to the *Livestock Export Review* ('Keniry Review') of the livestock export industry.⁶⁴ The ASEL or Standards reflected by the Position Statement represent the basic animal health and welfare requirements for the conduct of the livestock export industry, which the Australian Government expects the industry to meet.⁶⁵ The health and welfare of livestock in the live export chain is said to be protected by several instruments, namely the industry quality assurance programs from place of origin to destination; state

62 Farmer, above n 18, 19.

63 Ibid.

64 Department of Agriculture, Fisheries and Forestry, above n 61, 5; John Keniry, *Livestock Export Review Final Report - A Report to the Australian Government Minister for Agriculture, Fisheries and Forestry* (23 December 2003) <http://www.daff.gov.au/__data/assets/pdf_file/0008/146708/keniry_review_jan_04.pdf>.

65 Department of Agriculture, Fisheries and Forestry, above n 61, 5.

and territory legislation, including animal welfare acts; and Australian government legislation, including the Standards.⁶⁶

Further, a number of responsibilities of various parties along the supply chain are outlined in the Position Statement. Exporters are accountable to the Australian Government for the outcomes of each consignment. The AQIS must be satisfied that importing country requirements are met before issuing a health certificate and export permit.⁶⁷ Overall, the state and territory governments have the responsibility for ensuring these requirements are met.⁶⁸

The Australian Government has declared its responsibility for ‘export policy, regulation of the live export industry including licensing livestock exporters, inspection of health and welfare certification of livestock for export, and issuing export permits and health certificates’.⁶⁹ Additionally the Government is also ‘responsible for the development of the Standards, and ensuring the effectiveness of the Standards in achieving their aims of acceptable animal health and welfare outcomes by regular review that involves stakeholders’.⁷⁰

What appears obvious is that there are sufficient regulations in place; however, the implementation and oversight, specifically when the livestock moved to Indonesia, was lacking.

B Risk Management

A ‘whole-of-chain-risk-based approach’ was recommended to ensure that critical risks are identified, their potential impacts analysed, and risk management measures developed and implemented.⁷¹ A heavy burden is placed on the exporter to be ‘responsible for ensuring that importing country requirements are met and that verification systems are established to meet audit scrutiny throughout the livestock export chain’.⁷²

The underlying principle of the Position Statement was that all participants throughout the livestock export chain are responsible for the health and welfare of animals in their care.⁷³ The industry is purportedly

66 Ibid 7.

67 Ibid 5.

68 Ibid.

69 Ibid 11.

70 Ibid.

71 Ibid 7.

72 Ibid 10.

73 Ibid.

conducted in a 'transparent manner, in which accountabilities, roles and responsibilities are clearly defined and met'.⁷⁴ Further, participants in the livestock export industry are supposed to be 'demonstrably competent and operate in accordance with the national animal health and welfare system in an environment that encourages sustainable improvement'.⁷⁵

C *Bilateral Trade and Investment Framework*

The Trade and Investment Framework ('the Framework') was signed in September 2005 by Deputy Prime Minister and Minister of Trade, Mark Vaile and Indonesian Trade Minister, Dr Mari Pangestu. The Framework aimed to 'strengthen commercial ties through enhancing business opportunities and improving facilitation of trade in goods, services and investment'.⁷⁶ By enhancing cooperation on trade, investment and business issues the Framework intended to minimise impediments, promote transparency in regulations and reduce costs. The Framework recognised that 'open, transparent and competitive markets are the key drivers of economic efficiency'.⁷⁷ The benefit to Australian companies was said to be the hallmark of the Framework. However this benefit did not translate when the government decided to unilaterally cease trading.

As a priority issue, cost reduction was aimed for through decreasing 'technical barriers, regulatory and administrative requirements, including through cooperation on standards'.⁷⁸ However, cooperation on standards, for one, was evidently not something that was further explored any deeper than saying the words. Arguably it is fairly common in most bilateral agreements that they tend to be just words of encouragement with no real effect. Put in a wider context, the Australian government did not assume ownership in a true sense and as observed there was a disconnect between domestic legislation and the agreement.

D *Importing Country Responsibilities*

Of interest is that before the Framework agreement was signed, the Australian government took the position that the importing country, Indonesia, will determine all animal health and any other requirements

74 Ibid 10.

75 Ibid.

76 Hon Mark Vaile, Minister for Trade, 'Australia and Indonesia Forge Closer Trade and Investment Ties' (Media Release, MVT72/2005, 29 September 2005) <http://trademinister.gov.au/releases/2005/mvt072_05.html>.

77 Department of Foreign Affairs and Trade, Australian Government, *Trade and Investment Framework* (29 September 2005), 1 <<http://www.dfat.gov.au/geo/indonesia/tif.html>>.

78 Ibid 2.

for imported livestock, and it may advise the Australian government of these from time to time. Furthermore, although the exporter is responsible under Australian Government legislation for compliance with these requirements, any negotiation on the requirements is undertaken at a government- to- government level.⁷⁹ The Government failed to note in particular that it is the failure of the Indonesian livestock system to monitor and supervise abattoir practices.⁸⁰

The Australian Government and Australian livestock export industry declared their commitment to furthering the health and welfare of livestock in importing countries by ‘fostering cooperation and goodwill sharing Australian technical expertise, providing educational and training opportunities, and supporting infrastructure’.⁸¹ The success of these commitments is, in light of the current circumstances, questionable at best. Perhaps turning a blind eye to certain practices was hidden under the guise of ‘remaining sensitive to cultural differences’.⁸²

However most importantly the position always has been that it is the importing country, which will ultimately determine animal health issues on their territory.

E *The Responsibility Handball*

Despite, or perhaps because of, the multiple legislative mechanisms and responsible bodies, the welfare of the livestock was not as well protected as it would appear on paper. Past issues in live trade have also shown that welfare of animals is closely tied to the viability of the trade. As shown in the past, domestic interest groups, such as the animal welfare lobby, can influence and can put pressure on government decisions. With so many responsible parties, at so many levels, it appears as if all parties have failed to take the responsibility required.

The industry has defended its role, arguing that the objective of the Position Statement is to improve animal welfare outcomes where possible, whilst recognizing that Australian cattle producers have no regulatory power and limited commercial influence to deliver practice change in countries receiving Australian livestock. Further, it argued that it had never claimed that animal welfare outcomes in all countries

79 Department of Agriculture, Fisheries and Forestry, above n 61, 9.

80 The University of Adelaide, Indo-Pacific Governance Research Centre, above n 6, 1,

81 Department of Agriculture, Fisheries and Forestry, above n 61, 10.

82 Ibid 13.

receiving Australian livestock were ideal, but it has, however, acted on opportunities for improvement when they arise.⁸³

F *Australian Standards for the Export of Livestock*
(ASEL or the Standards)

The ASEL purportedly ensures that minimum standards of sourcing and on-farm preparation of livestock, land transport of livestock, management of livestock in registered premises, vessel preparation and loading, onboard management of livestock and air transport of livestock are adhered to.⁸⁴ This issue after all is completely within the responsibility of Government regulation and their enforcement.

However, contributing to the difficulty in control of exported animals is the fact that Australia's regulatory reach cannot extend beyond our borders. Indonesia's sovereignty must be respected. Once animals leave Australia they are no longer subject to the protection of animal welfare laws or the ASEL.⁸⁵ These laws only apply to the exporter and even then, questions have been raised as to their enforceability.⁸⁶ It has been suggested that at an operational level, failure to comply with the ASEL is systemic.⁸⁷

Once animals have been sold and delivered to an importing country, they are subject to the customs and practices of that country.⁸⁸ Indonesia has no legislation pertaining to animal cruelty. Although some were drafted in 2009, they have yet to be implemented.⁸⁹ 'There is a need for awareness, and appropriate handling, of sensitivity in some overseas countries about the perception that Australia may be seeking to regulate extraterritorially.'⁹⁰

83 Cattle Council of Australia, *Independent Review into Livestock Export Trade Submissions* (18 July 2011), 5 <http://www.livestockexportreview.gov.au/__data/assets/pdf_file/0004/1951447/Cattle_Council_of_Australia.pdf>.

84 Department of Agriculture, Fisheries and Forestry, Australian Government, *Australian Standards for the Export of Livestock*, Version 2.3, April 2011 <http://www.daff.gov.au/__data/assets/pdf_file/0010/1904365/australian-standards-v2.3.pdf>.

85 These standards are referenced in the *Australian Meat and Livestock Industry (Export Licensing) Regulations 1998* and the *Export Control (Animals) Order 2004*.

86 Law Society of South of South Australia, *Independent Review into Livestock Export Trade Submissions* (15 July 2011), 2 <http://www.lawsocietyasa.asn.au/submissions/110715_Independent_Livestock_Export_Review.pdf>.

87 Farmer, above n 18, xiii.

88 Hatten, above n 28.

89 Law Society of South of South Australia, above n 86.

90 Farmer, above n 18, xvii.

There has always been an urgent need for a closer examination of a range of issues relating to ASEL, including issues of scope, clarity, accountability, flexibility, sanctions and review procedures.⁹¹ There were enough incidences in live transports especially to the Middle East, to have this issue resolved. The government is only due to review the ASEL by 28 February 2013.⁹² In addition to Australian legislation, international guidelines are also influencing domestic legislation.

G *World Organisation for Animal Health Guidelines*

The World Organisation for Animal Health (OIE) guidelines is a comprehensive set of standards covering a wide range of issues around the design and management of facilities and animal handling practices. It not only sets out specific provisions, but also, in effect defines a culture of good animal handling practices which avoids, to the greatest extent possible, causing distress to animals. While it covers design and implementation of physical changes to facilities and training of operators in the details of good practice, it is the instilling of a culture of good practice that requires strong leadership and training.⁹³ Although Indonesia and Australia are both signatories to the OIE, the standards are unenforceable.⁹⁴ Despite this, the OIE's standards provide an international platform, through which Australia could engender support for, as well as promote, joint work.⁹⁵

However, it could be argued as being hypocritical to reprimand Indonesia for not adhering to these standards. A review of the Australian government and industry-funded restraint boxes embarrassingly found they grossly breach OIE slaughter standards, contributing to the cruel slaughter practices used in Indonesia.⁹⁶ An immediate suspension of the installation of new Mark I restraint boxes was accordingly implemented.⁹⁷

91 Ibid xv.

92 Australian Government, *Domestic Action* (21 October 2011), Live Exports Government Action<http://www.liveexports.gov.au/government_action>.

93 Australia Indonesia Business Council, above n 10, 2.

94 Law Society of South of South Australia, above n 86, 2.

95 Industry Government Working Group on Live Cattle Exports, Report to Australian Government Minister for Agriculture, Fisheries and Forestry, 26 August 2011, 12 <http://www.liveexports.gov.au/__data/assets/pdf_file/0015/2030361/igwg-cattle-report.pdf>.

96 Willingham, above n 24.

97 Department of Agriculture, Fisheries and Forestry, above n 25.

H *ASEAN-Australian-New Zealand Free Trade Agreement*

Australia and Indonesia have a number of agreements in place, which are intermittently reviewed. Many government meetings have been held to discuss various areas of trade between Indonesia and Australia, with the intention to strengthen trade ties between the two nations. The 9th Indonesia-Australia Trade Ministers' Meetings held in Jakarta on 20 April 2011 focussed on bilateral trade and investment issues, including access to the Indonesian market for Australian beef products and the agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA).⁹⁸

The AANZFTA is one of Australia's largest free trade agreements. Indonesia ratified AANZFTA on 6 May 2011, and it came fully into effect on January 10, 2012.⁹⁹

I *Indonesia-Australia Comprehensive Economic Partnership Agreement*

In November 2010 it was agreed that negotiation of the Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) would commence.¹⁰⁰ However it was not until April 18 2011, just months before the ban, that pre-negotiation consultations were held.¹⁰¹ Therefore the channels of communication were open and arguably it would have been appropriate to discuss the issues raised on the *Four Corners* program before any immediate unilateral decision was made. This is specifically so, as the IA-CEPA aims to broaden the range of opportunities for Australian and Indonesian exporters, importers and investors.¹⁰² It is expected to build on outcomes of the AANZFTA, with benefits of the agreement including sanitary and phytosanitary measures.¹⁰³

It would have been anticipated that the IA-CEPA would provide solid standards, technical regulations and conformity assessment procedures, recognising their important role in international trade.¹⁰⁴ In addition

98 The 9th Indonesia-Australia Trade Ministers' Meeting, Expanding Bilateral Economic Cooperation Through IA-CEPA, Jakarta, 20 April 2011 <http://www.indonesia.embassy.gov.au/files/jakt/110420joint_press_release-ENG.pdf>.

99 Australian Government, Australian Customs and Border Protection Service, *ASEAN-Australia-New Zealand* <<http://www.customs.gov.au/site/page6076.asp>>.

100 Department of Foreign Affairs and Trade, Australian Government, *Indonesia-Australia Comprehensive Economic Partnership Agreement Negotiations* <<http://www.dfat.gov.au/fta/iacepa/index.html>>.

101 The 9th Indonesia-Australia Trade Ministers' Meeting, above n 98.

102 Ibid.

103 Department of Foreign Affairs and Trade, above n 100.

104 Australia Indonesia Business Council Submission, above n 21.

the IA-CEPA has potential to improve access to information for both Australian and Indonesian business regarding sector-specific regulation; provide a mechanism for addressing issues on standards certification; and build upon existing cooperation for purposes of facilitation, recognition and acceptance of the results of conformity assessment.¹⁰⁵ There are also opportunities for increased cooperation and ideally, consultation mechanisms.¹⁰⁶

Following the pre-negotiations of the IA-CEPA, a Memorandum of Understanding (MOU) was signed between the Australian Chambers of Commerce and Industry (ACCI) and KADIN (Indonesian Chamber of Commerce). It was agreed to 'engage in the preparatory negotiations process and the involvement in the business sector'.¹⁰⁷ The MOU provides a forum for dialogue between ACCI and KADIN for the negotiations between Indonesia and Australia of a CEPA, and in doing so gives significant momentum to the government level negotiations.¹⁰⁸ The MOU aims to promote open communication and cooperation at the highest levels of industry throughout the CEPA negotiations.¹⁰⁹

Accordingly, the IA-CEPA is not binding. All that has been achieved at this stage is, in a sense, an agreement to agree. However the IA-CEPA is a promising sign for future trade with Indonesia. It has potential to provide more stringent regulations, theoretically avoiding any future trade bans for animal welfare reasons.

VII RESUMING TRADE

The importance of the live export trade in cattle for Australian farmers and for the domestic economy, particularly at a regional level, is indisputable. Trade in live animals also provides an important source of protein for many of Australia's trading partners and assist them in achieving their food security objectives. As such, it is important for the transition to the new framework to minimise unnecessary disruption to supply chains.¹¹⁰

105 Ibid.

106 Ibid.

107 Hon. Dr Craig Emerson and Dr Mari Pangestu, 'Press Conference, Australia Indonesia Trade Ministers', *Australian Chamber of Commerce and Industry*, 20 April 2011, 1. <<http://www.acci.asn.au/getattachment/d9f86eca-0fb4-467d-b715-b1906e2372cf/Transcript-Press-Conference-Australia-Indonesian.aspx>>.

108 Australian Chamber of Commerce and Industry, 'Business Agreement with Indonesia' (Media release, 20 April 2011) <<http://www.acci.asn.au/Research-and-Publications/Media-Centre/Media-Releases-and-Transcripts/Global-Engagement/Business-Agreement-With-Indonesia>>.

109 The 9th Indonesia- Australia Trade Ministers' Meeting, above n 98.

110 Industry Government Working Group on Live Cattle Exports, above n 95, 3.

A *An Interim Framework For Control*

Trade was legally resumed by virtue of the *Export Control Repeal Order 2011*.¹¹¹ Under the old framework, exporters were only required to track animals from the property of origin to the port of export and report on the outcome of the voyage. A new framework to restrict exports was developed in consultation with industry and the Australian Veterinary Association, which has far more onerous requirements of the exporter.¹¹² Before being issued approval to export by the Department of Agriculture, Fisheries and Forestry (DAFF), a supply chain assurance system past the point of slaughter must be established. The assurance must demonstrate internationally agreed welfare standards; control of animals in the supply chain; traceability through the system; reporting and accountability; and independent auditing. Exporters incur any extra costs of demonstrating supply chain assurances.¹¹³ All exporters are accountable to the Australian Government for the outcomes of each consignment, regardless of the fact that ownership of the cattle may change more than once.¹¹⁴ The most crucial point in the debate is that critics have correctly argued that tracing in and of itself does not ensure the welfare of the individual animal or provide any means by which appropriate welfare standards can be enforced in another jurisdiction.¹¹⁵

The resumption of trade was to be progressive as the various exporters have their supply chains verified by commercial independent auditors.¹¹⁶ It was predicted the trade would reach, at most, 25 per cent of the pre-June levels in the three months following because of the more rigorous auditing requirements.¹¹⁷ Although the onus on exporters would add additional costs, it would still fail to overcome the basic problem of slaughter control in Indonesia.

Cattle arrived to a smaller, more regulated, and more humane industry than prevailed before *Four Corners* triggered the Indonesian abattoirs

111 *Export Control Repeal Order 2011* (Cth) s 3, the order functioned to repeal the *Export Control (Export of Livestock to the Republic of Indonesia) Order 2011* and the *Export Control (Protection of Animal Welfare) Order 2011*.

112 Explanatory Statement, *Export Control Repeal Order 2011* (Cth).

113 Australia Indonesia Business Council, above n 10.

114 Department of Agriculture, Fisheries & Forestry, above n 84.

115 Law Society of South of South Australia, above n 86, 4.

116 Richard Willingham and Tom Allard, 'Month-long Live Cattle Ban to Indonesia Lifted' *The Age* (online), 7 July 2011 <<http://www.theage.com.au/national/monthlong-live-cattle-ban-to-indonesia-lifted-20110706-1h2lw.html>>.

117 Primary Industries Ministerial Council, above n 4; Peter Alford, 'Live Cattle Trade Resumes, But Not Enough Stock' *The Australian* (online), August 17 2011 <<http://www.theaustralian.com.au/national-affairs/live-cattle-trade-resumes-but-not-enough-stock/story-fn59niix-1226116304968>>.

scandal.¹¹⁸ However, many Indonesian meat works and local traders vowed to ‘never handle Australian cattle again’, thereby contributing to the ‘smaller’ industry.¹¹⁹

The new requirements currently only apply to livestock exports to Indonesia.¹²⁰ The independent review by Mr Bill Farmer AO, recommended future changes to the way Australia manages its global livestock export trade, as explored below.¹²¹ Officials from Australian and Indonesian governments are working on a single set of standards to be jointly verified, with the international animal welfare guidelines as a benchmark.¹²²

VIII REVIEW AND REFORM

Reform of current policy and procedure was, and is, clearly required in order to prevent any future situations resulting in similar problematic consequences of the Indonesia live cattle ban, particularly in light of Indonesia already drastically reducing the intake in 2012. A number of reviews have been initiated as a result of the ban. It is important to note that any proposed framework be based around internationally agreed standards, and that Australia applies the least trade restrictive measure necessary to meet the required standards in order to comply with World Trade Organization requirements not to discriminate the application of these standards across countries.¹²³

The Australian Government has no power to regulate in other sovereign nations, and accordingly any new regulatory framework will apply only to Australian exporters. However the new arrangements will clearly have an effect on supply chains in other countries. Indonesia, who relies on Australian cattle for their food security will understandably be particularly sensitive to any real or perceived threats to the future of the trade.¹²⁴

A *Senate Enquiry*

A senate enquiry was conducted into the role and effectiveness of Government and relevant industry bodies, including MLA and LiveCorp, in improving animal welfare standards in Australia’s live export markets

118 Alford, above n 117.

119 Joni Liano, head of the Meat and Feedlot Traders Association (which represents two-thirds of the Indonesian feedlots) quoted in Alford, above n 117.

120 Australian Government, ‘Action on Live Exports’ (7 September 2011) <http://www.liveexports.gov.au/government_action#supplychain>.

121 Ibid.

122 Ludwig, above n 32.

123 Industry Government Working Group on Live Cattle Exports, above n 95, 6-7.

124 Ibid 12.

and the domestic economic impact of the live export trade. The initial reporting date scheduled for 25 August was twice extended. The report was finally released in November 2011.¹²⁵

B *Policy Changes*

Under the new arrangements there are said to be clearer requirements for exporters to provide assurances that Australian livestock exported to Indonesia will be managed in a manner consistent with OIE Standards and Guidelines right through to the point of slaughter.¹²⁶ 'Recent events have demonstrated that continual improvement is no longer sufficient to meet community expectations for animal welfare outcomes and the Minister for Agriculture has made it clear that high standards of animal welfare outcomes must be assured throughout the supply chain.'¹²⁷ However, 'just what constitutes compliance and suitability to undertake the role of an independent monitor remains undefined'.¹²⁸

The Australian Government has said they will continue working closely with the Indonesian Government to further develop the mutually beneficial trading relationship, which already exists, including meeting internationally agreed animal welfare standards across livestock supply chains.¹²⁹ Given the industry's history of a lack of compliance, doubts have been raised that restricting the live export of cattle to only accredited abattoirs will work because it relies on industry improving the treatment of animals, which they have failed to do on a number of occasions.¹³⁰

C *Legislative Change*

The Indonesian and Australian governments have conceded that the current legislative requirements placing such a heavy burden on the exporter are not sustainable in the longer term. Both governments have agreed to work closely together, and with industry, to bring about improvements in practices in abattoirs and to make the trade sustainable.¹³¹

125 Hatten, above n 28. The report was released in November 2011 by the Rural Affairs and Transport Reference Committee: Rural Affairs and Transport References Committee, Parliament of Australia, *Animal Welfare Standards in Australia's Live Export Markets* (2011).

126 Department of Foreign Affairs and Trade, Australian Government, Statement to the Senate Committee, *Inquiry into Animal Welfare Standards in Australia's Live Export Markets*, 10 August 2011, <<http://liveexports.gov.au/news/daff-statement-to-senate-committee-100811>>; Senator Ludwig quoted in Vasek, above n 11.

127 Cattle Council of Australia, above n 83, 5.

128 Shifrin, above n 45.

129 Explanatory Statement, Export Control Repeal Order 2011 (Cth).

130 LexisNexis, above n 53.

131 Ludwig, above n 32.

A number of legislative and regulatory options are being considered to improve animal welfare in the trade.¹³² The industry needs to be sufficiently supported to be ‘sustainable, productive, internationally competitive and profitable’, but this must be balanced with the need to adhere to animal welfare standards.¹³³

The Independents and Greens have introduced bills into parliament seeking to ban all live export from Australia. The Independents want a complete phase-out of live export by 1 July 2014, while the Greens want an immediate ban. These bills have yet to be considered by the parliament; however the likelihood of them passing would appear slim given their lack of commerciality as well as the absence of a credible alternative plan to shore up the livelihood of the northern Australian cattle industry.¹³⁴

D *Industry Government Working Group*

The Industry Government Working Group on Live Cattle Exports (IGWG) was commissioned by the Minister for Agriculture, Fisheries and Forestry, Senator Joe Ludwig, to monitor a number of changes. These include the implementation of the new regulatory framework for live cattle exports to Indonesia; monitoring and assessing the domestic impacts of the temporary suspension of the trade to Indonesia; consideration of any impacts or longer term adjustment responses for the live cattle export industry arising from the application of the new framework; and consideration of outcomes from the independent review into Australia’s livestock export trade (Farmer Review).¹³⁵

Early evidence shows that the regulatory framework established for the trade in live cattle to Indonesia, though only active since 10 August 2011, is allowing exporters to put in place arrangements that fulfil the requirements to the satisfaction of the Australian regulator. Independent audits of the supply chains to date have shown that exporters have been able to put in place arrangements for control of the supply chain and for traceability of animals throughout the supply chain. This provides some evidence that implementation of the new regulatory framework is feasible for Indonesia at least.¹³⁶ More time is, however, needed to assess

132 Department of Agriculture, Fisheries and Forestry, above n 25.

133 Ibid.

134 Hatten, above n 28. Two bills have been introduced into Parliament, namely, The Live Animal Export Restriction and Prohibition Bill 2011 [No 2] and the Live Animal Export (Slaughter) Prohibition Bill 2011 [No 2]. They have not yet been passed through both houses.

135 Industry Government working Group on Live Cattle Exports, above n 95, 2.

136 Ibid.

the full effectiveness of the reforms. No clear indication has yet emerged that Indonesia is viewing Australia as a reliable supplier of livestock.

E *The Farmer Review*

Mr Bill Farmer AO independently (but financed by the Department of Agriculture, Fisheries and Forestry) reviewed the live export trade ('the Farmer Review').¹³⁷ The terms of reference for the review include the consideration of facilities, treatment, handling and slaughter of livestock exported from Australia; the preparation and export of livestock including responsibility for compliance and enforcement of relevant standards; and the adequacy and effectiveness of current Australian regulatory arrangements for the live export trade.¹³⁸ The review has recommended a new regulatory framework for Australia's live export trade and was released to the public on 21 October 2011.¹³⁹

The Farmer Review found that there is an overarching need for nationally consistent and enforceable standards for livestock welfare. It was also found that it would be desirable for industry to develop a through-chain quality assurance system to complement government regulatory and compliance programs.¹⁴⁰ It is undeniable that 'greater clarity about, and shared understandings on, responsibilities and regulatory powers in the respective jurisdictions would assist the Australian Government and the states and territories to identify and address gaps and areas of discontinuity'.¹⁴¹

The government accepted all recommendations of the Farmer Review, and it is said that the reforms will be implemented in stages arguably between now and the end of August 2012. Whether this timeline is adhered to, and further, whether the reform is effective in improving control of live animal export is yet to be seen considering the Indonesian response to cut cattle imports. The reforms will be implemented through changes to subordinate legislation (Orders) under the *Export Control Act 1982*.¹⁴²

137 Hatten, above n 28.

138 Hon Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, 'Ministerial Statement About New RSPCA and Animals Australia Footage', (Media Release, DAFF/207L, 18 August 2011) <http://www.maff.gov.au/media_office/media_releases/media_releases/2011/august/ministerial-statement-about-new-rspca-and-animals-australia-footage>.

139 Farmer, above n 18.

140 Ibid xiii.

141 Ibid.

142 Australian Government, *New Supply Chain Assurance Framework* (21 October 2011), Live Exports Government Action <http://www.liveexports.gov.au/government_action>.

F Reform Of Stunning Legislation

One of the concerns for animal welfare, which resulted in the ban, surrounded the fact that cattle were not stunned prior to slaughter. Though the issue of animal welfare is not strictly within the scope of this paper, it is however, important to the argument for the ban on exportation. Accordingly, it is necessary to discuss the possibility of compulsory stunning legislation.

1 Cultural Considerations

Whether mandatory stunning of animals is legislated, though unlikely at this point, is something to be considered. The *Majelis Ulama Indonesia*, the Indonesian authority responsible for Halal practices, which includes the slaughter of animals, has indicated support for the practice of stunning animals prior to slaughter and has approved the practice in Australian abattoirs exporting meat to Indonesia. Although it is understood that there are some Muslim views that animals must be slaughtered while conscious to comply with Sharia principles, other experts argue from the Islamic, as well as universal, principle that slaughtering should be carried out in a humane way.¹⁴³ Australia continues to encourage stunning but it is not required by the OIE. The slaughter of animals in Australia must be performed in ways that prevent unnecessary injury, suffering and pain and with the least practicable disturbance.¹⁴⁴

2 The Global Experience

The Dutch are currently venturing down the stunning pathway, with their parliament passing a bill banning the slaughter of livestock without stunning it first, removing an exemption that has allowed Jews and Muslims to butcher animals according to their centuries old dietary rules. However the bill in Australia is yet to pass the senate.¹⁴⁵

3 Indonesian Practices

The efforts of the export industry have led to the introduction of stunning in some Indonesian abattoirs. However, there is a long way

143 Australia Indonesia Business Council, above n 10, 3.

144 Australian Government, above n 120.

145 'Dutch move to ban slaughter of livestock which hasn't been stunned', *The Australian*, June 29 2011 <<http://www.theaustralian.com.au/news/world/dutch-move-to-ban-slaughter-of-livestock-which-hasnt-been-stunned/story-e6frg6so-1226084017408>>. A private member's bill by Mr Wilkie is still pending as the debate on the Livestock Export (Animal Welfare Conditions) Bill 2012 has been adjourned.

to go. There has been a push to make the promotion and adoption of stunning a priority in Indonesia's abattoirs.¹⁴⁶ The Australian Government does not have the ability to enforce stunning in Indonesian abattoirs, nor does it have any right to inspect those outlets to identify poor welfare practices.¹⁴⁷

Though some Indonesian abattoirs are privately owned, government bodies own many. Implementing skills and practices across regions and different ownership and control models will be challenging. It has been suggested that the body designated to control slaughter practices be made up with ownership by all key stakeholders. This could be a joint project in the content of the proposed IA-CEPA.¹⁴⁸

4 *Australian Practices*

The majority of animals slaughtered in Australia are stunned before slaughter. However up to 15 abattoirs are authorised to slaughter livestock without prior stunning in Australia, on the basis of religious grounds. Approximately 250,000 livestock are slaughtered in Australia without stunning each year.¹⁴⁹ Australian abattoirs which slaughter animals without prior stunning, trade domestically and are regulated by state authorities.¹⁵⁰ This is argued to be in order to meet Australia's international obligations to provide for freedom of religious observance under the United Nation's International Covenant on Civil and Political Rights.¹⁵¹ It is hardly reasonable to require Indonesians to stun Australian cattle, if it is not a universal policy on Australian shores, and further, is contrary to international obligations. The suggestion that stunning must be compulsory in all abattoirs in Indonesia is accordingly unrealistic and unjustifiable when, by analogy, it is not required in Australia.

It would therefore be unrealistic to expect any proposed legislation for compulsory stunning when considering if this can possibly assist in avoiding a similar situation of a ban on live export.

146 Campbell Newman, 'Bligh must help end live export crisis' *Cando QLD* (online), 27 June 2011 <<http://lnp.org.au/news/leader-of-the-lnp/bligh-must-help-end-live-export-crisis>>.

147 Law Society of South of South Australia, above n 86, 3.

148 Australia Indonesia Business Council, above n 10.

149 Rout, above n 2.

150 Australian Government, above n 120.

151 *Ibid.*

IX CONCLUSION

The Australian Government's blanket ban of the exportation of live cattle to Indonesia was a 'knee-jerk' reaction to public outcries of vested interest groups, which failed to serve any real purpose.

Importantly it highlighted two points. Firstly, the failure of the government to combine evidence based policy making with a sound process. The lack of consultation, most importantly a bilateral one, occurred despite several bi-lateral agreements having been set up. Secondly, an immense volume of regulations is not a solution; rather it masks a real problem.

The ban resulted in significant job and income loss, for the large part due to the inability of the industry, as well as governments, to properly deal with a long-standing problem. There are multiple legal and policy frameworks governing the live cattle trade, the Trade and Investment frameworks, OIE standards, and the Australian Position Statement on the export of livestock, to name a few. However, despite printed standards there was a failure of exporters, industry and government to fulfil their roles in supervising the various stages of exportation. Although trade has now been resumed with additional measures of protection, it is not a permanent solution. The heavy burden placed on exporters to trace stock is not sustainable, nor does tracing, in and of itself, ensure animal welfare. Reform of control mechanisms is undoubtedly needed; however, the blanket ban was an unnecessary step, which disregarded proper procedure and commerciality, with a clear lack of consultation, most importantly a bilateral one. The result is that Indonesia arguably is speeding up self-sufficiency, and as noted by the Indonesian Agricultural Minister, the only way Australian cattle producers will be able to participate in the beef industry is to operate facilities in Indonesia.¹⁵² The solution appears to be rather simple, as Permani noted in the Policy Brief:

Understanding the systemic sources of regulatory failure would facilitate a more creative and ultimately more effective response by the Australian Government particularly through investment in regulatory capacity building for animal welfare within the live stock industry.¹⁵³

This is especially the case as the Australian government looked inwardly pleasing one interest group, instead of seeing the whole picture and focusing its attention on all the stake holders. The question which should have been asked is, how can Australia jointly with Indonesia overcome the problem of reported animal cruelty?

¹⁵² Earl, above n 1.

¹⁵³ The University of Adelaide, Indo-Pacific Governance Research Centre, above n 6, 1.

