



AUSTRALIAN LIVESTOCK
EXPORTERS COUNCIL

13 December 2022

Mr Ross Carter
Inspector-General of Live Animal Exports
Department of Agriculture, Fisheries and Forestry
GPO Box 858
Canberra ACT 2601

Dear Mr Carter

The Australian Livestock Exporters' Council (ALEC) is a member-based, peak industry body representing Australia's livestock export sector which contributes over \$1 billion in export earnings annually while employing 13,000 mainly regional Australians. ALEC provides strategic direction to the industry, sets industry policy and represents Australia's livestock export trade in Australia and internationally.

ALEC members account for more than 96 per cent of Australia's annual livestock exports, by volume and value. ALEC's membership also extends to supply chain participants including registered premise operators, ship owners, feed suppliers and other service providers to the trade.

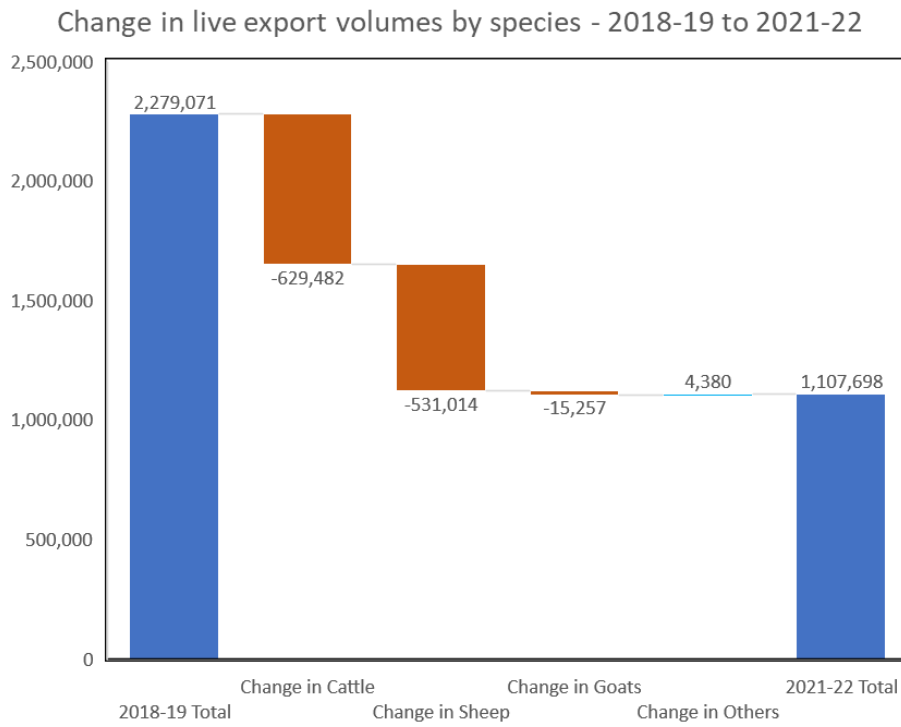
Thank you for the opportunity to submit to your review of the Department of Agriculture, Fisheries and Forestry's (DAFF) communications and engagement in regulating livestock exports.

This submission will cover all aspects of the review's terms of reference.

DAFF needs to be more accountable for performance against service standards...

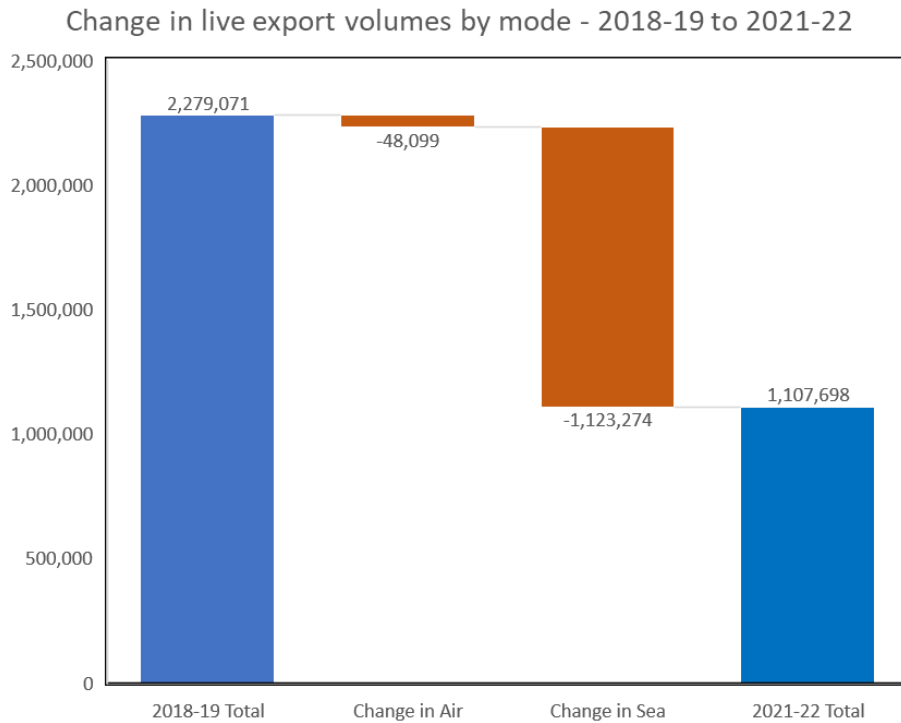
DAFF claims it operates a risk-based regulatory framework. Over the past few years, the industry has seen declining volumes as a perfect storm of a pandemic, the aftermath of a crippling drought, and rising regulatory costs all transpire at once. This has seen export volumes diminish markedly (shown in Figure 1 and Figure 2 below).

Figure 1: Change in live export volumes by species 2018-19 to 2021-22



Source: DAFF

Figure 2: Change in live export volumes by mode 2018-19 to 2021-22



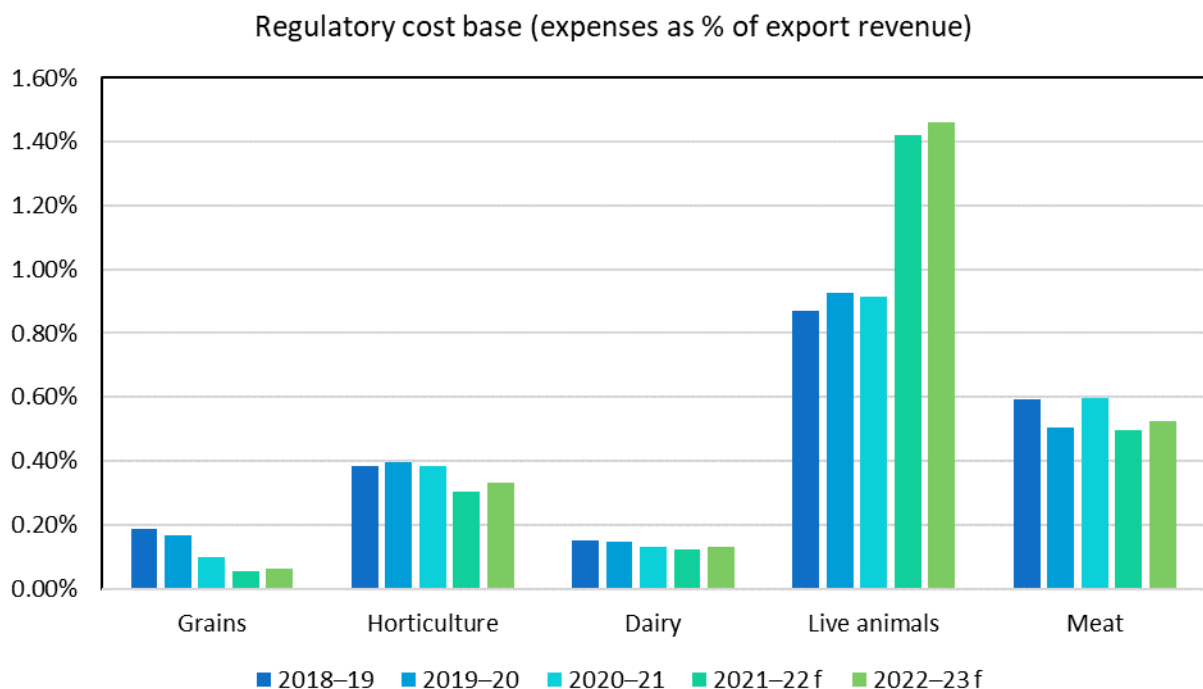
Source: DAFF

Surely it follows that as volumes of livestock exports diminish, animal welfare risks diminish. That is, less livestock being exported, and fewer sea voyages and air journeys taking place, the risks of things going wrong are diminished. But the regulatory framework, and therefore the costs, do not adjust to fit the prevailing conditions in the industry.

Some of the fee-based services (such as processing notices of intent to export) will decline also meaning exporters pay fewer fees. But the cost base itself does not adjust and both the fees and charges get spread over a smaller volume of exports.

Over this period, this has meant the regulatory cost base has increased dramatically as a percentage of industry export revenue, contrasting dramatically with the costs of export regulation for other commodities (see Figure 3). On this basis, it is clear that DAFF is charging the live export industry for a ‘premium’ product (i.e. regulatory framework). So, what is actually being delivered?

Figure 3: Regulatory cost base (% of export revenue)



Sources: DAFF 2022-23 CRIS, ABARES

An examination of DAFF’s most recently published service standards makes for sobering reading. DAFF has consistently failed to meet a range of its own performance standards – in 2020-21, DAFF failed to meet 9 out of 12 service standards.¹ Many of these standards relate to processing times for various types of applications and variations and not meeting the required timeframes hampers the ability of exporters to deliver livestock effectively on time and can contribute to poor animal welfare outcomes if consignments are delayed.

¹ <https://www.transparency.gov.au/annual-reports/department-agriculture-water-and-environment/reporting-year/2020-21-32#h1022> (see table 85)

The most egregious examples in the 2020-21 financial year were:

- Applying for or renewing an approved arrangement and/or approved export program – only 33 per cent of applications are processed to DAFF's service standard (target 90 per cent).
- Exporter Supply Chain Assurance System (ESCAS) applications and variations – 48 per cent of applications and 79 per cent of variations are processed to DAFF's service standard (target 90 per cent for both).
- Submitting a notice of intent (NOI) to export with an approved arrangement – only 77 per cent are processed to DAFF's service standard (target 95 per cent).

There appear to be insufficient incentives for DAFF to improve their performance against these standards.

One of DAFF's service standards is as follows:

- Assess/issue export documents for live animals. We will:
 - assess your documents during our standard hours of service (6:30am to 6:30pm)
 - advise you as soon as practical if there are missing, incomplete, incorrect or ineligible documents.

The first requirement – to assess the documents between 6.30am and 6.30pm (in an unspecified time zone) – is irrelevant to exporters. What matters to exporters is that they can contact DAFF when an issue arises and that they can be guaranteed, at least for some of the day (if not 24 hours), a qualified person from DAFF will be available to assist them with their queries, concerns or issues. The second requirement is not meaningful as it does not specify a timeframe and is subjective (i.e. what is a 'practical' timeframe?). Ironically, this service standard is one where DAFF met their target in 2020-21 (98 per cent achieved vs 95 per cent target).

Prior to the COVID-19 wave experienced in Canberra in mid-to-late 2021, DAFF had a dedicated hotline, which was shut down when a lockdown was imposed, and DAFF staff were required to work from home. This has made it far more difficult for exporters to receive guidance and assistance or report compliance issues. The hotline has since been reinstated, but its suspension was a hinderance to exporters, therefore, ALEC urges DAFF to prioritise always maintaining a telephone presence. There really is no excuse for not maintaining a line of communication for exporters looking to meet their compliance requirements.

Recommendation: ALEC recommends that DAFF:

- Always maintain a dedicated hotline with adequate staffing to ensure exporters can contact DAFF when needed to ensure compliance
- Amend their service standards to ensure that guidance material is updated in a timely manner, ensure that enquiries are responded to within a reasonable timeframe and in a satisfactory manner (i.e. achieves a resolution)

Noting the poor performance outlined above, there appear to be insufficient incentives for DAFF to improve their performance against their own service standards. In addition to performance improvements against existing standards, the industry would like to see additional service standards around timeframes to update guidance material, satisfactorily answering enquiries from exporters, within reasonable timeframes.

One of the most concerning aspects of DAFF's performance reporting is that DAFF decided not to report against these service standards in the 2021-22 annual report, with the only explanation offered being that the standards are being revised. ALEC understands that DAFF is undertaking a project to undertake performance reporting against new service standards that were introduced in 2022. These new service standards are expected to align more closely with new legislated timeframes that were introduced as part of the new Export Control Act 2020 and the Export Control (Animals) Rules 2021 (for example, references to calendar days were replaced with reference to business days). This still leaves a gap and will make tracking performance over time impossible for the next couple of years. Given there is no publicly available performance information for the previous financial year, ALEC believes this project needs to be prioritised and completed before the next annual reporting cycle. Consideration should also be given to production of more frequent performance reports and greater contextual information provided, so that exporters can gain insights into how to improve their interactions with DAFF.²

The principle here is that DAFF should be proactive in using data and information collected from exporters to provide guidance material and performance information that adds commercial value to their operations by improving efficiency (for example, by reducing bottlenecks and processing times). It would also prove to exporters that DAFF was making good use of the information provided to them. All too often, DAFF requests more detailed information for regulatory purposes that are vaguely defined, unclear and, from the perspective of the industry, do not add anything to the value of the industry. From an exporter's perspective, DAFF collects information only to:

- Utilise it in a punitive way to enforce compliance and impose administrative sanctions (which is a valid use of regulatory data, but it should not be the only use); or
- Collect it and never use it for any verifiable purpose – it is just nice to have, for some unspecified future use.

Recommendation: ALEC recommends that until DAFF rectifies all shortfalls against current performance indicators, all further increases in cost recovery should be paused to provide DAFF with an incentive to lift their performance

² <https://www.agriculture.gov.au/about/commitment/client-service-charter/service-standards#live-animal-export-livestock>

Recommendation: ALEC recommends that DAFF:

- Complete the project on reporting on new service standards prior to the next annual reporting cycle
- Produce more frequent performance reports
- Produce contextual performance information to assist exporters to understand how to interact more efficiently
- Introduce a data collection and handling policy, where information is only collected if needed, and the information is used for both regulatory compliance purposes, and to improve administrative efficiency/lower costs to industry

Another gap in the service standards is a lack of reference to client (i.e. exporter) satisfaction. There are numerous ways that regulators can gauge satisfaction with their performance and service levels. As an illustrative example, Resources Health and Safety Queensland (RSHQ) conducts a bi-annual survey of regulated entities³. Many of the questions in the survey relate to regulator contact with the industry and how RSHQ helps industry achieve certain outcomes.

This could serve as a basis for DAFF to incorporate industry satisfaction with regulatory services. In any event, the principle is that DAFF needs to make some attempt to capture and publish satisfaction levels in a transparent manner, so that performance over time can be appraised.

Recommendation: ALEC recommends that DAFF assess performance and report against client satisfaction criteria (in addition to the new client service standards introduced in 2022)

The Australian Pesticides and Veterinary Medicines Authority is another example of a regulator that produces frequent, easy-to-understand performance information that provides useful commercial information to businesses operating in their sector.⁴ Quarterly reports on application approval timeframes and a distribution of status reports (work in progress, applications received, applications processed and on-time status) provide a simple basis for comparison over time.

³ <https://s3.treasury.qld.gov.au/files/Resources-Safety-and-Health-Queensland-2019-20.pdf> (see pp. 22-54)

⁴ <https://apvma.gov.au/node/26876>

DAFF needs to prioritise updating information on its website and guidance material relating to livestock export regulation...

The Australian National Audit Office (ANAO) recently conducted a performance audit of the implementation of, and governance arrangements for, the export control framework. The ANAO made the following recommendation:

- [DAFF should] ensure policies and processes are up-to-date, reflective of current legislation, fit-for-purpose and are operating as intended for both its internal instructional materials and external website content

DAFF agreed with the recommendation.⁵

In practice, the export control framework, as applied to live animal exports, uses a range of regulatory instruments, including the Export Control Act 2020 (the Act), the Export Control (Animals) Rules 2021 (the Rules), various guidelines, and content included in Export Advisory Notices (EANs).

The use of guidelines and EANs is problematic, as DAFF is inconsistent in how it uses these tools. EANs, in particular, are a communication tool that, in some cases appear to substitute for guidelines. This applies across all elements of the regulatory framework, however, the problem is most acute in the Exporter Supply Chain Assurance Scheme (ESCAS).

ESCAS is complex because it regulates the export supply chain outside of Australia through regulating the animal welfare risk mitigation controls that exporters put in place in foreign countries and applies World Organisation for Animal Health (OIE) standards.

There are 29 individual standards, based on OIE standards, referenced in a current EAN (EAN 2018-01). Exporters must comply with these standards and independent audits are used to verify performance. The standards themselves are outcomes-focused. Attachment B in the EAN provides prescriptive guidance to auditors. However, in practice, it appears that the more prescriptive guidance to auditors is used by the department to assess compliance in investigations.

ESCAS requirements also sit alongside importing country requirements in the destination countries. It is therefore imperative that the regulatory framework is clear and straightforward for exporters to follow. DAFF issued an administrative practice statement in 2012 (published on the website). The *Performance Management and Compliance Guidelines (Approved Arrangements)*⁴⁶, the *Administrative Practice Statement (ESCAS)* and the *Guideline – Management of Non-Compliance (ESCAS)* are out of date (all published prior to the introduction of the *Export Control Act 2020*), and still reference repealed legislation. These should be updated as a matter of urgency.

Recommendation: ALEC recommends that DAFF should update the *Performance Management and Compliance Guidelines (Approved Arrangements)*, *Administrative Practice Statement (ESCAS)* and the *Guideline – Management of Non-Compliance (ESCAS)* as a matter of urgency.

⁵ <https://www.anao.gov.au/work/performance-audit/implementation-the-export-control-legislative-framework> (p.39)

Privacy of individuals and businesses must be respected

Exporters remain very concerned about the level of detail being published on DAFF's website. ALEC acknowledges that s424 of the Export Control Act 2020 states that the Secretary must give the Minister for Agriculture, Fisheries and Forestry (the Minister) a report at the end of each reporting period and the Minister must arrange for a copy to be tabled in Parliament. All of these reports are published on DAFF's website.

The level of detail published by DAFF, however, is quite extraordinary. The reports to Parliament cover livestock mortalities during all export voyages by sea in the 6-month reporting period. The items published include:

- Name of the exporter
- Loading and destination ports
- Departure date, discharge date and voyage duration
- The number of livestock loaded, mortalities and mortality rate by species

Such detail provides a one stop shop for anyone to derive all the intelligence of Australian exporters – not only by fellow exporters (competitors) but also overseas customers, foreign governments and animal rights activist groups.

Also concerning is the level of detail reported against completed ESCAS investigations. Whenever DAFF receives a third-party complaint, or otherwise becomes aware of a potential issue, DAFF will utilise its powers under s285 to compel the relevant exporters to provide information or documents to aid their investigation. Failure to comply with a s285 notice is an offence.

This information received through these notices is included in quarterly ESCAS Regulatory Performance Reports. The publication of this information is at odds with s390 of the Act that restricts the use of "protected information", which is any information obtained under the Act. This would include s285 notices.

Under s390, this information may only be disclosed when authorised by the secretary, and where disclosure is for a secondary permissible purpose. This is defined as a purpose of:

(a) achieving the objects of this Act; or

(b) administering or enforcing any of the following:

(i) a prescribed agriculture law;

(ii) another Australian law, to the extent that the law relates to public health, food safety, biosecurity, the export of goods from Australian territory, the health and welfare of live animals, or the health and condition of animal reproductive material.

None of the objects of the Act could be taken to authorise the release of information obtained under s285, merely to provide information to members of the public with an interest in live export compliance. The examples given in s390 where disclosure may be appropriate is limited to other regulatory bodies.

Other parts of the agriculture industry are not subject to the same level of intrusive reporting that could endanger the safety of individuals.

DAFF has previously stated that it is more efficient for the department to publish this information on the website than continuously answer individual requests to provide the information. Yet efficiency is not a consideration under the Act when using information gained by DAFF using its powers. And neither should it be.

ALEC is also highly concerned about timeliness of Independent Observer reports from long haul voyages being provided to exporters. DAFF takes an inordinate amount of time to process them when the reports should be 95% complete by the time a voyage ends given little else onboard will occupy an IO's time. Given their exorbitant costs, it is not too much for exporters to expect that IO reports are submitted and provided to exporters in a reasonable timeframe. This should also be contrasted with the expectations placed upon AAVs and accredited stockpersons regarding end of day and end of voyage reports in the Australian Standards for the Export of Livestock (ASEL). These reports must be provided within 24 hours and 5 days respectively. Adverse findings can be reported by an IO and exporters have minimal chances for recourse. This can materially affect exporters' operations.

Recommendation: ALEC recommends that DAFF should implement mandatory reporting timeframes for Independent Observer reports to be provided to exporters, particularly if there are compliance issues identified, so that rectification actions can be taken as soon as possible. The timeframes should be legislated and similar to those for end of voyage reports by AAVs and accredited stockpersons.

DAFF's privacy and compliance policies are inconsistent regarding publication of information

DAFF has a range of policies regarding privacy and publication of information.

DAFF's privacy policy only refers to 'personal information', defined as: "...any information or opinion about an identified individual, or an individual that is reasonably identifiable. The information or opinion does not have to be true or recorded in a material form." The privacy policy also states that it does not apply to business information (except possibly in the case of sole traders and partnerships).

DAFF's compliance policy was published in 2021. It applies to the whole department and states the following:

Information received from the public about alleged non-compliance will be handled in a confidential manner. We may share this information with relevant internal areas and with other law enforcement and regulatory agencies as provided for under relevant legislation.

Where legislation permits or requires, we may release details of non-compliance or investigative activities where such a release would support the achievement of the department's regulatory outcomes or is

required by law. In other circumstances, the details of investigation activities may remain confidential once the investigation is complete.

*We may choose to release information about entities that have breached or are alleged to have breached our legislation to support our regulatory outcomes. This will be done in accordance with our legal obligations, including the Privacy Act 1988. We will ensure that the released information does not prejudice a person's right to a fair hearing or legal process, impinge upon the safety of others involved in the investigation (such as **complainants, witnesses and suspects**) or prejudice any of our past or future activities.*

Request for information from the public, including regulated entities, may be made under the Freedom of Information Act 1982 [FOI Act]. For details about how to make a Freedom of Information (FOI) request, see Freedom of Information.⁶ (emphasis added)

In practice, for exporters, this appears to mean that DAFF has discretion to publicly release information about alleged or proven breaches “to support regulatory outcomes”, without specifically defining what outcomes they are referring to, or the circumstances where this might happen. The policy also references the fact that individuals can make requests for information under the FOI Act.

DAFF also has a livestock export specific compliance statement, also published in 2021, that is on a separate part of the DAFF website. It has two main references relating to maintaining confidentiality and publishing information. The first reference is:

*Maintaining confidentiality – we conduct investigations on the principle of balancing confidentiality and the need for transparency. We do not comment on matters that are subject to a current investigation. However, **we may disclose the outcomes of compliance investigations and the compliance measures undertaken where deemed important to public confidence in the trade or to promote wider compliance in the industry.** We will publish independent observer summary reports, reportable mortalities and ESCAS breach investigation reports **when these investigations are complete.**⁷ (emphasis added)*

⁶ https://www.agriculture.gov.au/sites/default/files/documents/compliance_policy.pdf (see p. 16)

⁷ <https://www.agriculture.gov.au/sites/default/files/documents/compliance-statement-export-livestock-dec-2021.pdf> (see p. 4)

The second reference is vaguer and merely says:

We publish information about our approach to regulating the export of livestock. This information includes:

- *regulatory compliance investigations*
- *findings collected by independent observers*
- *ESCAS quarterly regulatory performance reports and mortality investigations.*

All up, the policies provide no clarity for exporters on:

- When or what information will be published
- The rights of exporters to request that information be redacted
- What regulatory outcomes DAFF is trying to achieve by publishing particular information
- If, or when, DAFF is required to provide justifications for publishing particular information.

This contrasts with the Minister's response to a recent order for the production of documents to the Senate relating to animal welfare incident reports (AWIR) in export accredited abattoirs:

Redactions have been applied to the remaining documents where information in those documents could unreasonably identify individuals, including names, contact details and other identifying information. Redactions have also been applied to information that, if released, could endanger the physical safety of a person either through identification of an individual, or through association with a business identified in an AWIR. This includes information such as business names, property identification codes, brands, logos and personal information.⁸ (p.4)

Any information related to a company has been redacted, in contrast to what happens to exporters. These documents were released to the Senate long after the incidents had taken place and the justification given clearly points to the risks to individuals 'through association with a business identified in an AWIR'. These risks are identical for livestock exporters and their staff as they are for individuals working in other parts of the supply chain.

Recommendation: ALEC recommends that DAFF should:

- Amend the privacy and compliance policies (specific to live animal exports) to align them with the Export Control Act and general departmental policies.
- Protect the privacy of exporters and their staff as is done for businesses in other agricultural sectors.

⁸ https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/297 (see p.4 of cover letter)

DAFF's stakeholder communication and engagement policy enables activist groups with nefarious intent to interfere with regulatory decisions and functions, harming legitimate exporters in the process

DAFF has recently updated their stakeholder engagement policy. The policy outlines four different types of interactions and how the department will engage in each circumstance.⁹ These are:

- Routine interactions with regulated entities
- Non-routine interactions with regulated entities
- Policy, guidelines and procedures development that affect export operations
- Standards, reviews, reforms and legislation

In the first two cases, DAFF states that they will interact directly and in-confidence with the regulated entities, which is appropriate. However, the publication of information by DAFF and involvement of third parties in 'non-routine' interactions are of concern.

There are two good examples here. The first is DAFF's acceptance of an activist-initiated submission related to the final shipment before the commencement of the 2019 moratorium. The submission from Animals Australia did not contain any new information and was simply AA's submission into the then recently completed Heat Stress Risk Assessment Review. Despite this DAWE deemed it appropriate to delay approval of the shipment and make the exporter respond to the concerns raised in the submission, which were not specific to that shipment anyway. Concerns raised by ALEC and the exporter at the time about the process being inappropriate were rebuffed by the department with one anecdotal response being that exporters are multinational companies and should be able to handle such requests.

The second example was the application for an exemption for a voyage to Kuwait during the Northern Hemisphere Summer prohibition period in exceptional circumstances at the height of the COVID-19 pandemic. An exporter was due to load a consignment of 56,000 sheep and 420 cattle in the last week of May 2020, but the vessel (MV Al Kuwait) was held in quarantine by the WA Government due to crew members being infected with COVID. As a result, the consignment was unable to be loaded and an exemption application was lodged by the exporter, along with a detailed animal welfare management plan to mitigate heat stress risks. This first application was rejected.

The exporter submitted a second exemption application with an amended animal welfare management plan on 7 June 2020, which was subsequently approved. In both cases, DAFF considered submissions from animal rights activists, which no doubt slowed the assessment process. DAFF concluded that these submissions were not representative of the community as a whole.

⁹

https://www.agriculture.gov.au/sites/default/files/documents/stakeholder_communication_and_engagement_policy.pdf (see appendix A)

The voyage itself was one of the most successful ever with an exceptionally low mortality rate, none of which were attributable to heat stress.

ALEC is concerned that DAFF is unable to make decisions like this on its merits without seeking external submissions from parties that have very little, if any, direct interest in the outcome (except to stop the trade altogether, no matter what the scientific evidence shows). The Live Animal Exports Branch and the Animal Welfare Branch within DAFF both employ a substantial number of veterinarians and regulatory experts to make such decisions based on scientific evidence. The current regulatory settings are supposed to be based in science and ensure that management of heat stress related risks for sheep are, as far as possible assessed and managed using objective criteria that reflect the source of the risks. Under DAFF's stakeholder engagement policy, activist groups are consulted on the development of standards and their legislative implementation. Once these policy settings are in place, what is the role of third parties in the decision-making process? ALEC believes they should have none – regulatory decisions should be made by DAFF independently, based on robust evidence and sound science.

Activist groups will always seek to use these processes to obstruct or delay exporters from undertaking their lawful business and industry pays for the privilege through cost recovery. The circumstances where DAFF will use its discretion to consult with third parties is unclear and causes significant uncertainty in the industry.

Recommendation: ALEC recommends that DAFF should:

- Amend the stakeholder communication and engagement policy to ensure regulatory decisions are independent and based on evidence specific to each investigation.
- Remove the reference to third party stakeholders in non-routine interactions with exporters, to limit the ability of activist groups to disrupt, delay and frustrate legitimate export operations.

Consultation timeframes and the approaches employed to engage stakeholders are ad hoc

Industry is often provided with inadequate timelines to respond to Department consultations on significant issues. They are often short which constrains the ability of industry to consult and respond to effectively.

ALEC is also concerned that DAFF does not produce a forward work plan of reviews, consultation process and planned legislative or regulatory changes which industry can rely upon to plan and resource their activities and contributions to these processes.

The recent and ongoing saga of DAFF's review of ESCAS is a case in point. The Live Animal Export Branch has verbally foreshadowed a review of ESCAS since the first quarter of 2022. Despite numerous requests for a project timeline and information about the consultation arrangements and review process, very little concrete information has been forthcoming.

ALEC was provided with a draft copy of a very loose scoping document in the middle of the year and we were informed that the review would commence 'soon'. Exporters discovered that DAFF (DAWE at the time) issued a tender for technical assistance with the review via the AusTender website and that the tender was awarded to a contractor with significant

history in the industry. While the contractor did not have any direct material conflict of interest, their involvement in development of other parts of the regulatory framework meant that exporters and their customers in market were reluctant to engage, as the contractor's positions on certain matters of direct relevance to this review were well known to the industry.

Several months passed without any further communication from DAFF on the review. Fast forward to November 2022 – ALEC was informed the review was to commence in mid-December and the major consultation period on technical matters would be conducted as a full public consultation on DAFF's 'Have your say' platform over the Christmas and New Year shutdown period. This is a notoriously busy time for all exporters and their compliance staff as independent performance audit reports (IPARs) are due for all exporters subject to ESCAS by 10 January 2023. To say that this was poorly planned is a gigantic understatement. Furthermore, it could have and should have been avoided.

In the past month alone, DAFF has initiated or flagged several reviews and consultation processes at short notice, expecting ALEC and exporters to respond many of them over the Christmas and New Year period.

These include:

- The review of ESCAS (mentioned earlier, involving multiple consultation stages)
- An ad hoc review of administrative provisions in the Export Control (Animals) Rules (submissions due 20 January)
- Responding to findings in ESCAS investigations (some of which are more than 12 months old)
- Updates to ASEL (commencing in February 2023)

It is manifestly unfair for DAFF to neglect these processes throughout the year, only to make them a departmental priority during a period when exporters are at their busiest, dealing with their routine compliance requirements. This sends a signal, rightly or wrongly, to exporters that DAFF does not respect them and is not interested in genuine engagement.

Credit where it is due, ALEC made representations to DAFF to delay the ESCAS review and DAFF have agreed to postpone it until January 2023, while keeping the consultation period open for 6 to 8 weeks. But this saga could have and should have been avoided through better planning. It also means that exporters will need to respond to reviews of ESCAS and ASEL in the first quarter of 2023.

Recommendation: ALEC recommends that DAFF should

- Produce a forward work plan for all planned reviews of standards, policies, legislation and other regulatory instruments at the beginning of each calendar or financial year.
- Seek comment from exporters and other interested stakeholders on the work plan before finalising.

ALEC notes several instances where DAFF (and its predecessor agencies) have inadvertently or otherwise, cast negative aspersions on the industry which mean any consultation or engagement process begin on the wrong foot.

An example of this is an engagement process conducted by DAFF (then DAWE) in November 2021 where exporters were asked about their experiences as a livestock exporter using their performance management and compliance framework.

In a presentation to exporters, DAWE made the following statement:

Exporters report experiencing slim profit margins associated with rising costs, including; COVID, drought and natural disaster, and DAWE cost recovery.

These market pressures may lead exporters to non-compliant behaviour to remain viable. (Emphasis in original).¹⁰

This statement is inflammatory, lacking in nuance and was not, to ALEC's knowledge, based on evidence. Such statements can be a real impediment to progress in undertaking reviews of sensitive topics such as compliance and enforcement.

Some quotes from members of the industry at the time included:

- "It actually goes to substantiate the long-held view by exporters that the [Department] believes us all to be scoundrels and rogues - the fact that they have the audacity to make such a statement brings into question how we will ever be able to work in a co-operative and collegiate manner for the betterment of Australian exports"
- "the fact it was written as it was reinforces that the very culture of the Department promotes the view that exporters will break any regulation to ensure a profit. Money before values, it disgusts me that they are allowed, even encouraged, by the system to act in this manner. Unfortunately, it is unlikely to ever change".¹¹

A regulator should always start with the assumption that most participants in the industry are trying to do the right thing and comply with the law. To do otherwise means a healthy tension between regulator and regulated often degenerates into distrust and suspicion.

Throwaway statements, like the one from the presentation above, should be avoided in future if trust between DAFF and exporters/regulated entities is to be improved and maintained.

It goes without saying, that ongoing acceptance of activist organisations to participate in such forums is often conflicted. For many years it has not been clear regarding DAFF's official position on their interaction/engagement with special interest groups. Seemingly it has been going on for many years and has been influenced by senior management within the LAE. Outcomes of an exemption application (Al Kuwait voyage in July 2020) and

¹⁰ DAWE (1 November 2021), 'Live Animal Exports – Discovery Information', p.11

¹¹ Quotes sourced from exporter correspondence with ALEC (24 November 2022). Details of original correspondence available upon request.

discovery applications clearly showed breaches and a compromised process by DAFF, allowing Animals Australia and the RSPCA access to confidential information from the exporter involved.

DAFF has provided some clarity through the release of a stakeholder communication and engagement policy, although the policy is not specific in some important matters. For example, the policy lists 'animal welfare groups' and 'community groups' as relevant external stakeholders. However, ALEC contends that some of the animal rights activist organisations do not fit either of these definitions, yet are given a platform and official recognition by DAFF as a member of such forums. At the very least, industry should not be liable for the costs arising from DAFF's engagement with them, unless it can be clearly linked to a regulatory or compliance outcome.

Recommendation: ALEC recommends that DAFF should:

- Be more specific about the role and expectations of all stakeholders in consultation forums and engagement processes
- Ensure that all stakeholders make constructive contributions
- Not allow engagement processes to be hijacked by nefarious interests

Investigation of complaints and allegations of non-compliance in livestock export regulation are procedurally unfair

DAFF can receive reports of alleged non-compliance from multiple sources:

- regulated entities themselves (self-reporting)
- ESCAS independent audit reports
- DAFF intelligence (e.g. DAFF audits, Regional Veterinary Officers during consignment inspections or Independent Observers on voyages)
- third parties (often these are animal rights activist groups) or importing countries

Under ESCAS, once a report is received, DAFF publishes details of the allegation(s) on their website and assess whether an investigation is required. These allegations can be classified as:

- report under assessment
- assessment completed
- investigation in progress
- investigation complete

At the time of writing, there were ten ESCAS investigations in progress. Seven of these were the result of complaints made by third parties. The most recent one was reported to DAFF in July 2022. The oldest report still under investigation was made in August 2020.¹²

¹² <https://www.agriculture.gov.au/biosecurity-trade/export/controlled-goods/live-animals/livestock/compliance-investigations/investigations-escas>

Investigations are intended to make findings of fact and determine an appropriate response. The standard of proof for findings is based on the balance of probabilities.

The ESCAS legislative framework provides that exporters are responsible for the individual animals they export under their respective export licences and ensuring those animals are treated in compliance with the conditions of the ESCAS.

However, in determining non-compliance in multiple cases, DAFF concluded that a single animal was exported by multiple exporters and fell under multiple ESCASs. As they were not able to determine if specific individual animals in the footage were under a specific ESCAS, every exporter with the facility in use at the time was issued a non-compliance for the same animal. This kind of collective punishment is procedurally unfair.

If the individual exporter(s) responsible for the animals cannot be identified, then it is incumbent on DAFF to admit that the evidence was inconclusive and doesn't support a specific finding of non-compliance. The investigation should be closed out within a reasonable timeframe. None of this would prevent DAFF from varying approved ESCAS conditions for relevant export licence holders to prevent future non-compliant behaviour. This would enable corrective actions to be taken, which should be sufficient to meet the outcomes ESCAS requires.

Another example is ESCAS Complaint 188. Three animals that a third party suspected subject to ESCAS that had leaked from the approved supply chain were shown in a Youtube video.

Animals Australia made a complaint to DAFF and passed on the complaint to exporters. The animals had no features that could lead to a reasonable suspicion that they were of Australian origin. In fact, there were several characteristics that pointed to animals not being subject to ESCAS. The videos also had no date, time or location. Despite the evidence not being sufficient to support a finding of non-compliance, the complaint, which was made in July 2021 remains visible on the website today and DAFF still has not reached a conclusion. Once again, this is procedurally unfair.

Recommendation: ALEC recommends that DAFF should:

- Investigate alleged ESCAS breaches independently and expeditiously.
- Adhere to standards of natural justice.
- Not attribute single instances of non-compliance to multiple exporters.
- Not engage in collective punishment (N.B. this would not prevent DAFF from making rectification imposing new conditions on export licences going forward).

Regulatory forums and roundtables are useful but follow through is patchy at best

The most recent final CRIS (2021-22) lists several regulatory consultation forums. Some of these are now defunct or replaced (the 2022-23 draft CRIS did not provide a list).

The Live Animal Export Finance Industry Consultative Committee (LAEFICC) and the Live Animal Export Regulatory Reform Roundtable are perhaps the most relevant forums.

LAEFICC is a prime example of a tick-a-box exercise to meet the requirements of the Australian Government's cost recovery guidelines. Exporters have long felt that LAEFICC has

been a tokenistic exercise, with a draft CRIS presented to LAEFICC, almost as a *fait accompli* with minimal time for exporters or ALEC (as the most impacted stakeholders) to respond before the draft CRIS is put out for public consultation. Although ALEC and the industry have had some successes in having irrelevant expenses removed from CRIS, LAEFICC and the CRIS consultation have lacked flexibility and difficult to influence and, generally, have not aided industry in this process.

One issue that LAEFICC and the CRIS process have consistently failed to address is requests by ALEC and exporters for de-identified organisational chart, showing teams and staff numbers (disaggregated by levels) so that the industry can make informed comments and provide feedback on the organisational size, scope and structure to deliver optimal regulatory outcomes. Any claims that providing such information might compromise privacy should be contrasted with the treatment of exporter information that is put out into the public domain.

Recommendation: ALEC recommends that DAFF provide a de-identified organisational structure chart with each draft CRIS to LAEFICC members, with information on the numbers of full-time equivalent staff at different APS/EL/SES levels to enable informed scrutiny of the regulatory activities and any changes over time.

Note: DAFF can ameliorate any privacy concerns by aggregating some levels (e.g. reported as APS 4/5) and imposing confidentiality requirements as a condition of participation in LAEFICC.

The Regulatory Reform Roundtable is a forum for senior DAFF regulatory officials and the Chairs and CEOs of ALEC and LiveCorp to discuss projects that would improve regulatory efficiency and enable both the regulator and exporters to better understand each other's views. In the 2020-21 Budget, the Australian Government allocated \$328 million to a 'Busting Congestion for Agricultural Exporters' package, aimed at improving regulatory efficiency and improving agricultural export performance. Around \$14 million of this was allocated to reducing costs for seafood and live animal exporters. Many of the initiatives that are overseen by the Regulatory Reform Roundtable are funded from this package. This forum has probably been the most beneficial regular consultation forum, enabling respectful dialogue and greater understanding of each other's perspectives. The discussions are frank and often deal with sensitive issues causing concern on either side. Some useful projects have emerged, although DAFF has often struggled to quantify the benefits of each project in terms of regulatory cost-savings and progress is piecemeal and incremental. This goes to the heart of a recommendation by the ANAO in their performance audit of the implementation of the export control framework:

The Department of Agriculture, Fisheries and Forestry:

develop milestones to ensure that the intended benefits of the revised legislative framework can be measured and monitored; and

fully implement its benefits management arrangements.

The reporting on benefits from specific initiatives has been unable to identify less than \$3 million of savings to industry and Government.

Another issue is the role of animal rights activist organisations in engagement processes and official departmental forums, such as the Live Export Animal Welfare Advisory Group (LEAWAG)¹³. LEAWAG was re-established as a strategic consultation forum arising from a recommendation out of the 2018 independent review into the capability and culture of the Department in relation to the regulation of live animal exports, known as the 'Moss Review'.

According to the latest Terms of Reference, LEAWAG membership is at the discretion of the chair – there are no membership criteria listed – and there are currently 27 organisations listed as members (along with State and Territory Government agencies). This issue came to a head recently when the recently formed Alliance for Animal Welfare was invited to join LEAWAG without any notice or consultation with existing members.

LEAWAG is referenced in DAFF's 2021-22 LAE Cost Recovery Implementation Statement (CRIS) as an 'industry engagement' activity, and it is fully cost recovered from the industry. Despite that, activist groups, some with a focus on animal rights (not animal welfare) and a stated desire to end the trade altogether, are invited to attend as standing members of the group.

Activist groups do not bear any of the costs of their involvement in this group, nor the work they create for the department in making allegations (whether justified or vexatious in nature). The costs are ultimately paid by industry. It is notable that no animal rights activist organisation has ever presented any material to LEAWAG for discussion or debate. This contrasts with ALEC, LiveCorp and other industry groups presenting regularly on industry, animal welfare and community sentiment research.

Activist groups derive their income, largely from (tax-free) donations – donations that are inspired by flawed perceptions of the industry as minimally regulated, engaging in inherently cruel conduct. Their incentives are to create a perception in the wider community of a regulator that is ineffective and beholden to the industry. They are invested in seeing the system and the regulator fail. They also have incentives to make the industry unviable through excessive regulation and forcing the regulator to undertake a never-ending pipeline of investigations – there are no penalties or costs for making spurious or vexatious allegations.

Poor regulatory culture is at the heart of several problems

Given the wide-ranging issues and problems cited above, it would be fair to conclude that a poor regulatory culture is impacting livestock export regulation.

DAFF, as the regulator of live animal exports, often takes an excessively risk-averse stance on practical and operational matters and gives a lot of weight to perceived pressure from people and organisations that do not have substantial direct interests, and as outlined above, are outright to opposed to the industry's existence.

¹³ <https://www.agriculture.gov.au/sites/default/files/documents/2021-22-lae-cris-final-report.pdf> (see p. 29). Please note the final 2022-23 CRIS has not yet been published, although the consultation period has ended.

There was a time that DAFF and its predecessor departments spoke of collaboration, co-regulation, working to improve welfare, the benefits of identifying problems etc so improvements could be made. Today it is a very adversarial approach in many instances, combined with a prescriptive, command and control approach. The regulator's focus is on demanding exporters submit mountains of data and paperwork, with little justification for why information is necessary to ensure transparently stated practical outcomes and manage well-defined risks, with an appropriate definition of risk appetite and tolerance for each risk category. There is often an inadequate recognition of the limitations of measures used in regulatory settings and how well they describe and measure that actual risks to animal welfare.

Absolute compliance with black letter law is prioritised over sensible use of discretion informed by sound science and robust evidence to ensure the best outcomes.

To be effective, consultation and engagement with stakeholders needs to be undertaken in good faith, giving people adequate time and opportunity to provide informed comments and consent. Most importantly, communication must be two-way and involve a significant amount of listening. The industry is concerned that it is not listened to when it matters and are slowly but surely disengaging from departmental processes.

Conclusion

Thank you for the opportunity to provide a submission to the inquiry. ALEC would welcome the opportunity to provide more detail on the concerns raised in this submission. Please do not hesitate to contact me at ceo@livexcouncil.com.au or on 0400 980 452 should you wish to discuss further.

Yours Sincerely



Mark Harvey-Sutton
Chief Executive Officer
Australian Livestock Exporters Council

