



Animal Welfare Lawyers

A nation and its moral progress can be judged by the way its animals are treated: Mahatma Gandhi

29 May 2023

Live sheep export independent panel
Department of Agriculture, Fisheries & Forestry

Introduction

We refer to the consultation relating to the phase out of live sheep exports by sea. Thank you for the opportunity to comment on the phase out of live sheep exports. Firstly, we would like to commend the Federal Government for taking decisive action in relation to this important issue. Phasing out live sheep export is the right thing to do. Phasing out live sheep export supports the wishes of the Australian community that has made it clear that they want to treat animals with respect. We have several comments in relation to the phase out.

About us

As our name suggests, we are a group of lawyers¹ with an interest in the welfare of animals and expertise across a range of legal areas. Our purposes are:

- (a) to provide advocacy on animal welfare issues; and
- (b) to promote community awareness of animal welfare; and
- (c) to promote changes to the law that will benefit animals and/or advocacy by animal welfare advocates.

We take a practical approach to animal welfare issues that is not driven by any ideological position.

Phase out of live sheep exports should be legislated.

Our view is that the phase out should be enacted in legislation. The legislation could facilitate a reduction in annual export numbers by setting maximum yearly export quotas during the phase out period. The legislation should include a specific cessation date for the practice (e.g. 1 January 2026) as opposed to simply a timeframe (e.g. three years) to mitigate the risk of unexpected delays in introducing legislation.

Mechanisms that do not provide the industry with a reasonable opportunity to wind down in an orderly fashion may lead to unacceptable outcomes, and potentially pose risks to the overall success of the phase out. It is good practice for the Government to listen to all those affected by the phase out. The current process provides an opportunity for an arms-length process to consult with affected stakeholders, before enacting legislation that will help ensure that the industry can transition away from live sheep export in an orderly fashion.

¹ Our members include barristers, solicitors, corporate counsel and academic practitioners.



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Self-regulatory approaches would place the phase out at unacceptable risk. An example of a phase out that was not backed by legislation was the voluntary phase out of mulesing, a painful and controversial sheep husbandry practice. Despite the Australian wool industry publicly committing in 2004 to phase out the practice by 2009, the lack of legislated timeframes to back up industry's commitment means that the practice continues to be routinely performed.²

Legislating the phase out of the trade is necessary to provide certainty to affected stakeholders and helps ensure that the practice is phased out in an orderly fashion. Anything less than legislating an end date for the trade has a greater potential to expose the Government to litigation.³ Such an approach sends a clear signal that Australia is serious about its commitments in relation to animal welfare to the Australian and international community, including Australia's trading partners, many of whom are increasingly concerned about animal welfare.

Phase out should be legislated during this term of government.

We note that the Government has indicated that the phase out of live sheep exports is unlikely to happen until the next term of government. However, our view is that it is critical that the legislation implementing the phase out should be enacted during the **current** term of government. Such an approach will honour the government's election commitment made to the Australian community. It will also provide certainty to all stakeholders and support the industry's continued transition away from live sheep exports.

Today, there is increasing concern about farm animal welfare generally — and live sheep export in particular — among Australians.⁴ Phasing out live export of sheep is a key election commitment by the Australian Labor Party that has been taken to the last two federal elections. The Australian community has been concerned about the high-profile practice for decades and a failure to legislate the phase out during the current term of government will be seen by some as an unfulfilled commitment.

² The controversial practice is illegal in other parts of the world.

³ While the circumstances are not the same, examples of change not effected through legislative means being challenged include the following: A 2011 decision by the then Agriculture Minister to immediately suspend the live cattle trade to Indonesia was successfully challenged on the basis that it disregarded proper procedures, exposing the Government to substantial damages: *Brett Cattle Company Pty Ltd v Minister for Agriculture* [2020] FCA 732; 274 FCR 337. In a more recent New Zealand case, a decision not to specify a phase out period for farrowing crates and mating stalls for sows in the regulations was found to be invalid by the NZ High Court after a successful challenge by the NZ Animal Law Association and Save Animals from Exploitation (SAFE): see *New Zealand Animal Law Association v Attorney-General* [2020] NZHC 3009.

⁴ Futureye, *Commodity or Sentient Being? Australia's Shifting Mindset on Farm Animal Welfare* (Independent Report Commissioned by Australian Department of Agriculture, 2018) <<https://www.sheepcentral.com/wp-content/uploads/2019/05/190129-Commodity-or-Sentient-Being-Australias-Shifting-Mindset-on-Farm-Animal-Welfare-v.-7.0.pdf>>.



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Setting an end date to live sheep export during the current term of government and locking-in this end date through legislation will provide industry certainty and adequate time to prepare. Failing to legislate the phase out creates uncertainty for all stakeholders that this important reform will not happen (or will happen in a less orderly way, potentially leading to adverse outcomes to all involved).

Phase out should be completed in a timely manner.

To address concerns about the legitimacy of the regulation of live sheep exports, the phase out should be completed in a timely manner. Research commissioned by the then Department of Agriculture and Water Resources has found that Australians are concerned about animal welfare regulation and want regulation that ensures animals are treated with respect.⁵ Yet a recent regulatory process relating to another controversial practice — conventional (or “battery”) cages for layer hens — allowed industry an unacceptably long phase out period of up to 15 years.⁶ Failing to phase out the live export trade in a timely manner will be seen as yet another example of government regulation prioritising industry interests over animals. There is also high risk that failure to legislate a prompt phase out of the industry will be seen by the community as a failure by the Government to fulfil a key election promise. Allowing this trade to continue long after it has lost the confidence of the Australian public and the government also poses a significant social licence threat for the Australian animal welfare regulatory regime and animal industries.⁷

Australia’s international reputation — and the reputation of its agricultural products in particular — is highly vulnerable to continued uncertainty around live sheep exports. The most recent Animal Protection Index by World Animal Protection, which found Australia’s ranking had reduced to “D”, called for a cessation of live export. The report warned that “live export is a stain on Australia’s reputation and immensely damaging to the country internationally”.⁸ The recent free trade negotiations between Australia and the UK also highlighted the increasing importance of animal welfare for Australia’s trade partners.⁹

⁵ Ibid.

⁶ <https://theconversation.com/national-plan-to-allow-battery-cages-until-2036-favours-cheap-eggs-over-animal-welfare-163552>

⁷ Futureye (n 4).

⁸ World Animal Protection, Animal Protection Index (API) 2020

https://api.worldanimalprotection.org/sites/default/files/api_2020_-_australia.pdf.

⁹ Latika Bourke, ‘Australia’s “Backwards” Animal Practices Still in the Way of Free Trade Deal with Britain’, *The Sydney Morning Herald* (24 January 2023) <<https://www.smh.com.au/world/europe/australia-s-backwards-animal-practices-still-in-the-way-of-free-trade-deal-with-britain-20230124-p5cex5.html>>. The final trade agreement includes a chapter relating to animal welfare which recognises that animals are sentient beings. Both parties have committed to continue to improve their levels of animal welfare protection: see Chapter 25 UK-FTA Agreement.



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Panel should take into account impacts of phase out on all affected stakeholders.

A review of the phase out should not be framed as being limited to considering practical considerations arising from a phase out — such as the potential financial impacts on, and opportunities for, the industry. The consultation paper observes that the phase out will impact individuals, businesses and communities that rely on the trade. This is cited as the reason why the current government will not phase out the trade during the current term of government. The paper notes that such an approach will “provide time for individuals and businesses to adapt and prepare” for the phase out.

Considerations around the practical adjustment of the industry are clearly important. However, we were concerned that the current consultation paper and the consultation questions as framed are focused exclusively on such matters. Previous research on animal welfare regulation in Australia has found that animal welfare regulators tend to adopt animal industries’ conception of animal welfare, framing it in instrumental terms, rather than an “end in itself”.¹⁰ Limiting the Panel’s considerations of “how” the phase out should proceed to economic costs and benefits of the various phase out options ignores the ethical and animal welfare dimensions of the phase out. In making its recommendations, it is important that the Panel considers the concern about the trade among the broader Australian community and the impact of various mechanisms on affected animals — who will be profoundly affected by the final decisions.

Impact on Australian community

There was a notable absence of consideration in the consultation paper relating to how the phase out of live export will address the serious concerns about the trade in the broader Australian community. As acknowledged in the paper, there is significant community concern about the treatment of sheep exported by sea and the numerous incidents and subsequent inquiries into the controversial trade.

The Government has made a commitment to cease the live export trade in response to a lack of public support for the trade among the Australian community. As such, decisions and recommendations around “how” the phase out will proceed — which includes questions around commencement of the phase out and conclusion of the trade, and the quotas of animals that are exported during the phase out — should not be framed as merely economic or practical. Having regard to the community’s expectations around the treatment of animals is a critical dimension of considering phase out mechanisms. It should not be overlooked.

¹⁰ Jed Goodfellow, ‘Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis’ (PhD Thesis, Macquarie Law School, 2015) 203.



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Impact on affected animals

We were also concerned about the notable absence of animal welfare considerations in the consultation paper. Governments are beginning to recognise the importance of considering animal welfare in making regulatory decisions. For example, the Animal Sentience Committee, established in 2022, has the role of considering how UK government decisions take account of animal welfare.¹¹ The Victorian government has also recognised that animals' interests need to be taken into account in the making of government decisions.¹² The Victorian Government is proposing a set of principles — that recognise animals are sentient beings — which would need to be considered in the making of decisions that affect animals.¹³ Animal welfare should be a primary consideration for evaluating the merits of the various phase out options.

There are a range of animal welfare problems **inherent** in the live export trade that have led to the decision to phase it out. It is critical to acknowledge that decisions around the phase out mechanism will profoundly impact hundreds of thousands of sentient animals that will continue to suffer throughout the journey. While impacts on businesses are clearly important, it is imperative that the impact of the phase out mechanism on animal welfare is prioritised.

Regulation of live export during phase out should be appropriately resourced and requires additional safeguards.

We note that the 2023-2024 Budget committed:

- \$5m over the next four years (with the first payment of \$1.172m in 2023-2024) to strengthen animal welfare transparency and assurance, complementing the October Budget measure (of \$4m over four years from 2022-2023) to create an Inspector-General of Animal Welfare and Live Animal Exports; and
- \$5.6m over the next two years for the Independent Panel tasked with advising on implementation of the Live Sheep Export Phase out.

We welcome this funding. However, it is to be questioned whether these allocations will be sufficient to address a financial position of the Department of Agriculture, Fisheries and Forestry (**DAFF**) that the Inspector-General of Live Animal Exports (IGLAE) described as “dire” in Review Report No 2023-01 *Communication and engagement in livestock export regulation*. This is particularly the case given the scale of the task:

¹¹ *Animal Welfare (Sentience) Act 2022* (UK)

¹² Victorian Government, *Plan for Victoria's New Animal Care and Protection Laws* (September 2022) <<https://engage.vic.gov.au/new-animal-welfare-act-victoria>>.

¹³ *Ibid*.



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- Review Report No 2023-01 records that of the 41 recommendations made for improvement of DAFF's regulatory practice since 2019, 33 remain open (i.e. only 8 have been implemented); and
- IGLAE found a lack of trust and confidence among animal welfare stakeholders that DAFF is taking appropriate action against non-compliance. IGLAE also reported that there is little counterfactual evidence that the department can provide.

DAFF is unlikely to prioritise expenditure on addressing deficiencies in the regulation of live sheep export by sea in circumstances where the phasing out of that practice has been announced, and there are other calls on its funds. Further, there appears to be a hiatus in IGLAE oversight of live export pending the creation of the new position of Inspector-General of Animal Welfare and Live Animal Exports. The IGLAE website states in this regard that publication of an indicative work program for 2023 has been deferred until after the new appointment has been made.

The above factors place the welfare of sheep pending the ultimate cessation of their live export by sea in particular jeopardy. They make a compelling case for the phasing out period to be as short as possible, and for legislation to be passed during the current term to ensure that that is achieved. Additional safeguards to protect exported sheep — and the integrity of the regulatory regime — during the phase out period should be implemented. For example, it is important to expand the northern summer trade prohibition to the period 1 May to 31 October, inclusive, on the basis of the high risk of severe heat stress for sheep exported during those months. This would be in line with the HSRA model developed by the Heat Stress Risk Assessment Review in 2019.¹⁴

We are available and happy to meet with you or to answer any questions. At first instance please contact [REDACTED]

Yours sincerely

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Lev Bromberg on behalf of **Animal Welfare Lawyers**

¹⁴ <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/biosecurity/export/live-animals/hsra-technical-panel-final-report.pdf>