

26 October 2017

Agricultural Export Legislation Taskforce  
Department of Agriculture and Water Resources  
GPO Box 858  
Canberra City ACT 2601

**RE: Export Control Bill 2017 – Exposure Draft**

Dear Agricultural Export Legislation Taskforce

We write on behalf of the Australian Livestock Exporters' Council (ALEC) and the Australian Livestock Export Corporation (LiveCorp) in regard to the Agricultural Export Legislation Review and to provide comment on the *Export Control Bill 2017*.

ALEC is the peak council for Australia's livestock export industry, responsible for setting industry policy and strategic direction. ALEC is a membership based organisation representing Australian Government licensed livestock exporters of breeder, feeder and slaughter livestock, namely cattle, buffalo, sheep, goats and camels. Our membership also extends to other supply chain participants including producers, registered premise operators, shippers and other suppliers to the trade.

LiveCorp is the industry's Research, Development and Extension (RD&E) and Marketing organisation, funded by statutory levies on exports of beef cattle, sheep and goats and a voluntary levy received for dairy cattle exports. Through its investment of these levies, LiveCorp administers programs to enhance the productivity, sustainability and competitiveness of Australia's livestock export industry by undertaking RD&E and providing technical support to Australian livestock exporters.

ALEC and LiveCorp work closely to ensure that our respective roles and responsibilities best meet the interests of the trade and the needs of our members. Together we have a long history analysing, coordinating and advocating for policy and regulatory change on behalf of the livestock export sector and we welcome all opportunities to contribute to the review and reform of relevant export legislation and regulation.

Australia's livestock export industry is a valuable contributor to Australia's agricultural sector and economically significant to rural and regional areas through the provision of jobs and wealth creation. The industry provides essential market competition that drives livestock prices around the country, influencing farm gate returns for all producers, not just those directly involved in the trade. As of September, Australia has exported 627,412 cattle and 1,281,360 sheep in the 2017 calendar year. Despite this reflecting a 24% and 6% decline year on year respectively, the trade is on the cusp of significant growth opportunities in a number of new markets, with stabilised trade with our existing trading partners in South East Asia and the Middle East.

As I am sure you are well aware, Australia's livestock export industry has undergone a regulatory 'overhaul' since the inception and adoption of the Exporter Supply Chain Assurance System (ESCAS) in 2011, under which animal welfare became a condition of trade. More recently, other reforms include moving to an Approved Arrangements framework, bringing it in line with other export commodities including meat, dairy, eggs and fish exports, as noted in the Bill's associated Regulatory

Impact Statement (RIS). The sector's ongoing state of regulatory 'transition' is reflected in the Department's preliminary work into the drafting of the *Export Control Bill (2017)*; the *2015 Export Regulation Review*, whereby livestock export and cost recovery were specifically out of scope.

As a result of this, and as an industry that is 100 percent reliant on access to export markets, it goes without saying that certainty and predictability of the legislative framework that facilitates trade, is of critical importance to ALEC, LiveCorp and our members. We consider that for regulation to be implemented and to operate efficiently, it requires clarity in legislation, through guidance that defines the objective and scope of the regulator and inform discretionary powers, as well as provides certainty for those being regulated.

ALEC and LiveCorp's short submission has been developed in consideration of the driving principles for consolidating the existing regulatory arrangements highlighted in the Regulation Impact Statement (RIS), specifically, that the *Export Control Bill (2017)* should provide the foundation for a contemporary, flexible and efficient framework that:

- meets the needs of industry and government today and into the future;
- is flexible and enables industry and government to respond to a range of situations to ensure market access is maintained;
- ensures that importing country requirements are met without imposing an unnecessary regulatory burden on users of the system;
- is clear, transparent and easy to understand; and
- provides for a broader range of monitoring, investigation and enforcement powers.

ALEC and LiveCorp welcome the opportunity to comment on the *Export Control Bill (2017)* exposure draft, and have provided this submitted response to highlight concerns relating specifically to; Exporting Goods; Powers of the Secretary and Compliance and Enforcement.

Additionally, while the *Export Control Bill (2017)* prescribes an overarching framework for the industry, substantial regulatory detail will be developed in the Export Control Rules. As such, it is difficult to provide an exhaustive assessment of the potential implications, or unintended consequences for livestock exporters and with this in mind, ALEC and LiveCorp request that the industry be afforded considerable opportunity to comment on the legislative drafting of the Export Control Rules, through which we can consider more operational implications for issues such as;

- Accredited properties;
- Registered Establishments;
- Notice of Intention to Export;
- Audits and Assessment of Goods; and
- Approved Arrangements.

Clarity in legislation is absolutely crucial for effective implementation of regulation. In addition to informing the scope of the regulator and framing the use of discretionary power, it is important in articulating compliance and enforcement policy. However, despite the *Export Control Bill (2017)* being drafted to 'provide a more consistent and clear framework that is responsive to emerging issues', by virtue of the Bill's size (in excess of 400 pages), it unreasonable to expect Australian exporters to effectively understand their complete obligations under the Draft Bill.

Similarly, given the length of the exposure draft, this short submission is unable to identify issues in their entirety or provide a complete assessment of concerns for the livestock export industry, rather it highlights key issues which require further consideration.

ALEC and LiveCorp's specific comments on the Export Control Bill (2017) are detailed below.

### **1. Export of Goods (prohibited goods);**

Part 2 of *Export Control Bill (2017)* sets out the prohibition of goods, including the Minister's powers to temporarily or absolutely prohibit goods from export. As an industry that has experienced firsthand, the significant impact of immediate, prohibited trade at the discretion of the Minister, greater guidance for grounds on which goods can be prohibited (i.e. to protect human, animal or plant life or health) and the inclusion of temporary prohibition in 'emergency' situations in the Bill, is welcomed in principle by the livestock export industry. However, the industry would support the inclusion of greater guidance, trigger points or principles on which significant regulatory outcomes (i.e. the prohibition of export) in the Bill. In assuming that such detail will be included in the Rules once they are developed, this is concerning given that, as explored more broadly below, Rules can be changed by the Departmental Secretary, without parliamentary scrutiny.

### **2. Powers and Officials (Powers of the Secretary);**

In public submissions to the Productivity Commission's Review of Agricultural Regulation in 2016, both ALEC and LiveCorp expressed concern about extensive discretionary powers afforded to the livestock export industry's regulator, highlighting that *'broad discretionary powers, and the absence of reasonable limits or sufficient guidance creates fundamental and wide reaching problems for regulatory oversight and action'*.

Further, as the public has matured its views around animal welfare over the last decade, the way in which the livestock export industry operates and conducts itself, is under enormous public and political scrutiny. The effect of broad discretionary powers within such a socially sensitive industry, places pressure on the regulator to opt for an unnecessary and inappropriate level of control or oversight of the industry.

Under the *Export Control Bill (2017)*, the discretionary powers of the Departmental Secretary are significantly extended, affording the Secretary power to make assessment and take certain substantive action, including the power to;

- Delegate powers or functions;
- Make rules;
- Apply conditions on export licences, permits and approvals;
- Vary, suspend or revoke an export licence; and
- Publish show cause notice.

An example of how the *Export Control Bill (2017)* provides the Secretary with, what we consider to be, overly broad discretionary powers, includes the power to make Rules by legislative instrument under *section 426 (1)* of the Bill (upon direction of the Minister). Although we suspect that the reason for this is to provide flexibility to react to changed circumstances, while allowing for the Rules to be subsequently disallowed by Parliamentary scrutiny if found inappropriate, the Bill does not

outline any appropriate limits to the Secretary's discretion, to ensure that the legislative framework is practical and achievable for exporters.

Further, the ability to implement Rules without constraint encourages 'regulatory creep'.

ALEC and LiveCorp have previously expressed serious concern about regulatory creep within the livestock export industry, particularly in the context of the regulator's risk appetite or lack thereof. The ability to create Rules based on Secretarial risk appetite, which may be overly sensitive to political and social factors, has the ability to result in regulatory uncertainty, disproportionate punitive direct costs or may inadvertently introduce technical barriers to trade. As stated above, the regulatory environment must be both stable and predictable for exporters, as the effect of the contrary, has a serious detrimental impact on the economic viability of an export company.

Another example of an area in which the Secretary has significantly broad powers under the *Export Control Bill (2017)*, includes the power to vary, suspend and revoke export licenses under *sections 202, 206 and 213* respectively. Despite being afforded this power, the Bill fails to incorporate license protections, or prescribe or limit the nature of conditions that trigger that power, including to reflect the seriousness of an alleged incident. Additionally, under *sections 206 and 213*, the Department has the ability to suspend or revoke an export license on the grounds that circumstances are 'serious and urgent', without including any detail or guidance on what constitutes 'serious and urgent'.

In such circumstances, the Secretary is not even required to provide notice to an exporter, therefore denying them an opportunity to provide reasons for why a license should not be suspended or revoked. Given the severity of such decision making on the business of a livestock exporter, including both financial and reputational implications, the Bill should include procedural fairness requirements, as applicable to circumstances that are not considered to be 'serious and urgent'.

With regard to procedural fairness issues and requirements more generally, ALEC and LiveCorp also have concerns relating to *section 369* of the *Export Control Bill (2017)*, whereby the Secretary has the power to publish the name of the person subject to a show cause notice and any information stated in that notice, and that the Secretary is not required to provide reasons for this decision. The Bill must at least require the Secretary to provide clear and detailed reasons for doing so and afford exporters the opportunity to argue against or respond to the publication of this information and allow for an opportunity for review.

It is important to note that neither ALEC nor LiveCorp are advocating that all level of discretion in decision making be revoked. We understandably recognise the importance of flexibility in a regulatory framework and the challenges of operating within a strict or overly prescriptive legislative environment. However, we firmly believe that the afforded flexibility through discretionary powers, should not come at a cost of regulatory certainty or predictability, particularly for matters which are core to an exporter business, such as conditions on an export license. Naturally, discretionary powers must be balanced in accordance with administrative law principles of due process and natural justice.

To this effect, the Draft Bill must provide sufficient mechanisms or safeguards relating to the extensive discretionary powers afforded to the Departmental Secretary, particularly for industries such as the livestock export industry which is subject to highly emotive, societal influence. Such

mechanisms must protect industries against oversensitivity to outside factors, and support predictability and proportionality in regulation.

### 3. Compliance and enforcement:

A key concern and challenge for livestock exporters since the adoption of the Exporter Supply Chain Assurance System (ESCAS), has been a distinct lack of clear regulation or policy relating to non-compliance. As a result, livestock exporters have been faced with an inconsistent and unpredictable non-compliance framework and disproportionate regulatory action to incidences of non-compliance. As such, the livestock export industry has previously called for greater clarity around the management of non-compliance, including a broader range of potential penalties that are fair and proportionate to the nature of the incident.

Under the *Export Control Bill (2017)*, the industry regulator will have access to greater compliance and enforcement powers than is currently available, the intent of which, as we understand it, is to provide greater proportionality to regulatory decision making. Additionally, the Bill includes a broader range of penalties for non-compliance, including criminal and civil penalties, infringement notices, enforceable undertakings, injunctions and administrative sanctions (i.e. suspension or revocation). While the inclusion of additional powers and the provision of a more graduated enforcement regime is welcomed in principle by the livestock export industry, the Bill fails to articulate any guidance, either to the exporter or to the Secretary, as to when it is appropriate to use specific powers.

By way of example, if a livestock exporter with an Approved Arrangement fails to notify the Secretary of a basic change (i.e. change to business address) under *section 186 (1)*, under the current *Export Control Bill (2017)*, that exporter may be exposed to several penalties ranging from a civil penalty, to no enforcement action at all. The Bill should include clear thresholds that must be met to trigger the availability of different levels of possible sanction and guidance as to the circumstances under which compliance and enforcement powers are used, based on factors that reflect the seriousness of the non-compliance.

In the Bill's current form, several offences are broad and do not clearly specify between severe and minor issues of non-compliance and in addition, the current Bill seems to have increased penalties relative to that included under the current regime. As a result, a lack of clarification between penalties based on the severity of an incident technically means that extreme penalties may be applied to relatively minor, administrative issues.

It is important that the *Export Control Bill (2017)* includes a proportionate, achievable and predictable enforcement and compliance framework.

### 4. Fit and Proper Person Test

ALEC and LiveCorp note that key to the *Export Control Bill (2017)*, is that multiple character tests across various pieces of legislation have been incorporated into a single character test of a 'fit and proper person', specifically that it replaces the current 'person of integrity test' and the 'competent to hold the license' arrangement under the *Australian Meat and Livestock Industry Act 1997*. While ALEC and LiveCorp welcome the removal of duplication and have regularly called for greater efficiency and coordination in regulation, it is important to just note the prescriptive nature of the

new test, comparative to the current regime. This includes extending the required test to the assessment of 'associates', which by definition under *section 13*, extends to distant relatives and body corporates for example. While this is not an issues specifically relating to the livestock export industry, it should be considered whether or not exporters should be held accountable for actions over which they have no control or that have no significant connection to an exporter's business.

In consideration of the above, ALEC and LiveCorp support absolute clarity in legislation, through more guidance for, in particular, the effective use of discretionary power and decision making and a procedural framework for non-compliance penalties and enforcement. We consider that this clarity will provide greater certainty for livestock exporters as regulated parties, as well as more clearly defining the scope and the objective of the regulator.

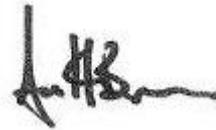
As mentioned, ALEC and LiveCorp welcome the opportunity for substantive consultation and to provide comment on the drafting of the Export Control Rules in due course. Additionally, we will continue to consider the *Export Control Bill (2017)* exposure draft and should any further issues arise, will provide a supplementary submission to the Department's review taskforce.

Please do not hesitate to contact either ALEC or LiveCorp with regard to this submission.

Yours sincerely,



**Mr Simon Westaway**  
**Chief Executive Officer**  
**Australian Livestock Exporters' Council**



**Mr Sam Brown**  
**Chief Executive Officer**  
**Australian Livestock Export Corporation**