

The live export crisis and Australia's extraterritorial lawmaking

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Abstract

In the wake of the live animal export crisis, the Australian government has imposed a new framework on live animal exporters which mandates compliance with Australian standards of animal treatment. These standards apply domestically, during transport and disembarkation and up to the point of slaughter in overseas jurisdictions. This paper will argue that in enacting this regulatory framework, Australia has engaged in extraterritorial lawmaking, despite its assertions that it is merely regulating domestic affairs. However, it will be contended that this extraterritorial lawmaking may actually be valid according to principles of international law. Nonetheless, it is clearly undesirable that such standards be imposed without full disclosure of their fundamental extraterritorial nature.

Keywords

extraterritorial jurisdiction, extraterritorial lawmaking, international law, live export, live export crisis

Introduction

Australia is the world's largest exporter of livestock, being the largest live sheep exporter and the third largest cattle exporter internationally.¹ Australia currently exports live sheep to 25 countries and feeder cattle² to 24 countries, predominately in the Middle East and Pacific regions.³ The live export industry contributes \$1.8 billion to the Australian GDP annually and employs an estimated 13,000 workers.⁴ As such, Australia is heavily reliant on the live export market to support northern Australian farming industries and employment. However, in recent times this market has continually come under significant public scrutiny in relation to the treatment of livestock exported from Australian shores.

This article will address the Australian government's response to the recent public criticism of the live export trade. Essentially, the government has imposed a framework of regulations which exporters must follow. These regulations determine and monitor animal treatment standards from the point of loading to the point of slaughter at overseas abattoirs. The potential of such a system to infringe upon the sovereignty and jurisdiction of the importer countries was recognised in the recent Independent Review of the Live Export Trade ('The Farmer Review').⁵ Significantly, a key finding of the Farmer Review was that there is "a need for awareness, and appropriate handling, of sensitivity in some overseas

¹ Bill Farmer (AO), as commissioned by the Commonwealth of Australia, *Independent Review of the Live Export Trade* (2011) x.

² 'Feeder cattle' refers to cattle whose export purpose is for consumption rather than breeding or other uses.

³ Department of Agriculture, Fisheries and Forestry, *Cattle and sheep export destinations* (2012) <http://www.daff.gov.au/animal-plant-health/welfare/export-trade/cattle_and_sheep_export_destinations> at 12 May 2012.

⁴ Hassall Associates Australia, *The Live Export Industry: Value, Outlook and Contribution to the Economy* (2006) <<http://www.mla.com.au/Research-and-development/Final-report-details?projectid=12726>> at 24 April 2012.

⁵ Farmer, above n 1.

countries about the perception that Australia may be seeking to regulate extraterritorially.”⁶

In assessing such issues, the central arguments of this paper will be:

1. that in enacting the new live export framework, Australia has engaged in extraterritorial lawmaking, despite its claims that it is merely regulating domestic affairs; however
2. that this extraterritorial exercise of power may actually be valid according to principles of jurisdiction at international law; and should be recognised as such to promote the development of international norms and enforcement

Following this opening discussion, the second part of this paper will discuss the background of the live export crisis and the development of its new regulatory regime. The third part will enter into a discussion on the exercise of extraterritorial jurisdiction and will assess whether the current Australian live export framework is in fact an example of extraterritorial lawmaking. The fourth part will assess whether the extraterritorial nature of the Australian live export regulations are acceptable according to the established principles of international law, before concluding by stating that in this case, the most appropriate course of action would be for the Australian government to organise, negotiate and enter binding international agreements in relation to the treatment of animals in live export.

It should be noted from the outset that trade law issues pertaining to international trade requirements are outside the scope of this paper and will require further additional investigation in the future.⁷

⁶ Farmer, above n 1, 71.

⁷ Indeed, Australia is bound by the obligations imposed by the World Trade Organisation’s (‘WTO’) General Agreement on Tariffs and Trade, which prevents a country from discriminating between foreign nations when importing or exporting goods. At the present time, the WTO does not recognise animal welfare as a legitimate basis on which to impose trading restrictions. Therefore, the implementation of Australia’s restrictions on importing to countries on the basis of animal welfare arrangements may in fact contravene the international WTO Agreement.

Ethical considerations

Live animal export is of course, an industry which touches at the heart of a number of ethical issues. This paper recognises the strength of the beliefs of many animal rights organisations, and indeed a number of the general Australian population, in claiming that live animal export is an industry which has resulted in unnecessary animal cruelty on a number of past occasions.⁸ New recognition of the concept of animals as sentient beings with rights has triggered the development of the new field of animal law, both in Australia and overseas,⁹ and led to significant discussion on the morality of continuing trade in live export.¹⁰ However, it is also considered that the rights of Australian beef producers must be taken into account in assessing the continuation of this industry. Indeed, the dependence of Australian farmers in the 'Top-End' on live export and their vast economic contribution in turn to our country's development cannot be ignored.¹¹

If this issue was to be rendered to a simplistic antagonism between animal rights and welfare considerations as opposed to the economic rights of a person to safeguard their interests, as well as food production in a time where sustainable food supply to third world countries is becoming an increasingly important issue, it is clear that it is those human rights that the law has historically preferred and currently protects. Indeed, as will be discussed in this paper, a number of Australia's export partners in this industry are partly or wholly dependent on Australian live export as a sustainable and secure food supply for their

⁸ Dr Bidda Jones, RSPCA Australia, 'The slaughter of Australian animals in Indonesia: an observational study' (2011) 31; See generally Graeme McEwen, *Animal Law: Principles and Frontiers* (1st ed, 2011).

⁹ Briana Everett, 'Animal law movement gains momentum' (2011) 547 *Lawyer's Weekly* 14.

¹⁰ See generally, Laura Morfuni, 'Pain for profit: an analysis of the live export trade' (2011) 16 *Deakin Law Review* 457.

¹¹ Jessica Blachett and Bruno Zeller, 'No winners in the suspension of the livestock trade with Indonesia' (2012) 14 *University of Notre Dame Australia Law Review*, 55.

growing populations. Furthermore, in many cases, the voices of the Australian public and activists are louder than other parties whose positions should also be considered in analysing the ethics of the trade, such as overseas consumers, and are further complicated by the involvement of the media.¹²

It is for this reason that the Australian government has attempted to render the industry an acceptable one to all parties by imposing its own animal treatment standards on importer countries in order to ensure continuation of the trade. However, as will be seen, it would be better served to do so on a more overt level in order both to promote new international norms and even customary law in relation to international animal treatment, as well as creating proper avenues for international enforcement.

Methodology

Both the first and second parts of the paper attempt to provide clarity on the current plethora of regulations pertaining to the operation of live animal export, as well as current scholarly opinion on the legality of extraterritorial jurisdiction at international law and its applicability in this case. These parts therefore utilise the doctrinal method in order to adequately achieve such aims, including intensive data collection through primary examination of orders, statutes, regulations, official review publications and direct contact with relevant ministerial spokespersons.

The final part of this paper turns to a normative study of the current Australian live export regulations in an attempt to evaluate their quality. The opinions of international legal scholars were assessed in relation to their ability to justify extraterritorial lawmaking in this

¹² CJC Phillips, 'Ethical perspectives of the Australian live export trade' (2005) 83(9) *Australian Veterinary Journal*, 561.

matter. Internationally accepted standards and criteria such as those established by the World Organisation for Animal Health and the CSIRO were used as comparators in an attempt to assess whether the current Australian regulations are desirable accordingly to international standards, and whether there may be more appropriate alternative methods of achieving the legislation's aims.

The Australian live export regulatory regime

Background

On 30 May 2011 the Australian television program, *Four Corners*, aired the report 'A Bloody Business'.¹³ This television report was an exposé of the current practices of cattle slaughter in Indonesian abattoirs. The cattle shown on the footage were confirmed to have been exported from Australia.¹⁴ The footage in this program was extremely confronting to the large majority of viewers. It depicted Indonesian abattoir workers performing cruel and painful acts on livestock imported from Australia.¹⁵ Examples included the dragging of crippled animals towards slaughter sections and images of livestock which remained sentient after throat cutting and were left to bleed to death. There were also cases of hitting, eye gouging and general abuse of the livestock imported from Australia. This footage was received to public outcry and provoked widespread condemnation of the shown slaughter practices.¹⁶

¹³ Australian Broadcasting Corporation, 'A Bloody Business', *Four Corners*, 30 May 2011 (Sarah Ferguson and Michael Doyle).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See Animals Australia, *Live Export: Indefensible* (2011) <<http://liveexport-indefensible.com/>> at 5 June 2012.

In response, without warning to farmers or exporters, the Australian Minister for Agriculture, Fisheries and Forestry immediately suspended all live export to Indonesia.¹⁷ Mr Bill Farmer AO, a former Australian ambassador to Indonesia, was commissioned to conduct an independent review of the live export market and its current practices.¹⁸

As well as demanding a review as to what constitutes appropriate animal treatment, this action should also provoke a discussion as to whether the Australian government has the legal right to modify and regulate the behaviour of foreign nationals overseas in light of traditional international law principles relating to state sovereignty.

Previous practices

The impetus for change in this case cast for some a sense of déjà vu. In August 2003 a shipment of 57,397 live sheep departed from Fremantle on The Cormo Express, destined for Saudi Arabia. However, upon arriving in Saudi Arabian waters the shipment was not permitted to disembark by government officials due to concerns that the sheep were diseased (an erroneous claim).¹⁹ Negotiations between the Australian government, the Saudi Arabian government and neighbouring countries stalled for over 80 days, until the

¹⁷ Minister for Agriculture, Fisheries and Forestry, 'Minister suspends live cattle trade to Indonesia' (Press Release, 8 June 2011)

<http://www.maff.gov.au/media_office/media_releases/media_releases/2011/june/minister-suspends-live-cattle-trade-to-indonesia> at 1 June 2012; see also Australian Broadcasting Corporation, 'Live export ban hits 11 Indonesian abattoirs' *Lateline*, 31 May 2011 (Karen Barlow).

¹⁸ Minister for Agriculture, Fisheries and Forestry, 'Mr Bill Farmer AO to conduct independent review into live export trade' (Press Release, 13 June 2011)

<http://www.maff.gov.au/media_office/media_releases/media_releases/2011/june/mr-bill-farmer-ao-to-conduct-independent-review-into-live-export-trade> at 28 May 2012.

¹⁹ John Keniry et al as commissioned by the Department of Agriculture, Fisheries and Forestry, *Live Export Review* (2003) 29; Orietta Guerra, 'Cormo Express delayed in Kuwait', *The Age* (Melbourne), 7 October 2003, <<http://www.theage.com.au/articles/2003/10/06/1065292529144.html?from=storyrhs>> at 22 March 2012; Grattan, Michelle, 'Sheep onboard a national shame' *The Age* (Melbourne), 24 September 2003 <<http://www.theage.com.au/articles/2003/09/23/1064082991895.html>> at 1 June 2012 .

Eritrean government agreed to unload the cargo.²⁰ During this time, 5,691 of the ship's live cargo had perished.²¹

In this case, it was the media that provoked public interest and condemnation, through the airing of footage of the ship stalled in international waters by the television program *60 Minutes*.²² The consequent public outcry gave momentum to the commissioning of an independent report into the live export industry, the 'Keniry Review'.²³ This review prompted the Commonwealth government to establish a new code for exporting under the Export Control Animals) Order 2004,²⁴ which mandated the use of Consignment Risk Management Plans ('CRMPs') and obligations to meet the new Australian Standards for the Export of Livestock ('ASEL'). This involved taking responsibility for the granting of export licences as well as working to promote greater international understanding of the need for the health and safety of exported livestock to be protected where possible.²⁵

Significantly, the ASEL was noted in a government department-sponsored conference to relate to the point of "planning the consignment" to "disembarkation", where "the Australian Government's jurisdiction over the animals ceases when disembarkation is complete."²⁶ Following this point in time, it was recognised that "after disembarkation, the health and welfare of the livestock is the responsibility of the importer, under the authority of the importing country."²⁷

²⁰ Minister for Foreign Affairs and Minister for Trade, 'Eritrea takes Australian sheep' (Press Release, 24 October 2003) <http://www.foreignminister.gov.au/releases/2003/joint_eritrea_sheep.html> at 28 May 2012.

²¹ Keniry, above n 19, 29.

²² Channel 9, 'Ship of Shame', *60 Minutes*, 21 September 2003 (Richard Carleton).

²³ Keniry, above n 19.

²⁴ Made under the *Export Control (Orders) Regulations 1982* (Cth).

²⁵ Keniry, above n 19, 6 (Recommendations 1-10).

²⁶ Peter Thornber, 'Livestock Export Standards' (Paper presented to the AAWS International Animal Welfare Conference, Gold Coast, 3 September 2008).

²⁷ *Ibid*, 5 (Figure 1).

Indeed, most international instruments relating to animal welfare in live export up until the most recent framework were preoccupied with ensuring that disembarkation in cases of disease outbreak would be guaranteed. To this end, Australia has signed Memorandums of Understanding ('MoU') with 10 Middle East and African countries which seek to guarantee that shipments of Australian livestock will be discharged upon reaching the importing country, and that parties will comply with World Organisation for Animal Health ('OIE') obligations as such.²⁸ These arrangements however are not formally binding and lack any type of enforcement mechanisms.

Essentially, following the *Cormo Express* incident and the Keniry Review and up until the most recent amendments, the Australian government had only sought to enforce animal welfare standards from the point of departure to the point of disembarkation.²⁹ This is because jurisdictional authority was accepted to have ended at the point of disembarkation: after this point the livestock were taken to be subject to the importing countries' territorial jurisdiction.

The Indonesian arrangement

After the airing of the Four Corners program in May 2011, the Australian government suspended live export to Indonesia on 7 June 2011.³⁰ This action "created concern in a number of countries, especially in countries highly dependent on Australian livestock

²⁸ Farmer, above n 1, 77.

²⁹ There was however one MoU with Egypt regarding post arrival welfare of livestock in response to a similar episode of animal mistreatment, however this was a unique international agreement and was the exception rather than the norm: see *Australian Meat and Live-stock Industry (Export of Live-stock to Egypt) Order 2008* (Cth).

³⁰ Department of Agriculture, Fisheries and Forestry, *Australian government response to mistreatment of Australian cattle in Indonesia abattoirs* (2011) <<http://www.daff.gov.au/animal-plant-health/welfare/export-trade/gov-response-to-cattle-mistreatment-in-indonesia>> at 13 May 2012.

exports, about the reliability of Australia as a supplier".³¹ Furthermore, it significantly impacted on the domestic economy and on farming viability in northern Australia. During the one month ban it was estimated that around 300 employees lost their jobs across Australia's 'Top End'.³² However the move was welcomed in Australia by animal rights activists and indeed, much of the wider public.³³ This reflects the core ethical issue within the live export debate itself: the conflict of interests between farmers and exporters and public animal rights groups.

Live trade with Indonesia was reopened after the government enacted the Australia Meat and Livestock Industry Order 2011³⁴ which allowed trade to resume where there was an "assurance that animal welfare outcomes would be met during transport, handling, slaughter and related operations".³⁵

The Farmer Review

After the live export crisis and the lifting of the one month ban on live exports to Indonesia, the Independent Review of Australia's Livestock Export Trade (the 'Farmer Review') was released on 31 August 2011.³⁶

The Farmer Review was designed to assist the Australian Government to "establish new safeguards which provide verifiable and transparent supply chain assurance up to and

³¹ Farmer, above n 1, xii.

³² Australian Broadcasting Commission, 'Live cattle industry in line for compensation', *7:30 Report*, 14 May 2012 (Hayden Cooper).

³³ RSPCA, 'RSPCA, Animals Australia, GetUp Websites Crash Under Huge Demand in Live Export Campaign' (Press Release, 31 May 2011) <<http://www.rspca.org.au/news/rspca,-animals-australia,-getup-websites-crash-under-huge-demand-in-live-export-campaign.html>> at 13 May 2012.

³⁴ *Australia Meat and Livestock Industry (Export of Livestock to the Republic of Indonesia) Order 2011 (No.2)* (Cth).

³⁵ Explanatory Memorandum, *Australia Meat and Livestock Industry (Export of Livestock to the Republic of Indonesia Repeal) Order 2012* (Cth).

³⁶ Independent Review into Live Export Trade, 'Independent Review Released' (Press Release, 21 October 2011) <<http://www.livestockexportreview.gov.au/>> at 1 June 2012.

including the point of slaughter for every livestock consignment that leaves Australia.”³⁷

Already, this was a marked difference from the Keniry Review, which sought only to address animal welfare up until the point of disembarkation.

The Farmer Review made 11 recommendations relating to the establishment of enforceable standards of animal welfare standards,³⁸ noting that:

The primary difficulty is that the Australian Government cannot exert legal jurisdiction in a foreign country, and specifically cannot regulate on matters of overseas compliance and enforcement... foreign governments would have sovereignty and other concerns with a move by Australia which purported to extend Australian jurisdiction overseas.³⁹

Essentially, the Farmer Review found that Australia could not seek to impose its standards of animal welfare upon importer countries, but rather should implement an Indonesia-style arrangement across all trading partners. It proposed that any other regulation would be seen as a potential exercise of extraterritorial jurisdiction which would impose upon state sovereignty.

Perhaps at this point it may be claimed that the Farmer Review ought to also have considered a recommendation that Australia instigate the development of a binding international treaty to support animal welfare standards during live export.

The current regulatory regime

As of 1 March 2012, the new live export regulatory regime as modelled on the Farmer Review came into force, and has been fully applicable to all live animal trading partners since 1 January 2013.

³⁷ Farmer, above n 1, x.

³⁸ Farmer, above n 1, xxiii-xxvii.

³⁹ Farmer, above n 1, 47.

The new regime⁴⁰ requires exporters to demonstrate that they have in place an Exporter Supply Chain Assurance System ('ESCAS') which delivers animal welfare standards equivalent to or above those recorded by the World Organisation for Animal Health (OIE). This includes control of animals to the point of slaughter, tracking of animals to the point of slaughter and independent auditing and reporting⁴¹

This includes animal handling at the ports, handling by animal transport drivers to the abattoir, and both treatment and the method of killing by abattoir workers. Therefore, the effect of the current Australian regulatory regime extends past domestic exporters and has the consequence of regulating the behaviour of foreign nationals at international abattoirs. Indeed, it may be found that this system extends well past the point where "the Australian Government's jurisdiction over the animals ceases when disembarkation is complete"⁴² and no longer treads carefully around the importing country's jurisdiction after this point.

The underlying aim of the current framework is to regulate conditions of slaughter of Australian animals overseas and to ensure animal handling is at an acceptable international standard. Despite such aims however, it is domestic exporters who face penalties if such standards are not maintained. There is no available enforcement mechanism under these new regulations for the offending foreign national who breaches the provisions. This is a fundamental flaw of the new regime.

⁴⁰ Formed by the Export Control (Animals) Amendment Order 2012 (Cth) and the Export Control (Animals) Order 2004 (Cth).

⁴¹ Explanatory Memorandum, Export Control (Animals) Amendment Order 2012 (Cth), 2.

⁴² Peter Thornber, above n 26, 1.

However, if the current regime is in fact an example of extraterritorial lawmaking which could be overtly exerted and justified under extraterritorial jurisdiction, the avenues for enforcement would be considerably greater.

Is this extraterritorial lawmaking?

Extraterritorial lawmaking and jurisdictional issues

Extraterritorial lawmaking may be defined as the regulation at law of foreign conduct outside a state's legal territory.⁴³ Historically, such lawmaking was not favoured and was regarded as controversial in the scheme of basic international law principles of state sovereignty. However, due to the increase of corporations and individuals in the globalised age continually crossing such boundaries, there has been recognition at international law of the need for and validity of such action.⁴⁴

Jurisdiction however is essentially a manifestation of state sovereignty and the ability to exercise a lawmaking function.⁴⁵ Extraterritorial jurisdiction is therefore seen to be exercised where an act taking place abroad will be an offence or prohibited by another jurisdictional power outside their traditional sovereign zone.⁴⁶ Whether this conflicts with the state sovereignty of the state in which such jurisdiction is exercised will often be dependent on whether either prescriptive or enforcement jurisdiction has been exerted (i.e., whether a state is merely prescribing that its laws apply outside its borders, or whether it is actively seeking enforcement for such laws), and whether such an action is taken in

⁴³ Austen Parrish, 'Evading Legislative Jurisdiction' (Paper presented at the Annual Meeting of the American Society of International Law, Washington, 23-26 March 2011).

⁴⁴ International Bar Association, *Report on the Task Force of Extraterritorial Jurisdiction* (2009) 5.

⁴⁵ Gillian Triggs, *International Law: Contemporary Practices and Principles* (2006) 344.

⁴⁶ Martin Dixon, *Textbook on International Law* (2007, 6th ed) 147.

relation to criminal or civil laws.⁴⁷ Valid exertion of extraterritorial jurisdiction will exist where it is the right of a state at international law to legislate and exert power outside its traditional territorial zone; generally where it falls under an established basis for jurisdiction, which will be discussed later in this paper.

Extraterritorial jurisdiction in the live export regime

In this case of live export, Australia is seeking to regulate the conduct of foreign nationals in foreign territory through use of domestic regulation. This amounts to an exertion of prescriptive extraterritorial jurisdiction.

The fact that the effect of the Australian regulation is to mandate the behaviour of foreign nationals in a foreign territory is indicative of the use of extraterritorial jurisdiction. In this case, a large number of Middle Eastern and Asian states rely on Australian live export for their food supply and security.⁴⁸ As a result, the survival of abattoirs, livestock transportation companies and workers in these areas are dependent on the continuance of the Australian live export trade. Given the dependence of these companies and persons on the live export trade, it is inevitable that they will be forced to comply with Australian regulations or risk losing their livelihoods. Therefore, Australia has effectively regulated the conduct of foreign nationals, companies and government officials through the implementation of its live export regime.

By mandating certain standards of animal treatment overseas and placing positive obligations on exporters as such, Australia is forcing overseas jurisdictions to comply with

⁴⁷For further information on this point, see e.g., Ian Brownlie, *Principles of Public International Law* (7th ed, 2008) ; Triggs, above n 45, 344; Roger O'Keefe, 'Universal jurisdiction: clarifying the basic concept' (2004); Vaughan Lowe, 'Jurisdiction' in *International Law* (2nd ed, 2006) 346. *Journal of International Criminal Justice*, etc.

⁴⁸Farmer Review, above n 1, xii.

domestic regulations in order to access the trading market. This amounts to an exertion of prescriptive extraterritorial jurisdiction.

However, it is clear that the Australian government has not sought to claim its actions amount to an exercise of prescriptive extraterritorial jurisdiction. Clearly, Australia does not want to harm its trading relationship with importer countries given the size of our live export industry. Indeed, civil extraterritorial jurisdiction is not widely advocated by many states, particularly where it may impede on state sovereignty, as it does in this case by forcing overseas abattoirs, workers and officials to comply with Australian standards of animal treatment.

The need for extraterritorial jurisdiction in the case of live export: ethical considerations in animal welfare

Essentially, the need for extraterritorial jurisdiction in the case of live export stems from the desire of the Australian government to project its animal welfare standards onto its trading partners, a problematic goal given the fundamental differences in welfare standards adhered to by Australia and its importer countries. This may essentially be seen as an ethical stance, powered by the interest in the proper treatment of animals by the loudest voices in the Australian general public, including animal activist groups such as 'Animals Australia',⁴⁹ as well as the RSPCA and its publications on the subject.⁵⁰

All countries importing Australian livestock are members of the World Organisation for Animal Health (OIE) and its' *Terrestrial Animal Health Code*.⁵¹ However, the practical

⁴⁹ See the website www.banliveexport.com

⁵⁰ See, e.g, Dr Bidda Jones, RSPCA Australia, 'The slaughter of Australian animals in Indonesia: an observational study' (2011).

⁵¹ World Organisation for Animal Health (OIE), *Terrestrial Animal Health Code* (2010).

standards of animal treatment in Australia and importer countries vary quite substantially in many circumstances, leading to the issues at hand.

In Australia, each state has enacted legislation preventing and punishing cruelty to animals, such as the *Prevention of Cruelty to Animals Act 1979* (NSW) as well as providing for compulsory stunning prior to slaughter.⁵² There is also a Model Code in Australia⁵³ which provides regulatory guidelines for animal slaughter. The focus of these practices is on animal welfare, such as reducing stress prior to slaughter in holding yards, access to water and stunning restraints to reduce animal injury.⁵⁴

Many importer states have also enacted animal welfare standards into their legislation, such as Indonesia's *Farm and Animal Welfare Law 2010* and the Egyptian *Decree of the Minister for Agriculture (No 27) (1967)* which provides provisions regarding animal slaughter, including the prohibition on the torture of animals and the prohibition on the use of hitting animals on the head or cutting tendons prior to slaughter. Other similar decrees require compliance with precautions in the transportation of animals to slaughter houses.⁵⁵ However, the failure of countries such as Indonesia to maintain both their domestic and OIE standards stems from their lack of supporting regulations and enforcement mechanisms.⁵⁶

As the international standards mirror largely the Australian welfare standards however (with the exception of stunning, which is a religious consideration outside the

⁵² CSIRO, *Australia Standard for the Hygienic Production and Transportation of Meat and Meat Products for Human Consumption* (2007) FRSC Technical Report No 3, 21.

⁵³ Primary Industries Standing Committee and CSIRO, *Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering Establishments* (2001) SCARM Report 79.

⁵⁴ *Ibid*, 8.

⁵⁵ Including *Decree of the Minister of Agriculture (No 45) (1967)*; see World Organisation for Animal Health (OIE), 'Global perspectives: the Middle East' (2005) 24 *Scientific and Technical Review* 591.

⁵⁶ See comments of Indonesian Ministry official Prabowo Respatiyo Caturroso in Peter Alford, 'Indonesian slaughter laws can't stop animal torture', *The Australian* (Melbourne) 2 June 2011 <<http://www.theaustralian.com.au/national-affairs/indonesian-slaughter-laws-cant-stop-abattoir-torture/story-fn59niix-1226067530577>> at 17 May 2012.

present scope of the framework, though perhaps this will be re-addressed in the future), it is clear that the new regulatory regime seeks to both impose international standards and Australian standards of animal welfare on importer countries. As found above, this is therefore a case of prescriptive extraterritorial lawmaking.

Conclusions on extraterritorial lawmaking in the case of live export

The argument that Australia is engaging in extraterritorial lawmaking in respect of the standard of treatment of Australian animals overseas is derived from the extensive implications of its current regulatory regime. This includes the imposition of its animal welfare standards on overseas regulators, officials and abattoir workers.

In this case, the Australian government has placed conditions on exporters of live animals not only in relation to the loading, transportation and unloading of livestock, but also to the extent that exporters mandate and arrange with importer countries that the treatment of such livestock is subject to OIE standards. This has the effect of impacting on the behaviour and activities of foreign nationals, more so than the domestic exporters. This amounts to the imposition of extraterritorial lawmaking on importer countries, as it seeks to regulate foreign national activity in a foreign country: specifically, the manner in which overseas government officials supervise the unloading and transportation of livestock, the manner in which livestock are treated during transportation to abattoirs and the treatment given to livestock by abattoirs up to the point of slaughter.

It is clear that at the present time, Australia is attempting to subtly influence international attitudes and practices through a covert form of extraterritorial lawmaking. However, a more open approach to its regulation and an assertion of extraterritorial

jurisdiction would undoubtedly lead to more rapid discussions and developments in the area. A greater momentum and open recognition of the current attempt to impose Australian standards of animal welfare during live export would contribute to the development of state norms and potentially customary international law. In order for Australia to openly acknowledge the effects of its current regulation, however, it must first be determined whether its extraterritorial jurisdiction would be valid according to principles of international law.

Is this extraterritorial lawmaking valid?

Is Australia's extraterritorial lawmaking valid in light of international legal principles of extraterritorial jurisdiction?

As it has been established, Australia may be found to have engaged in extraterritorial lawmaking on the issue of animal treatment during live export through its new regulatory framework. We may now seek to determine whether this assertion of extraterritorial jurisdiction is valid according to international law.

Scholars such as Brownlie and Lowe have established that the exercise of extraterritorial jurisdiction is "permitted only where there is a nexus between the state seeking to assert jurisdiction and the regulated persons or conduct falling within one of the established bases of jurisdiction".⁵⁷ As such, the established bases for jurisdiction, as seen below, should be consulted in order to determine whether Australia's extraterritorial lawmaking could be justified as a valid use of extraterritorial jurisdiction.

⁵⁷ Lowe, above n 47, 346.

Territorial jurisdiction

The territorial jurisdiction relates to the principle that a state has jurisdiction over all matters arising in its territory. This was expounded in the Lockerbie Case, where Scotland claimed jurisdiction over the prosecution of Libyan nationals who hijacked a plane which crashed in Scottish territory.⁵⁸ The exercise of territorial jurisdiction is usually recognised where an act or offence takes place in a state's territorial zone.⁵⁹

This basis of jurisdiction would indicate that Australia generally cannot prescribe or enforce its standards of animal treatment internationally. It could be argued however that as the animals commence the export process in Australia, territorial jurisdiction could be invoked to argue that such lawmaking is valid. This would be reminiscent of the subjective territorial jurisdiction. However, this generally arises only in the criminal context as has not adequately been tested in relation to civil matters at this point.

Nationality jurisdiction

Nationality jurisdiction is the right of a state to regulate and enforce its law on its citizens and in some cases, permanent residents, even where they are currently residing outside the state's territory. While traditionally, states may have been reluctant to prosecute their nationals for conduct overseas, preferring to leave such prosecution to the territorial state,⁶⁰ new international obligations and trends have seen states increasingly utilising the nationality jurisdiction in cases of slavery, sex trafficking and child pornography committed overseas.

⁵⁸ *Libyan Arab Jamahiriya v United Kingdom and United States* (1992) ICJ Rep 22 ('Lockerbie Case').

⁵⁹ Dixon, above n 46, 147.

⁶⁰ See, eg, *Ronald Biggs Case* (1977) House of Commons, Hansard Vol 930, col 450, page 29.

In certain restricted circumstances, a state may also assert its jurisdiction over acts of nationals causing harm to the environment or a species of animal.⁶¹

While again, this is generally exercised in the criminal context and has not had any wider application to civil lawmaking, it could conceivably be argued that Australia is legislating extraterritorially for the purpose of protecting animals originating and exported from its territory: "Australian livestock". This could possibly lend itself to an argument that such livestock is Australian and therefore able to be protected by the nationality jurisdiction.

Despite the fact that much of the public concern is based on the fact that such animals are "Australian", this is an unsteady foot on which to stand. There is a no global recognition of the nationality of animals or their protection at the present time.

Universal jurisdiction

Universal jurisdiction will also exist generally in criminal cases. This jurisdiction generally exists where an act or event has taken place which is so contrary to acceptable human practices that any state may claim jurisdiction over its prosecution at international law. Such jurisdiction will occur in instances of piracy,⁶² crimes against humanity and genocide,⁶³ or other extreme human rights abuses.⁶⁴ As discussed previously, however, there is some limited scope for the new recognition of civil universal jurisdiction, particularly in the context of reparations for human rights abuses.

⁶¹ Triggs, above n 45, 352; See the prohibition on 'takes, trades, keeps, moves or interferes with a cetacean' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 229B(1)(a).

⁶² *Re Piracy Jure Gentium* [1934] AC 586.

⁶³ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) lists genocide and crimes against humanity within the jurisdiction of the International Criminal Court.

⁶⁴ For example, torture as seen in *Pinochet (No 3)* [2000] 1 AC 147.

Furthermore, it could conceivably be posited that the protection of animal welfare should attract the universal jurisdiction as a result of the fundamental human interest in ensuring the welfare of animals.⁶⁵ The fact that animals are sentient creatures has long raised debate regarding their entitlement to basic animal rights,⁶⁶ and has seen calls for the development of human rights-like charters, which have been established in several jurisdictions, including the United Kingdom.⁶⁷

However, while there is a growing judicial recognition that national human rights law can apply extraterritorially,⁶⁸ the same principle has not been extended to animals. It is unlikely that animal welfare, which lacks inclusion in a greater United Nations convention or treaty, would be deemed of sufficient concern to attract the universal jurisdiction. While this may not be an attractive point to animal rights activists, it remains the case that for many other persons, animal rights cannot be considered to be of the same significance as those of human beings.

Passive personality jurisdiction

On this basis, a state may assert its jurisdiction over a non-national for acts taking place in an alternate territory if nationals of the state are injured.⁶⁹ While the authority of the passive personality jurisdiction in relation to individuals has been doubted in past history, the pervasion of international terrorism fears in states' psyches has caused the revival of the

⁶⁵ See generally Graeme McEwen, *Animal Law: Principles and Frontiers* (1st ed, 2011); RSPCA, 'Animal Welfare Legislation', Position Paper H1 <www.kb.rspca.org.au/afile/503/88> at 12 May 2012.

⁶⁶ Peter Singer, *Animal Liberation* (1995) 4.

⁶⁷ See, eg, Wolverhampton Council, 'Wolverhampton Animal Rights Charter' (2006) <http://www.wolverhampton.gov.uk/NR/rdonlyres/6134CC4D-75B5-48F8-847B-04B61F1EC180/0/animal_welfare_charter_layout.pdf> at 3 March 2012.

⁶⁸ Triggs, above n 45, 454.

⁶⁹ *Ibid*, 354.

principle, as seen in the case of a plane hijacking in *United States v Yunis*.⁷⁰ Several international treaties have also integrated the passive personality jurisdiction into their enforcement procedures, including the International Treaty against the taking of Hostages.⁷¹

However, this basis of jurisdiction would not be clearly applicable in the case of live export regulations.

Protective jurisdiction

The protective or security principle states that a state may exercise jurisdiction 'in respect of offenses which, although occurring abroad and committed by non-nationals, are regarded as injurious to the state's security':⁷² meaning that a state may assert its authority over any matter which may result in a deleterious effect on the state.⁷³

While this basis of jurisdiction could conceivably be quite broad in its spectrum, it has not to date been relied on by states or tribunals in cases other than exceptional instances relating to illegal immigration, currency offences and treason.⁷⁴ Several scholars in this area have argued for a greater application of Brownlie's 'sufficient connection' test in order to assert this basis for jurisdiction,⁷⁵ as seen in the case of *Joyce v DPP*⁷⁶ where an American national was charged with engaging in German radio propaganda during the Second World War after obtaining a fraudulent British passport. The House of Lords in that case concluded that a state's "proper regard for its own security requires that all those who

⁷⁰ (1991) 924 F 2d 1086.

⁷¹ *International Convention against the taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) art 5.

⁷² Rebecca Wallace, *International Law* (4th ed, 2002) 112.

⁷³ Dixon, above n 46, 149.

⁷⁴ Triggs, above n 45, 357.

⁷⁵ *Ibid*, 357; See generally F.A Mann 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Hague Recueil* 49-51.

⁷⁶ *Joyce v DPP* [1946] AC 347 at 372.

commit that crime, whether they commit it within or without the realm should be amenable to its laws". This jurisdiction was also utilised more recently in the case of *R v Abu Hamza*.⁷⁷

Essentially, protective jurisdiction seeks to respond to extraterritorial acts performed by aliens that have an adverse effect on the state's welfare or security.⁷⁸ However, in recent years many states have enacted domestic legislation which attempts to give them jurisdiction over *any* matters which have an effect in their territory. This extensive conceptualisation of the protective jurisdiction is known as the "effects doctrine", which has been used and criticised internationally in relation to United States' anti-trust legislation.⁷⁹

Therefore, it is apparent that protective jurisdiction could be effectively utilised by the Australian government to validate its actions in engaging in extraterritorial lawmaking in the case of live export.

Clearly, any negative impact on the Australian live export industry stemming from foreign nationals' actions would have significant effects on the Australian economy. This industry contributes \$1.8 billion to the Australian GDP annually and employs an estimated 13,000 workers.⁸⁰ Where animals involved in live export are mistreated overseas, this is relayed to the public via media, resulting in public outcry. Consequently, there is a domestic loss of meat consumption as consumers boycott meat sales. Without the live export trade, livestock prices would decline because of excessive supply in the domestic market, seriously affected the sustainability of agriculture and farmers' incomes in Australia.⁸¹

⁷⁷ [2006] EWCA Crim 2918.

⁷⁸ Dixon, above n 46, 150.

⁷⁹ See, eg, the discussion of the effects doctrine in Triggs, above n 45, 367-372.

⁸⁰ Hassall Associates Australia, *The Live Export Industry: Value, Outlook and Contribution to the Economy* (2006) <<http://www.mla.com.au/Research-and-development/Final-report-details?projectid=12726>> at 24 April 2012.

⁸¹ Phillips, above n 12, 559.

Given the extensive implications on Australian economic interests if live export regulations pertaining to animal welfare and treatment were not put into place, including loss of international trade and relationships, as well as domestic employment and industry, the current regulatory regime is therefore justifiable on account of the protective jurisdiction.

Therefore, it may be found that Australia could and should validate its current extraterritorial lawmaking as an exertion of prescriptive extraterritorial jurisdiction on the basis of the protective principle.

Arguments for Australia asserting extraterritorial jurisdiction in the case of live export

In this paper, it has been established that despite claims to the contrary, the current live export regulatory framework is an example of extraterritorial lawmaking. However, it has also been concluded that in this case, due to the significant public interest in the continuation of the industry and the maintenance of animal welfare standards, Australia should validate this extraterritorial lawmaking openly on account of its ability to prescribe its regulations extraterritorially on account of the protective jurisdiction.

The main justifications as to why the Australian government should openly assert prescriptive extraterritorial jurisdiction in relation to its live export regulations are highlighted below.

1. It is not desirable for Australia to covertly engage in extraterritorial lawmaking

Firstly, the fact that Australia continues to claim that its live export regulations are merely an exercise of domestic jurisdiction is neither desirable nor best practice at international

law. Where legislation or regulations are in fact examples of extraterritorial lawmaking, such an effect should be openly accepted in order to promote accountability across the international sphere.

2. *Where Australia may validly exercise extraterritorial jurisdiction on this issue, it should do so to promote the development of international ethics and norms*

It may also be contended that while Australia's live export regulations remain hidden beneath the guise of domestic lawmaking, there will be a failure to fully recognise the importance of animal welfare and treatment both at international law and to the Australian economy.

While at the present time it may be accepted that Australia is attempting to subtly influence international attitudes and practices, a more open approach to its regulation would undoubtedly lead to more discussions and developments in the area. A greater momentum and open recognition of the current attempt to impose Australian standards of animal welfare during live export would contribute to the development of state norms and potentially customary international law.

It is clear that opening discussions for and entering into an open and binding United Nations or similar agreement would provide the strongest mechanism for maintaining appropriate standards for animal treatment internationally. However, this has currently not been considered for the foreseeable future. In the meantime, an open Australian approach to exerting extraterritorial jurisdiction on this issue would provide a basis upon which such discussions could be raised.

3. Exertion of extraterritorial jurisdiction will promote avenues for enforcement

At present, enforcement penalties under the live export regime will be felt by exporters and the industry at large where licences are revoked. However, it may be argued that this fails to adequately address the problem at hand, which is the lack of international enforcement mechanisms in relation to the treatment of exported Australian animals.

If Australia was to assert extraterritorial jurisdiction and the validity of such an exercise on account of the protective jurisdiction, it would be able to seek to better enforce international standards of animal treatment up to and during slaughter and also potentially introduce stunning requirements. This would have the effect of protecting the Australian industry insofar as maintaining public approval by upholding animal welfare standards. After all, improvements in conditions for livestock involved in live export are fundamental in gaining widespread acceptability of the trade in order to maintain domestic economic interests.⁸²

Conclusions

In the case of the new live export regulations, Australia may be seen to have exercised prescriptive jurisdiction in mandating that Australian standards of animal welfare and treatment be adhered to in overseas jurisdictions. While this in itself may be characterised as domestic regulation, the fact that the regulations also necessarily affect foreign nationals' practices in overseas jurisdictions results in the undeniable characterisation of the live export regulations as prescriptive and extraterritorial in nature.

⁸² *Ibid*, 561.

However, it is also apparent that this exercise of extraterritorial lawmaking may in fact be valid in light of current international law principles relating to the protective principle as a basis for asserting extraterritorial jurisdiction. The fact that Australia has been compelled to protect its vital trading, economic and social interests may be sufficient to establish that protective jurisdiction has been invoked.

In this case, it has been argued that the most appropriate course of action would be for the Australian government to organise, negotiate and enter binding international agreements in relation to the treatment of animals in live export with the same level of recognised international enforcement as human rights and other internationally beneficial laws. This would undoubtedly soothe public opinion in seeking to further protect animal rights on an international scale while also ensuring the continuation of our live export industry.

However, in the meantime, it is advisable that the Australian government openly and overtly accept their actions in entering into extraterritorial lawmaking, and seek to exert extraterritorial jurisdiction on the basis of protective jurisdiction. This would have the effect of protecting economic and social interests domestically as well as acceptable standards of animal treatment internationally.