Emanuel Exports Pty Ltd; EMS Rural Exports Pty Ltd and Secretary, Department of Agriculture, Water and the Environment [2021] AATA 4393 (26 November 2021)

Division:	**GENERAL DIVISION**
File Numbers:	**2018/5307; 2018/5541**
Re:	**Emanuel Exports Pty Ltd; EMS Rural Exports Pty Ltd**
	APPLICANTS
And	**Secretary, Department of Agriculture, Water and the Environment**
	RESPONDENT

Decision

Tribunal:	**Deputy President Britten-Jones** **Senior Member Dr M Evans-Bonner**
Date:	**26 November 2021**
Place:	**Perth**

1. The reviewable decision (application 2018/5307) of the First Assistant Secretary dated 21 August 2018, to cancel the live-stock export licence held by Emanuel Exports Pty Ltd (Emanuel's Licence), is set aside. The Tribunal substitutes a new decision that Emanuel's Licence is suspended from 22 June 2018 to 3 December 2021, being seven calendar days from the date of this decision.

2. The reviewable decision (application 2018/5541) of the First Assistant Secretary

dated 5 September 2018, to cancel the live-stock export licence of EMS Rural Exports Pty Ltd (EMS's Licence), is set aside. The Tribunal substitutes a new decision that EMS's Licence is suspended from 11 July 2018 to 3 December 2021, being seven calendar days from the date of this decision.

.....[Sgd].....

Deputy President Britten-Jones

CATCHWORDS

AGRICULTURE, WATER AND THE ENVIRONMENT – application 2018/5307 – live export of sheep – cancellation of live-stock export licence – export permits – carriage of sheep by sea – show cause notices issued – integrity and competence – whether Emanuel ceased to be a body corporate of integrity – Emanuel through its managing director, provided incorrect pen air turnover (PAT) data for the vessel MV Awassi Express – whether Emanuel knew PAT values incorrect or should have known they were incorrect – whether Emanuel knew PAT values would affect the acceptable loading capacity of vessel – attribution of the actions of a person to a corporation – vessel data file for heat stress assessment software program (HotStuff) based on incorrect PAT values – whether any person who participates in management or control of the live-stock export business of Emanuel has ceased to be a person of integrity – whether Emanual contravened a condition of its licence – whether Emanuel committed multiple alleged breaches of Australian Standards for the Export of Livestock (ASEL) – alleged breaches of ASEL after licence cancellation at Peel Feedlot – whether sufficient changes to management and control of Emanuel to demonstrate it is a body corporate of integrity – First Reviewable Decision set aside and substituted with a new decision that the licence should be suspended for the period 22 June 2018 to 3 December 2021

AGRICULTURE, WATER AND THE ENVIRONMENT – application 2018/5541 – EMS's live-stock export licence cancelled due to association with Emanuel – no adverse findings by Secretary against EMS – whether the degree of association with Emanuel warrants cancellation of EMS's licence – Second Reviewable Decision set aside and substituted with a new decision that the licence should be suspended from 11 July 2018 to 3 December 2021

JURISDICTION – nature and scope of the Tribunal's review – whether Tribunal's review should be restricted to the content of the show cause notices – formulation of the statutory questions

APPLICABLE LAW – legislative regime changed before proceedings finalised – whether Tribunal should apply law as at date of Tribunal's decision or as at the time the reviewable decisions were made – transitional provisions – accrued rights – review concerned with

rights and liabilities at anterior date – held that applicable legislation is the version in force at the time of the export licence cancellations

EVIDENCE AND PROCEDURE – applicability of rules of evidence in the Tribunal – former Applicants' managing director not called as a witness – whether adverse inference should be drawn – rule in Jones v Dunkel *–self-incrimination privilege*

STATUTORY INTERPRETATION – meaning of "integrity" – meaning of "competence" – use of the present tense – temporal element – "person who participates" held to describe the person participating in the management or control of the business at any time

LEGISLATION

Acts Interpretation Act 1901 (Cth) ss 7(2), 7(2)(c), 7(2)(e)

Administrative Appeals Tribunal Act 1975 (Cth) ss 33(1), 33(1)(c), 39, 43(1), 62(4)

Australian Meat and Live-stock Industry Act 1997 (Cth) ss 7, 8, 8(1), 10, 11, 12, 12(1)(b)(i), 12(1)(c), 16, 17, 17(1), 17(5), 17(5)(a), 23, 23(1), 23(1)(b), 23(1)(b)(i), 23(1)(b)(ii), 23(1)(d), 23(1)(g), 23(3), 23(3)(a), 23(3)(aa), 23(3)(b), 24, 24(1), 24(1)(b), 24(1)(b)(i), 24(1)(c), 24(4), 25A, 51, part 2, part 2A

Australian Meat and Live-stock Industry (Conditions on live-stock export licenses) Order 2012 (Cth) s 3

Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018 (Cth) s 9

Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East – Northern Winter) Order 2018 (Cth) s 9

Australian Meat and Live-stock Industry (Standards) Order 2005 (Cth) s 3(1)

Corporations Act 2001 (Cth) ss 206F(1), 206F(1)(b)

Export Control Act 1982 (Cth) ss 3, 7

Export Control Act 2020 (Cth)

Export Control (Animals) Order 2004 (Cth)

Export Control (Consequential Amendments and Transitional Provisions) Act 2020 (Cth) s 2, sch 1 s 1, sch 2 s 4, sch 3 s 2, sch 3 s 37(3)

Health Insurance Act 1973 (Cth) ss 23DL, 23DL(1)

CASES

Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321

Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd [1979] FCA 21; (1979) 2 ALD 1

Commissioner for Corporate Affairs (Vic) v Bracht [1989] VR 821

Costello and Department of Transport [1979] AATA 184; (1979) 2 ALD 934

Drake v Minister for Immigration and Ethnic Affairs [1979] FCA 39; (1979) 2 ALD 60

Esber v Commonwealth [1992] HCA 20; (1992) 174 CLR 430

Frugtniet v Australian Securities and Investments Commission [2019] HCA 16; (2019) 266 CLR 250

Grant v Repatriation Commission [1999] FCA 1629; (1997) 57 ALD 1

Gribbles Pathology (Vic) Pty Ltd v Cassidy [2002] FCA 859; (2002) 122 FCR 78

Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298

Merrimack College v KPMG LLP 480 Mass 614 (2018)

Mikasa (NSW) v Festival Stores [1972] HCA 69; (1972) 127 CLR 617

Minister for Immigration and Border Protection v SZMTA [2019] HCA 3; (2019) 264 CLR 421

Mottaghi and Migration Agents Registration Authority [2007] AATA 60; (2007) 98 ALD 424

Muller v Dalgety & Company Ltd [1909] HCA 67; (1909) 9 CLR 693

Murdaca v Australian Securities and Investments Commission [2009] FCAFC 92; (2009) 178 FCR 119

Salomonn and Migration Agents Registration Authority [2013] AATA 146

Shi v Migration Agents Registration Authority [2008] HCA 31; (2008) 235 CLR 286

Tay v Minister for Immigration and Citizenship [2010] FCAFC 23; (2010) 183 FCR 163

Uelese v Minister for Immigration [2015] HCA 15; (2015) 256 CLR 203

SECONDARY MATERIALS

Australian Standards for the Export of Livestock (version 2.3) 2011, 27 April 2011

Inquiry under section 143 of the Casino Control Act 1992 (NSW) Report dated 1 February 2021, volume 1, pages 337, 338

Macquarie Dictionary (online 26 November 2021)

Oxford English Dictionary (online 26 November 2021)

REASONS FOR DECISION

Deputy President Britten-Jones
Senior Member Dr M Evans-Bonner

26 November 2021

overview of the Facts

1. On 1 August 2017, the MV Awassi Express (**Vessel**) set sail from Fremantle, Western Australia to the Middle East. The ship was loaded with live sheep being exported by Emanuel Exports Pty Ltd (**Emanuel**), one of Australia's largest exporters of live-stock. There were 63,804 sheep on board. Hot and humid conditions greeted the Vessel at its first port of discharge in Qatar where the ship was delayed. The captain of the Vessel described how the "*crisis conditions on board*" were managed but hundreds of sheep died in a short period from 16 August 2017 onwards. The Vessel continued to Kuwait where 733 carcasses were disposed of. There were further delays. The final port was Dubai, where the last consignment was discharged on 24 August 2017.

2. A total of 2,400 sheep died during the voyage. Decomposing carcasses accumulated on board the vessel until they could be disposed of on 26 August 2017.

3. The current affairs television program, "*60 Minutes*"*,* obtained video footage from the animal welfare organisation, Animals Australia, showing the conditions on board the Vessel. A report was prepared and broadcast on 8 April 2018. Emanuel's export licence was suspended by the First Assistant Secretary (who, for convenience, we will refer to as the **Secretary**) on 22 June 2018 and then cancelled on 21 August 2018. Subsequently, the licence of EMS Rural Exports Pty Ltd (**EMS**) was suspended by the Secretary on 11 July 2018 and then cancelled on 5 September 2018 based on EMS's association with Emanuel as a wholly owned subsidiary.

4. The primary ground for cancellation of Emanuel's export licence was that Emanuel had ceased to be a body corporate of integrity because Emanuel, through its managing director Mr Graham Daws, had provided misleading information about Pen Air Turnover (**PAT**) values (also referred to as "*PAT scores*") for the Vessel to a consultant, Dr Conrad Stacey, who used that information to create a vessel data file. It was not in dispute that Mr

Graham Daws had incorrectly doubled the PAT values back in 2014.

5. Expert evidence was provided regarding the PAT values. The experts agreed that overstating the PAT values was a serious issue and, regardless of the exact details of the weather, would significantly increase risk (of mortality) at the hottest times of the voyage. The experts also agreed that the voyage exceeded risk limits and that the Vessel was effectively overloaded and required de-stocking to meet the appropriate risk limits.

6. There is no significant dispute regarding the key events we have set out above in relation to the death of sheep on board the voyage to the Middle East in August 2017 and the earlier events of 2014 when Mr Graham Daws incorrectly doubled the PAT values. However, there *is* significant dispute with respect to the inferences we should draw from those facts and with respect to how the relevant legislative regime should be interpreted and the penalties, if any, that should be applied.

7. The Secretary submitted that we, the Tribunal, should affirm the cancellation decision primarily due to the seriousness of the historical events, the ongoing involvement of Mr Graham Daws in Emanuel's business and the failure by Emanuel to show it has taken sufficient steps to rehabilitate itself. The Applicants submitted that they are bodies corporate of integrity and that their licences should not be cancelled. The Applicants submitted that Mr Graham Daws resigned as managing director and that they have set up new corporate governance procedures designed to ensure compliance with regulations in the live-stock export industry and to ensure animal welfare.

Overview of the Licence Cancellations

8. Since the company's incorporation in Western Australia in 1955, Emanuel was carrying on the business of exporting live-stock. From 2 July 1973 until 29 June 2018, Mr Graham Daws was a director of Emanuel. From 1 June 1982 until 29 June 2018, Mr Graham Daws was also the company secretary. His son, Mr Nicholas Daws was appointed as a director of Emanuel on 25 January 2018 and replaced his father as company secretary and Managing Director on 29 June 2018.

9. Emanuel was the holder of live-stock export licence number L006 (**Emanuel's Licence**), issued by the Secretary under Part 2 of the *Australian Meat and Live-stock Industry Act 1997* (Cth) (**AMLI Act**). Subsequent legislative references are to the AMLI Act

unless otherwise indicated, although we have sometimes included reference to the AMLI Act where it is required for clarity.

10. Emanuel's Licence was for the period of 16 November 2017 to 15 November 2022.

11. On 21 August 2018, the Secretary cancelled Emanuel's Licence under s 24(1)(c) (the **First Reviewable Decision**) because she was satisfied that Emanuel had:

(a) ceased to be a body corporate of integrity;

(b) ceased to be competent to hold a live-stock export licence; and

(c) contravened the condition of its licence that it comply with the Australian Meat and Live-stock Industry (Standards) Order 2005 (**Standards Order**) requiring it not to export live-stock except in accordance with Australian Standards for the Export of Livestock (Version 2.3) 2011 (**ASEL**).

12. On 18 September 2018, Emanuel applied to this Tribunal for a review of the First Reviewable Decision.

13. Like Emanuel, EMS was carrying on the business of exporting live-stock since it was incorporated in Western Australia in 1988. Mr Graham Daws was a director and the company secretary of EMS from 12 July 1988 until 29 June 2018. His son, Mr Nicholas Daws, was appointed as a director of EMS on 25 January 2018 and replaced his father as company secretary on 29 June 2018.

14. EMS was the holder of live-stock export licence number L366 (**EMS's Licence**) which was also issued by the Secretary under Part 2 of the AMLI Act. EMS is a wholly owned subsidiary of Emanuel.

15. On 5 September 2018, the Secretary cancelled EMS's Licence pursuant to s 24(1)(c) (**Second Reviewable Decision**), based on "*the nature and gravity of the findings made against Emanuel*" and on "*the action taken against* Emanuel's *licence*". Further, the Secretary found that "*the close and enduring association between Emanuel and EMS*" meant that there was a significant risk that Emanuel may seek to frustrate its licence cancellation by relying on EMS's licence.

16. On 26 September 2018, EMS applied to this Tribunal for a review of the Second Reviewable Decision.

Background Facts

17. We will now provide a more detailed outline of the facts leading up to the reviewable decisions to cancel Emanuel's Licence and EMS's Licence.

18. On 5 April 2018, the animal rights organisation, Animals Australia, wrote to the Secretary to make a formal complaint regarding serious breaches of the ASEL. The complaint letter particularised alleged breaches of the ASEL and World Organisation for Animal Health (OIE) animal welfare guidelines during five separate sea voyages of the Vessel (Voyages 23 to 27), with each voyage carrying between 59,000 and 67,000 Australian sheep to the Middle East during the months of May 2017 to November 2017.

19. The Animals Australia complaint letter attached 320 video files of the alleged breaches as supporting evidence, which were taken on the mobile telephone of one of the crew members of the Vessel during each of the voyages between May 2017 to November 2017. Some of these video files were included in the 60 Minutes report on 8 April 2018.

First Show Cause Notice: findings and response from Emanuel

20. On 1 May 2018, the Secretary issued a show cause notice to Emanuel under s 23 (**First Show Cause Notice**). The Secretary stated that she was considering cancelling or suspending Emanuel's Licence or issuing a reprimand.

21. The "*background*" section in the First Show Cause Notice refers to Voyage 25. The Secretary stated that:

> *The Department … has received information that indicates that Emanuel has breached a number of conditions of its export licence.*
>
> *This information relates to a voyage of the Awassi Express (V025 LNC 9602) (the **Voyage**), which loaded its cargo, relevantly more than 63,000 sheep, in Fremantle on 31 July to 1 August 2017, and which completed discharge of that cargo in Dubai, United Arab Emirates on 21 to 24 August 2017. By the end of the Voyage, 2,400 sheep on board the vessel were reported dead.*
>
> *This represents a mortality rate of 3.76%, which is above the reportable level of 2% prescribed by Australian Standards for the Export of Livestock (Version 2.3) 2011 (**ASEL**).*

22. The Secretary found reasonable grounds for believing that Emanuel contravened a condition of its export licence (s 23(1)(g)) because of multiple breaches of ASEL standards relating to the onboard management and welfare of live-stock and because the accredited veterinarian and accredited stockperson departed the Vessel prior to its complete discharge.

23. The Secretary also found reasonable grounds for believing that Emanuel had ceased to be a body corporate of integrity (s 23(1)(b)(i)) because Mr Nicholas Daws, who was at that time the managing director of Emanuel, was aware that the accredited veterinarian and accredited stockperson had left the Vessel early.

24. Finally, the Secretary found that persons who participate in the management and control of a live-stock export business, namely Mr Graham Daws and Mr Nicholas Daws, had ceased to be persons of integrity (s 23(1)(d)). This was on the basis that, as directors of Emanuel, they knew or ought to have known about the breach of the ASEL concerning the accredited veterinarian and accredited stockperson departing the Vessel early, but they did not disclose the breaches to the Department.

25. Emanuel responded to the First Show Cause Notice by letter dated 15 May 2018. Emanuel disputed many of the findings of the Secretary, including that the evidence did not support a reasonable inference that Emanuel failed to do everything it could to ensure ASEL standards were met. Emanuel submitted that there were factors outside of its control on Voyage 25, such as extreme weather conditions of heat and humidity. In this preliminary response, Emanuel also disputed that either Mr Graham Daws or Mr Nicholas Daws had any knowledge of the accredited stockperson and the accredited veterinarian departing before the complete discharge of the Vessel.

26. Emanuel made further submissions and provided further evidence in a letter to the Secretary dated 31 July 2018. Attached to the letter was a report from Professor Shane Maloney and a "*substance of opinion*" from Dr Ben Madin. In its submissions, Emanuel stated that:

> *Emanuel does not dispute the catastrophic outcome of Voyage 25. The outcome however was not caused by any systemic failures by Emanuel's compliance systems.*
>
> *The outcome was caused by a confluence of events whilst in the Persian Gulf, that is, the onset of the severe weather on 15/16 August 2017, being the rapid rise in extreme temperature and humidity, compounded by the delay in awaiting pilotage*

of 3 hours and 32 minutes in the port of Hamad, Qatar, the first port of discharge …

27. Emanuel considered that "*Voyage 25 was in fact an aberration*".

Findings of Dr Conrad Stacey

28. On 1 June 2018, the Secretary issued a notice to Dr Conrad Stacey of Stacey Agnew Pty Ltd. Dr Stacey is a leading authority on the interaction of weather, ventilation and animal tolerance relating to heat stress on live export voyages. He provided information to Emanuel in relation to the Vessel in 2014. The notice required Dr Stacey provide information including calculations and communications regarding the Vessel and Emanuel.

29. Dr Stacey provided the email correspondence between himself and Mr Graham Daws from June 2014. These emails revealed that Mr Graham Daws provided incorrect PAT values.

30. Standard 4.12 of the ASEL requires that stocking densities and pen-group weight-range tolerances for live-stock must be in accordance with the heat stress assessment using an agreed heat stress risk assessment (**HSRA**). In his statutory declaration dated 14 August 2018, Dr Stacey explained that HSRA's are produced using computer software called "*HotStuff*":

> *… computer software called 'HotStuff' … is used to assess the risk of heat stress on live export voyages to the Middle East. HotStuff is the accepted software that produces Heat Stress Risk Assessments (**HSRA**) for the purpose of S4.12 of the* Australian Standards for the Export of Livestock (Version 2.3) 2011 *(**ASEL**). The Department of Agriculture and Water Resources (**Department**) has been supervising the live export industry using outputs from HotStuff (Version 4), since July 2011.*
>
> *Users of HotStuff import a vessel file into the software, create a new voyage, and enter in their voyage plan, including the dates of voyage, ports of departure and arrival, and for each line of livestock: the type and breed, weight, fat score, acclimatisation zone, and number of animals of each line in each deck space and the area occupied. The HotStuff output is the HSRA that is submitted by the exporter in support of the export permit application for that voyage and consignment. If the mortality risk exceeds the industry-nominated 2% probability of 5% mortality for any of the lines of livestock, the exporter can make adjustments to the voyage plan, for example by reducing the number of animals proposed to be loaded.*

31. The vessel file includes the PAT values for each deck of the vessel where the live-

stock are kept during the voyage. Dr Stacey explained that the PAT values for a deck determine the number of stock that can safely be carried on that deck in the hottest Middle Eastern weather. Further, he explained that PAT values are calculated by dividing the air volume flow (m^3/hour) supplied to a deck space by the pen area (m^2) in that deck space.

32. Following the receipt of this information from Dr Stacey, another show cause notice was issued to Emanuel on 22 June 2018 (**Second Show Cause Notice**).

Second Show Cause Notice: findings and response from Emanuel

33. In the Second Show Cause Notice, the Secretary relied upon the inflation of the PAT values by Mr Graham Daws, which had the effect of increasing the stocking density on the Vessel and exceeding the acceptable mortality risk. The Secretary explained:

> *… Mr Graham Daws provided incorrect PAT scores to Mr Conrad Stacey on 27 and 30 June 2014 and that they were incorrect by an error factor ranging from 1.997166 to 2.005627.*
>
> *According to Mr Conrad Stacey, the inflation of the PAT scores provided by Mr Graham Daws, if forming the basis of HotStuff calculations, would have had the practical result of increasing wet bulb temperatures by 1 or 2 degrees Celsius on Awassi voyages, in turn exceeding the acceptable mortality risk. Mr Conrad Stacey considers that had the correct PAT scores been used, stocking density would have been reduced by up to 50% in some areas of the Awassi.*
>
> *The Department has subsequently received HSRA plans generated by Mr Conrad Stacey using the incorrect PAT scores provided by Emanuel and the correct PAT scores calculated by Mr Conrad Stacey for Voyage 025 of the Awassi. Those HSRA plans indicate that a total of 65,050 livestock were loaded onto the vessel for Voyage 025, resulting in 8 decks exceeding the acceptable mortality risk. They also indicate that in order for all decks to meet the acceptable mortality risk, only 60,816 livestock should have been loaded onto the vessel. This means that 4,234 additional livestock were loaded.*
>
> *Emanuel has submitted 9 HSRA plans with incorrect PAT scores to the Secretary in connection with an application for an export permit for the Awassi Express. Each of those applications for an export permit were granted.*

34. The Secretary found reasonable grounds for believing that Emanuel was not a body corporate of integrity and was not competent to hold an export licence:

> *For these reasons, I have reasonable grounds for believing that Emanuel knew or ought to have known that the PAT scores provided to Stacey Agnew and the Secretary for the purpose of it obtaining export permits were incorrect.*
>
> *On that basis, I have reasonable grounds for believing that Emanuel has ceased to be: (a) a body corporate of integrity; and (b) competent to hold the licence, and that paragraphs 23(1)(b)(i) and (ii) of the Act therefore apply.*

35. The Secretary made a further finding in the Second Show Cause Notice with respect to Mr Graham Daws:

> *There is evidence to suggest that Mr Graham Daws knew or ought to have known that the PAT figures he provided to Mr Conrad Stacey and the Secretary for the purposes of obtaining export permits were incorrect. This resulted in the Secretary approving export permits for Emanuel to export livestock in a manner that exceeded acceptable stocking density and mortality risk.*
>
> *On that basis, I have reasonable grounds for believing that Mr Graham Daws, a person who participates in the management or control of Emanuel, has ceased to be a person of integrity and that paragraph 23(1)(d) of the Act therefore applies.*

36. Noting that the First Show Cause Notice had already been issued to Emanuel, the Secretary concluded that it was necessary to immediately suspend Emanuel's Licence:

> *The provision of incorrect PAT scores that affect the calculation of stocking density, and therefore the level of acceptable mortality risk, jeopardises the interests of the industry as a whole, insofar as it impacts upon the protection of the health and welfare of animals, and the maintenance of the industry, and its integrity, as an international trade. Given my view that there are reasonable grounds to believe that Emanuel has provided incorrect PAT scores in circumstances where it knew or ought to have known that they were incorrect, I cannot be confident that any representations by Emanuel in relation to PAT scores and HSRAs are accurate.*
>
> *On that basis, it is necessary or desirable in the interests of the industry to immediately suspend Emanuel's licence under subsection 23(4) of the Act.*

37. Emanuel responded to the Second Show Cause Notice in a letter dated 6 July 2018 and submitted that the initial suspension of its licence should be immediately revoked because there was "*no basis to find that Emanuel or Mr Graham Daws has ceased to be a body corporate or person of integrity under subsection 23(1)(b) or (d) of the Act or that Emanuel has ceased to be competent to hold a licence under subsection 23(1)(b) of the Act*". Emanuel's submissions included that:

> *… calculation of PAT scores was not a matter that was within the ordinary business of Emanuel or its employees. As a result, there was no expertise or business system within Emanuel in relation to the determination of the Awassi PATs.*
>
> *The provision of the Awassi PATs to Stacey Agnew was a one-off task undertaken by Graham Daws to assist a longstanding client for the purpose of creating an initial vessel file for Hotstuff. In providing the PATs, Graham Daws relied in part, in good faith, on information obtained from the company responsible for installing ventilation on the Awassi, his knowledge of industry practice and the advice of the consultant with expertise in ship design who had a detailed knowledge of the Awassi, having been involved in its conversion to a livestock carrier.*
>
> *Importantly, there is no evidence that, in submitting subsequent HSRA plans to the Secretary as part of subsequent applications for export permits for the Awassi, management or employees of Emanuel responsible for submission of HSRA plans knew or should have known that the PAT data for the Awassi vessel file in Hotstuff*

was incorrect. In circumstances where there had been no material changes to the design of the Awassi, it was not unreasonable for Emanuel's management and employees not to review the original data file each time a new application for an export permit was granted.

38. In the letter dated 6 July 2018, Emanuel further submitted that, "*Graham Daws formed an honest and reasonable belief that accepted industry practice was to add together air supply and exhaust fans, which would lead to original PAT-scores being multiplied by a factor of 2*". Additionally, it was submitted, "*based on his limited knowledge of PAT scores and his understanding of accepted industry practice, Mr Graham Daws provided what he understood to be the correct Awassi PAT scores*" and *"made an honest and reasonable but mistaken attempt to calculate the Awassi PAT scores*". Emanuel's letter also stated:

> *The provision by Emanuel to Mr Conrad Stacey of PAT scores on behalf of the owners of the Awassi was a one-off occurrence. It was not a function ordinarily undertaken by Emanuel in the course of its business. As a result, there were no processes in place at Emanuel in June 2014 to confirm the methodology used to determine PAT scores or the accuracy of PAT scores.*

39. Emanuel further submitted that:

> *For the reasons addressed in this Response, Emanuel stands by its corporate integrity and competence and the integrity of its former managing director, Mr Graham Daws. For the reasons set out* [above]*, Emanuel strongly denies that it knowingly provided incorrect information to the* [Department] *or that the* [Department] *cannot be confident of the accuracy of representations made by Emanuel in relation to export permit applications or HSRA is in particular.*

40. Emanuel stated that there was no significant risk of future breaches because the Department was at that point requiring independent audits of PAT values for all ships, and because Emanuel would in future be employing a compliance officer experienced in the live-stock industry to ensure regulatory compliance.

41. Finally, Emanuel made further submissions to reiterate that Mr Nicholas Daws was not advised and was not aware of the fact that the accredited veterinarian and accredited stockperson left the Vessel early, and that there were no other communications or reports to alert him as such. It was submitted that he was not aware of this until shortly before the release of the 60 Minutes report on 8 April 2018.

EMS Show Cause Notice

42. The Secretary issued a show cause notice to EMS on 11 July 2018 (**EMS Show Cause Notice**) based on the matters in the show cause notices issued to Emanuel, because EMS was a wholly owned subsidiary of Emanuel and Mr Nicholas Daws was sole director and secretary of both Emanuel and EMS. The Secretary stated that:

> *In light of the matters set out in the two show cause notices against Emanuel referred to above, and the immediate suspension of Emanuel's licence upon issuance of the second SCN* [show cause notice]*, I find that it is necessary or desirable in the interests of the industry to immediately suspend EMS's licence under section 23(4) of the Act, given (i) Emanuel's total ownership and control of EMS, (ii) the integrity concerns relating to Emanuel and Mr Nicholas Daws and (iii) the risk of the suspension against Emanuel being frustrated by its reliance on EMS's licence.*

43. EMS responded to the EMS Show Cause Notice by a letter dated 23 July 2018. EMS submitted that there was no reasonable basis for the Secretary to continue the suspension of EMS's Licence and requested the Secretary immediately revoke the suspension. EMS did not dispute its corporate relationship with Emanuel but disputed the integrity concerns relating to Emanuel and Mr Nicholas Daws. EMS referred to the resignation of Mr Graham Daws as a director of Emanuel and EMS, stating that, "*the management of Emanuel and EMS has been undergoing a substantial review and restructure*". EMS submitted that there was no evidence of "*ongoing or repeated disregard by EMS for its regulatory obligations*".

44. Emanuel informed the Secretary on 9 August 2018 of the changes it proposed to make to its corporate governance, compliance, and risk mitigation measures. Emanuel advised that Mr Graham Daws had resigned as a director in late June and that Mr Nicholas Daws had been appointed as the sole director of both Emanuel and EMS. The letter advised, amongst other things, that Mr Nicholas Daws had resolved to appoint two new independent directors to the board of Emanuel. The letter advised that Emanuel was in the process of appointing "*a Compliance and Corporate Governance/Company Secretary with both industry and regulatory experience*".

45. On 14 August 2018, the Secretary notified Emanuel of alleged ASEL breaches for Voyages 24, 25 and 26 and provided a copy of the statutory declaration from Dr Stacey dated 14 August 2018.

46. Emanuel responded by letter dated 20 August 2018. It stated that the alleged breaches on Voyages 24 and 26 were not relevant to the grounds on which the Secretary

formed the belief for the First Show Cause Notice, and for that reason only Voyage 25 was relevant. The letter further denied breaches and submitted that the breaches were minor and were caused by factors beyond Emanuel's control, such as extreme weather conditions. The letter also made a further submission that, with respect to Mr Graham Daws providing incorrect PAT values to Dr Stacey, there was "*confusion and a general lack of understanding as to how PAT scores ought to be calculated*".

Reviewable decisions

47. In a decision dated 21 August 2018, being the First Reviewable Decision, the Secretary decided to cancel Emanuel's Licence on the basis that she was satisfied that:

a. *Emanuel has ceased to be a body corporate of integrity because it has provided misleading PAT values to the Department in circumstances where: (i) Emanuel knew they were incorrect or should have known they were incorrect, and (ii) Emanuel was aware that the PAT values would affect the acceptable loading capacity of the Awassi; and*

b. *Emanuel has ceased to be competent to hold a live-stock export licence because Emanuel has not been able to provide correct information concerning PAT values and/or committed multiple contraventions of ASEL.*

48. The Secretary's reasons for deciding to cancel Emanuel's Licence included the following:

> *The conduct of Emanuel in providing misleading PAT values is very serious in that it had the potential to significantly impact the welfare of the live-stock being exported by Emanuel. I note, and do not dispute, the evidence of Professor Shane Maloney that by his estimates, the conditions experienced on Voyage 25 were hotter than anything in the historical record. However, I place more weight on the fact that had the correct PAT values been provided, significantly fewer sheep could have been loaded, resulting in a lower stocking density. I am satisfied that this may have resulted in an exacerbation of the effect of the severe weather events confronted by Voyage 25. This undermines the effect of the regulatory scheme, which has as one of its central components, the welfare of live-stock.*
>
> *I am satisfied that Emanuel's actions in providing incorrect PAT values jeopardises the interests of the industry as a whole as it impacts upon the protection of the health and welfare of animals, and the maintenance of the industry, and its integrity, as an export industry.*
>
> *In determining the appropriate action to take under s 24 of the AMLI Act, I have had regard to Emanuel's indication that it will appoint a compliance officer to ensure the provision of correct PAT values in the future, that Mr Graham Daws is no longer a director of Emanuel, and that Emanuel proposes to appoint two independent directors. However, I afford limited weight to this consideration in circumstances where, as found above, I am satisfied that Emanuel's actions in providing incorrect PAT values was not limited to the actions of Mr Graham Daws.*
>
> *I am not satisfied that the structural changes proposed by Emanuel mean that*

Emanuel is a body corporate of integrity and/or competent to hold the licence. Emanuel's willingness to provide incorrect PAT values when it knew or should have known that they were incorrect shows its willingness to disregard or manipulate the regulatory regime in order to advance its commercial interests or obtain a commercial benefit. …

I note that the negative health and welfare outcomes of Voyage 25 resulted in significant public criticism of the live export trade to the Middle-East as a whole and brought the industry into disrepute. Furthermore, I find that it is in the interests of the industry that exporters comply with the licence conditions, including ASEL, and, particularly the proper and honest provision of information to the Department, including PAT values. As noted above, the PAT value is an essential component of the HSRA that is submitted by the exporter in support of the export permit application for a voyage and consignment and is relevant to the calculation of the mortality risk (noting that industry-nominated standard is a 2 per cent probability of 5 per cent mortality for any of the lines of live-stock).

49. The Secretary was not, however, satisfied that Mr Nicholas Daws had ceased to be a person of integrity.

50. The Secretary also stated that:

… whilst it is clear that Mr Graham Daws was a person in management or control of Emanuel at the time of his relevant conduct, I am not satisfied on the evidence before me that Mr Graham Daws is a person who currently participates in the management and control of Emanuel the purpose of s 23(1)(d) of the AMLI Act.

51. On 5 September 2018, the Secretary made the Second Reviewable Decision to cancel EMS's Licence pursuant to s 24(1)(c). The Secretary was satisfied that EMS was an associate of Emanuel, and given this association, the Secretary concluded:

There is a significant risk, in light of the close and enduring connection between Emanuel and EMS, that Emanuel may seek to frustrate its licence cancellation by relying on EMS's licence. I am satisfied that cancellation of EMS's licence would be consistent with the interests of industry and would promote compliance with the regulatory regime – particularly those aspects directed to the observance of licence conditions and the protection of animal health and welfare.

52. As noted above, on 18 September 2018, Emanuel lodged an application for review of the First Reviewable Decision, and on 26 September 2018, EMS lodged an application for review of the Second Reviewable Decision in this Tribunal.

Issues

53. In the section titled, "*jurisdiction*" below, we have considered the scope of our jurisdiction in detail, and specifically the questions raised by the statute for consideration

(*Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286 (***Shi***); *Frugtniet v Australian Securities and Investments Commission* [2019] HCA 16; (2019) 266 CLR 250 (***Frugtniet***)).

54. These "*questions*", or in other words the issues that require our determination, are whether there are reasonable grounds for believing that:

(a) Emanuel has ceased to be a body corporate of integrity (s 23(1)(b)(i)) (**Issue 1**);

(b) a person who participates in the management or control of Emanuel (that is, Mr Graham Daws) has ceased to be a person of integrity (s 23(1)(d)) (**Issue 2**);

(c) Emanuel contravened a condition of Emanuel's Licence (s 23(1)(g)) (**Issue 3**);

(d) Emanuel has ceased to be competent to hold Emanuel's Licence (s 23(1)(b)(ii)) (**Issue 4**);

(e) if the answer to one or more of Issues 1 through to 4 is in the affirmative, whether Emanuel has taken sufficient steps to rehabilitate itself, that is, to address the concerns or issues that led to the integrity, competence and non-compliance concerns (**Issue 5**); and

(f) depending on our findings with respect to Issue 5, whether the power in s 24(1) should be exercised, and if so, how. This involves a consideration of whether: the licence should be cancelled; the licence should be suspended for a period; or whether Emanuel should be reprimanded (**Issue 6**).

55. With respect to EMS, the issue that requires determination is whether the degree of association of Emanuel and EMS warranted the cancellation of EMS's Licence and the regulatory action that should be applied to this licence following the Tribunal's findings on Issues 5 and 6 (**Issue 7**).

The hearing and the evidence

56. The hearing of these applications took place from Monday 22 February 2021 to Friday 5 March 2021, with closing submissions initially commencing on Wednesday 17 March 2021.

57. The hearing was originally scheduled for an eight-day hearing in approximately mid to late April 2020 but was vacated due to difficulties associated with the COVID-19 pandemic. The hearing was then scheduled for an eight-day hearing from mid to late November 2020 but was vacated by consent after the Tribunal granted leave to the Secretary to file additional evidence.

58. Written closing submissions were received and further oral closing submissions were heard by the Tribunal from Wednesday 5 May 2021 to Friday 7 May 2021.

59. During the closing submissions we noted that the AMLI Act was amended by the *Export Control (Consequential Amendments and Transitional Provisions) Act 2020* (Cth) (**Transitional Act**) with effect from 28 March 2021. We requested submissions from the parties regarding the law that we should apply in deciding the applications. The parties requested time to make written submissions on this issue and we formally directed that they do so. We received written submissions on the applicable law from the parties in May 2021.

the witnesses who gave evidence at the hearing

Witnesses called by the Applicants

60. The Applicants called the following witnesses who provided witness statements and gave evidence at the hearing.

Mr Nicholas Daws

61. Mr Nicholas Daws is the managing director of both Emanuel and EMS. He commenced working for Emanuel and EMS in 1997 as a live-stock clerk. Prior to taking over the role of managing director from his father, Mr Graham Daws, Mr Nicholas Daws was general manager and finance manager of both entities.

Mr Ben Stanton

62. Mr Ben Stanton is the commercial manager of Emanuel (and previously the export manager). He commenced working for Emanuel during his school holidays from 1996 to 1999 and commenced fulltime employment with Emanuel in 2002. He is the son of Mr Mike Stanton, who was previously a director of Emanuel.

63. In 2008, Mr Ben Stanton became the export manager of Emanuel, and, at the time of the hearing, he was the commercial manager. He reported to Mr Graham Daws until Mr Daws resigned as managing director of the companies in June 2018.

Mr John Edwards

64. Mr John Edwards is the export services manager, and shared live-stock manager of Emanuel. He commenced employment with Emanuel in May 2016 as export services manager. Until the time that Emanuel's Licence was cancelled, this role involved ensuring compliance with the Exporter Supply Chain Assurance System (**ESCAS**), which is a method of tracing live-stock through the supply chain (which we explain further below in the "*Legislative framework*" section). Following the licence cancellation, his role became broader, including by sharing the role of live-stock manager with Mr Nicholas Daws, Dr Ludeman and Mr Ben Stanton. His role now involves ensuring that animals are compliant with state and federal regulations when they enter the Peel Feedlot (a feedlot of which Emanuel is the registered operator). Mr Edwards has also been a board member of the Australian Live Exporters Council since 2003, where he represents the sheep export industry (as opposed to one specific company, such as Emanuel).

Dr Robert Macpherson

65. Dr Robert Macpherson is an Australian government accredited veterinarian, whose company, RA Veterinary Services, is engaged by Rural Export and Trading (WA) Pty Ltd (**RETWA**) at the Peel Feedlot. RETWA is a subsidiary of the Kuwait Livestock Trading Company (**KLTT**), which owns the Peel Feedlot. Since approximately 2003, he has provided sheep export inspection services. Dr Macpherson undertook inspections at the Peel Feedlot.

Dr Holly Ludeman

66. Dr Holly Ludeman is the corporate governance and compliance officer for Diverse Management Group Pty Ltd, of which Emanuel and EMS are subsidiary companies. Dr Ludeman commenced her employment on 10 December 2018 after Emanuel's Licence and EMS's Licence had been cancelled.

Dr Ben Madin

67. Dr Ben Madin is the managing director Ausvet Pty Ltd. His expert reports were admitted into evidence. Dr Madin attended the Peel Feedlot on three occasions in December 2020 for the purpose of preparing his second report.

Witnesses called by the Secretary

68. The Secretary called the following witnesses who both provided sworn statements and gave evidence at the hearing.

Dr Karen Dowd

69. Dr Karen Dowd has been the senior veterinary officer for the West Region, Exports and Veterinary Services Division of the Department since 2019. As part of this role, Dr Dowd undertakes inspections of animals for export for the purpose of providing a health certificate. Dr Dowd undertook inspections at the Peel Feedlot.

Ms Cristina Hutchison

70. Ms Cristina Hutchison is the Assistant Secretary, live animal exports, of the Secretary.

Implications of Mr Graham Daws not being called to give evidence

71. Allegations regarding the conduct of Mr Graham Daws were relevant to the statutory questions before us, including whether he ceased to be a person of integrity and whether he is a person who continues to participate in the control or management of Emanuel or EMS. This raises the issue of what we should make of the absence of Mr Graham Daws as a witness. In this regard, the Applicants' raised a "*question of jeopardy*" (transcript of closing submissions/36), or in other words, a claim of self-incrimination privilege. The parties also made submissions regarding whether the rule in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 should be applied. We will now consider these issues.

72. With respect to the self-incrimination privilege claim, we observe that the proper course would be that when the person is in the witness box, they can refuse to answer any questions that may tend to incriminate them (see s 62(4) of the AAT Act). We now turn to the rule in *Jones v Dunkel*.

73. In summary, the rule is that the failure of a party in a civil action to give evidence under oath may give rise to an adverse inference that the evidence they would have given would not assist their case. The rule was stated by Kitto J, at 308, as follows:

> *... any inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put a true complexion on the facts relied on as the ground for the inference has not been called as a witness by the defendant and the evidence provides no sufficient explanation of his absence.*

74. The rule was more particularly described by Menzies J at 312:

> *In my opinion a proper direction in the circumstances should have made three things clear: (i) that the absence of the defendant as a witness cannot be used to make up any deficiency in evidence; (ii) that evidence which might have been contradicted by the defendant can be accepted the more readily if the defendant fails to give evidence; (iii) that where an inference is open from the facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.*

75. The parties made similar submissions that the extent of any inference that could be drawn would be that any evidence that Mr Graham Daws would have given, had he been called as a witness, would not have assisted the Applicants' case.

76. We may have been assisted in making findings of fact if Mr Graham Daws had been called as a witness because of his past role as managing director at the time of the events leading to the cancellation of the licences. It was certainly open to the Applicants to call Mr Graham Daws, as their former managing director, and to do so may have assisted them in contradicting aspects of the Secretary's case. For example, Mr Graham Daws would have been able to give evidence relating to issues such as whether he continued to control or to manage the Applicants' business after his resignation as managing director.

77. However, the Applicants were able to address some of the issues in these proceedings through leading other evidence. For example, several of the Applicants' witnesses gave evidence confirming that Mr Nicholas Daws had entirely taken over from Mr Graham Daws as managing director, and that Mr Graham Daws no longer had any role in the management of either company.

78. Further, with respect to the provision of incorrect PAT values, there is other evidence before the Tribunal, including email correspondence between Mr Graham Daws

and Dr Stacey from which we have been able to infer what Mr Graham Daws knew or ought to have known concerning the incorrect PAT values.

79. Whilst we may have been assisted in making findings of fact if Mr Graham Daws was called to give evidence, we do not place much weight on his failure to give evidence. In these circumstances, it is appropriate for us to simply draw an inference that nothing Mr Graham Daws would have said in evidence would have assisted the Applicants' case.

Legislative framework

Applicable law

80. As previously noted, the AMLI Act was amended by the Transitional Act with effect from 28 March 2021.

81. The Transitional Act repealed the *Export Control Act 1982* (Cth) (**Export Control Act**) and Parts 2 and 2A of the AMLI Act were replaced with new export licence provisions contained in the *Export Control Act 2020* (Cth).

82. The parties agreed, in their written submissions on the applicable law, that the questions for determination in this review remain unchanged by the repeal of Parts 2 and 2A, and that the Tribunal should determine the correct or preferable decision under s 24(1) of the AMLI Act which was the applicable provision at the time of the Secretary's decisions. That is, the applicable legislation is the version of the AMLI Act in force at the time of the licence cancellations.

83. We agree, and note s 7(2) of the *Acts Interpretation Act 1901* (Cth) (**Interpretation Act**) which provides, in part:

> *(2) If an Act, or an instrument under an Act, repeals or amends an Act (the* **affected Act***) or a part of an Act, then the repeal or amendment does not: …*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or …*
>
> *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.*
>
> *Any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the affected Act or part had not been repealed or amended.*

84. Relevantly, sch 3 s 2 of the Transitional Act provides: "*This Schedule does not limit the effect of section 7 of the* Acts Interpretation Act 1901 *as it applies in relation to the repeals and amendments made by this Act*".

85. We find that the Applicants have an accrued right (*Re Costello and Department of Transport* [1979] AATA 184; (1979) 2 ALD 934, 939–945; *Esber v Commonwealth* [1992] HCA 20; (1992) 174 CLR 430) to have the Tribunal review the Secretary's decisions made under s 24(4) of the AMLI Act. Subsections 7(2)(c) and 7(2)(e) of the Interpretation Act preserve the Applicants' accrued right for the Tribunal to review the Secretary's decisions, namely the First Reviewable Decision and the Second Reviewable Decision.

86. Further, sch 3 s 37(3) of the Transitional Act is also consistent with the preservation of accrued rights, pursuant to ss 7(2)(c) and 7(2)(e) of the Interpretation Act (notwithstanding the fact that sch 3 s 37(3) concerns an export licence suspension). Schedule 3 s 37(3) states:

> *(3) If:*
>
> *(a) the export licence had been suspended under subsection 23(5) or paragraph 24(1)(e) or (f) of old Part 2 of the AMLI Act; and*
>
> *(b) the suspension was in force immediately before the commencement time;*
>
> *then the export licence is taken to be suspended after the commencement time under subsection 205(1) of the new Export Control Act.*
>
> *Note 1: The suspension may be revoked (see section 209 of the new Export Control Act).*
>
> *Note 2: Applications may be made to the Administrative Appeals Tribunal for review of decisions made in relation to an export licence under section 23 or subsection 24(1) of old Part 2 of the AMLI Act (see subsections 23(8) and 24(4) of old Part 2 of the AMLI Act and section 7 of the* Acts Interpretation Act 1901*).*

87. Therefore, we accept the contention of the parties that the applicable law for the current applications was the law in force as at the time that the Secretary made the First Reviewable Decision and the Second Reviewable Decision.

Prohibition on the export of live-stock

88. Section 7 of the Export Control Act provides for the prohibition by regulations of the export of "*prescribed goods*" which includes live-stock.

89. Section 3 of the Export Control Act provides that "*regulations includes orders*".

90. The export of live-stock is subject to the following conditions in s 1A.01 of the *Export Control (Animals) Order 2004* (Cth) (**Animals Order**):

> *The export of live-stock is prohibited unless the following conditions are complied with:*
>
> *(a) the exporter holds a live-stock export licence under the AMLI Act;*
>
> *(b) the Secretary has approved an ESCAS, unless an ESCAS is not required because of subsection 1A.19(4);*
>
> *(c) an NOI for the export has been approved under section 1A.25A, the approval is in force and, if the exporter was required to vary the NOI under section 1A.26, the NOI has been varied as required;*
>
> *(d) if the export is by sea—the live-stock are held before export, and assembled for export, in registered premises; …*
>
> *(f) if the live-stock are held before export, and assembled for export, in registered premises—the exporter has given the operator of the registered premises information as required by section 1A.28;*
>
> *(g) an approved arrangement for the exporter is in effect in relation to the live-stock;*
>
> *(h) the live-stock have been prepared in accordance with the approved arrangement and any conditions on the approval of the arrangement;*
>
> *(ha) the exporter is the holder of an approved export program in force under Subdivision A of Division 1A.7 that applies to some or all of the export activities of the exporter in relation to the live-stock;*
>
> *(i) an export permit for the export by the exporter is in force;*
>
> *(j) the live-stock are exported to the place, and by the means, specified in the export permit;*
>
> *(k) the exporter complies with the approved arrangement, the approved ESCAS and any condition on the approval of either;*
>
> *(l) the exporter complies with any condition of the export permit.*

91. In summary, the Animals Order prohibits the export of live-stock unless:

(a) the exporter holds a **live-stock export licence**;

(b) an **export permit** for the export by the exporter is in force;

(c) there is an **approved arrangement** in effect; and

(d) the exporter complies with any **condition of the export permit**.

Live-stock export licence

92. The AMLI Act establishes the licensing regime for the grant of an export licence.

93. Section 11 concerns the application process for an export licence. It provides:

(1) An application for an export licence must be made in accordance with the regulations.

(2) An applicant for an export licence must pay the prescribed fee in respect of the application:

(a) when the application is lodged; or

(b) at any later time permitted under the regulations.

(3) If a person has given the Secretary information or a document in connection with an application for an export licence and, before the application is granted or refused:

(a) a change happens so that the information, or anything stated in the document, ceases to be correct in relation to a matter; or

(b) the person becomes aware that the information, or anything stated in the document, is incorrect in relation to a matter;

the person must, within 7 days after the change happens or the person becomes so aware, as the case may be, give the Secretary a written statement setting out the correct particulars of the matter.

(4) A person who fails to comply with subsection (3) commits an offence punishable, on conviction, by imprisonment for not longer than 12 months.

(Notes omitted.)

94. It is the Secretary who grants the export licence under s 10.

95. Section 12 sets out the requirements for the grant of an export licence:

(1) The Secretary must not grant an export licence unless satisfied that:

(a) if the applicant is an individual, the applicant is:

(i) a person of integrity; and

(ii) competent to hold the licence; and

(iii) a person of sound financial standing; and

(b) if the applicant is a body corporate, the applicant is:

(i) a body corporate of integrity; and

(ii) competent to hold the licence; and

(iii) a body corporate of sound financial standing; and

(c) each person who participates or would participate, in the management or control of the applicant's meat or live-stock export business or proposed meat or live-stock export business is a person of integrity; and

(d) the applicant is, and is likely to continue to be, able to comply with the conditions to which the licence, if granted, would be subject; and

(e) the granting of the licence to the applicant would not, for any other reason, be contrary to the interests of the industry.

(2) The regulations may prescribe the matters to which the Secretary is to have regard for the purpose of satisfying himself or herself about the matters referred to in subsection (1).

(3) Without limiting subsection (2), for the purpose of satisfying himself or herself about the matters referred to in subsection (1) in relation to an application for a live-stock export licence, the Secretary may have regard to the extent to which the applicant has complied with any requirements of or under the Export Control Act 1982 , including any conditions or restrictions:

(a) to which a licence or permission under that Act, to export prescribed goods that are live-stock, was subject; or

(b) that otherwise relate to the export of prescribed goods that are live-stock.

96. Section 8 provides that, in the circumstances described in that section, a person is taken to be a person who participates, or would participate, in the management or control of a meat or live-stock business. Section 8(1) provides:

(1) For the purposes of this Part, a person is taken to be a person who participates, or who would participate, in the management or control of the meat or live-stock export business, or proposed meat or live-stock export business, of another person if:

(a) the first-mentioned person has or would have authority to direct the operations, or an important or substantial part of the operations, of the business or proposed business; or

(b) the first-mentioned person has or would have authority to direct a person who has or would have authority of the kind referred to in paragraph (a) in the exercise of that authority or proposed authority.

97. The Secretary may issue a show cause notice to the holder of an export licence in the circumstances set out in s 23. The relevant parts of s 23 are as follows:

(1) If the Secretary has reasonable grounds for believing, in relation to an export licence, that: …

(b) if the licence is held by a body corporate, the holder of the licence has ceased to be:

(i) a body corporate of integrity; or

(ii) competent to hold the licence; or

(iii) a body corporate of sound financial standing; or …

(d) a person who participates in the management or control of the meat or live-stock export business of the holder of the licence has ceased to be a person of integrity; or

(e) information or a document given to the Secretary in connection with the application for the licence was false or misleading and, if the information or document has not been false or misleading, the licence would not have been granted; or

(ea) if the licence is a licence to export live-stock and the holder was required to make a declaration of a kind mentioned in subsection 7(3B) of the Export Control Act 1982 *as a condition subject to which a licence or permission to export under that Act was granted—the holder made any such declaration falsely; or …*

***(g) the holder of the licence has contravened a condition of the licence**;*

the Secretary may give a written notice under this section to the holder of the licence.

(1A) Without limiting subsection (2), for the purpose of determining whether a circumstance mentioned in subsection (1) has occurred in relation to a live-stock export licence, the Secretary may have regard to the extent to which the holder has complied with any requirements of or under the Export Control Act 1982*, including any conditions or restrictions:*

(a) to which a licence or permission under that Act, to export prescribed goods that are live-stock, was subject; or

(b) that otherwise relate to the export of prescribed goods that are live-stock.

(2) The regulations may prescribe the matters to which the Secretary is to have regard in determining whether a circumstance referred to in paragraph (1)(a), (b), (c) or (d) has occurred.

(2A) If paragraph 25A(2)(b) applies, the Secretary may give a written notice to the holder of the licence mentioned in that paragraph.

(3) A show cause notice must:

(a) if subsection (1) applies—state the grounds on which the Secretary formed the belief because of which the notice is given; and

(aa) if subsection (2A) applies—state the grounds on which the Secretary gives the notice; and

(b) include a statement to the effect that the holder of the relevant licence may, within 14 days after the day on which the notice is given to the holder, give the Secretary a written statement showing cause why the licence should not be dealt with under subsection 24(1). …

(Emphasis added.)

98. The powers of the Secretary after issuing the show cause notice are set out in s 24. Relevantly, s 24(1) provides:

(1) If the Secretary:

(a) has given a show cause notice to the holder of an export licence; and

(b) after considering any written statement by the holder of the licence given within the period mentioned in paragraph 23(3)(b), is satisfied:

(i) if subsection 23(1) applies—of any of the matters mentioned in subsection 23(1); or

(ii) if subsection 23(2A) applies—that he or she should take action in relation to the licence under any of paragraphs (c) to (g) of this subsection;

the Secretary may, by written notice given to the holder of the licence:

(c) cancel the licence; or

(d) if the licence is about to expire—determine that the licence not be renewed; or

(e) if the licence is not already suspended—suspend the licence for the period specified in the notice; or

(f) if the licence is already suspended—further suspend the licence for the period specified in the notice; or

(g) reprimand the holder of the licence.

99. The Secretary also has powers in relation to the licensing of associates. Section 25A provides:

(1) This section applies if:

(a) the Secretary:

(i) refuses to grant a live-stock export licence to a person; or

(ii) determines that a person's live-stock export licence not be renewed; or

(iii) suspends, further suspends or cancels a person's live-stock export licence; and

(b) another person is an associate of the person.

(2) If this section applies, the Secretary may do either or both of the following, on any one or more occasions:

(a) if the other person is or becomes an applicant for the grant of a live-stock export licence—refuse to grant the licence;

(b) if the other person is or becomes the holder of a live-stock export licence—give a written notice under subsection 23(2A) to the other person.

(3) To avoid doubt, the Secretary may do as mentioned in subsection (2) whether or not the other person is still an associate at the time the Secretary does so.

100. Section 24(4) provides that decisions of the Secretary made under s 24(1) can be appealed to the Tribunal.

101. We discuss the interpretation of ss 23 and 24 in more detail below under the headings "*Jurisdiction*" at [153]–[161] and, "*The interpretation of section 23 of the AMLI*

Act".

The Standards Order, the Conditions Order, the Animals Order and the ASEL

102. The Secretary may make orders to be complied with by holders of an export licence and may give written directions under s 17(1) of the AMLI Act.

103. Pursuant to s 17(1), the Secretary has made the following Orders:

(a) the Standards Order; and

(b) Australian Meat and Live-stock Industry (Conditions on live-stock export licenses) Order 2012 (Cth) (**Conditions Order**).

104. The holder of a licence must comply with the orders and directions made under s 17(1). This is stated in s 17(5):

> *(5) An export licence is subject to the condition that the holder of the licence must comply with:*
>
> *(a) orders made under this section; and*
>
> *(b) any directions given from time to time to the holder under this section.*

105. Section 3(1) of the Standards Order provides that the holder of a live-stock export licence must not export live-stock except in accordance with the relevant ASEL.

106. The version of the ASEL that is applicable to these proceedings is version 2.3, April 2011. Broadly speaking, the ASEL sets out the following six standards for the export of live-stock from farm through to sea or air voyage:

> *Standard 1 Sourcing and on-farm preparation of livestock …*
>
> *Standard 2 Land transport of livestock …*
>
> *Standard 3 Management of livestock in registered premises …*
>
> *Standard 4 Vessel preparation and loading …*
>
> *Standard 5 Onboard management of livestock …*
>
> *Standard 6 Air transport of livestock …*

107. Section 3 of the Conditions Order provides that the holder of a live-stock export licence must comply with any relevant provisions of the Animals Order.

Approved arrangements

108. Under s 1A.02 of the Animals Order, an exporter who wants to export live-stock must also apply to the Secretary for approval of arrangements for the preparation of live-stock.

109. The Secretary may approve the arrangement if the Secretary is satisfied of the matters set out in s 1A.05(1) of the Animals Order, which provides:

> *(1) The Secretary may, by written notice given to the applicant, approve the arrangement for the preparation of live-stock for export if the Secretary is satisfied that:*
>
> *(a) the arrangement covers each step of the preparation; and*
>
> *(b) acting in accordance with the arrangement will ensure compliance with:*
>
> *(i) this Order; and*
>
> *(ii) the Australian Standards for the Export of Live-stock; and*
>
> *(iii) conditions to which the applicant's live-stock export licence under the AMLI Act covering the proposed export is subject or will be, or is likely to be, subject if the applicant is granted such a licence; and*
>
> *(iv) importing country requirements for the live-stock; and*
>
> *(c) preparation of live-stock for export in accordance with the arrangement will provide a sound basis for giving an export permit and health certificate for the live-stock; and*
>
> *(e) the applicant will act in accordance with the arrangement.*

Notice of intention

110. Section 1A.24(1) of the Animals Order requires that an exporter must give the Secretary a Notice of Intention to Export (**NOI**) before the proposed export.

111. Relevantly, s 1A.25A(2) sets out the approval criteria for an NOI:

> *(2) The criteria for approval of an NOI for a proposed export of live-stock are:*
>
> *(a) whether the proposed export complies with the following:*
>
> *(i) the requirements of this Order;*
>
> *(ii) the requirements of the AMLI Act and regulations under that Act;*
>
> *(iii) orders and directions under the AMLI Act;*
>
> *(iv) the conditions of the exporter's live-stock export licence under the AMLI Act; and*
>
> *(b) whether the international transport arrangements for the live-stock are adequate for their health and welfare.*

112. Under s 1A.26 the exporter must notify the Secretary if circumstances change after an NOI is given.

Exporter Supply Chain Assurance System (ESCAS)

113. Generally, an ESCAS must be given to the Secretary 10 working days before the first export to which the ESCAS will apply (s 1A.20(1)(b) of the Animals Order).

114. Section 1A.19(2) of the Animals Order specifies that the ESCAS must contain details about the supply chain of the live-stock.

Heat stress risk assessment (HSRA)

115. ASEL Standard 4.12 provides in part that:

> *Stocking densities and pen-group weight-range tolerances for species of livestock must be in accordance with specifications in Appendix 4.1 and heat stress assessment using an agreed heat stress risk assessment unless a variation is required and approved by the relevant government agency…*

116. In an *Export Advisory Notice 2012 – 08* dated 8 May 2012 (**2012 EA Notice**), exporters were advised that they were required to submit an HSRA to the Department with their NOI and consignment risk management plan (**CRMP**).

117. In summary, the 2012 EA Notice set out instructions which required exporters to use a software program called "*HotStuff Version 4"* to calculate the HSRA, which was to be attached to the NOI/CRMP with the "*vessel data file*" (or to organise the vessel owner to submit the vessel data file directly to the Department). The instructions also stated that the exporter was required to "*ensure the HSRA risk output is less than a 2% risk of a 5% mortality*".

Export permit and health certificate

118. Section 1A.01(i) of the Animals Order prohibits the export of live-stock unless an export permit for the export by the exporter is in force. An exporter may apply to the Secretary for an export permit and must also give a declaration which addresses the criteria set out in s 1A.29(3) of the Animals Order:

> *(3) The declaration by the exporter must state that:*
>
> *(a) the exporter has complied with:*

(i) any requirements under any other Commonwealth law, or the law of a State or Territory, that the exporter must comply with; and

(ii) the Australian Standards for the Export of Live-stock; and

(iii) the approved ESCAS that applies to the export; and

(iv) all importing country requirements relating to the consignment that the exporter must comply with; and

(b) the live-stock have been prepared for export by the exporter in accordance with the approved arrangement for the exporter; and

(ba) an accredited veterinarian has undertaken the activities in the approved export program held by the exporter under Subdivision A of Division 1A.7 that apply in relation to the preparation of the live-stock; and

(c) no relevant circumstances have changed in relation to the approved ESCAS or approved NOI that applies to the export.

119. The Secretary may grant an export permit if the various conditions set out in ss 1A. 30(1) and 1A.30(2) are satisfied. These sections provide:

(1) The Secretary may grant an export permit for live-stock if:

(aa) an NOI for the export of the live-stock has been approved under section 1A.25A and the approval is in force; and

(a) the exporter has applied for the permit under section 1A.29; and

(b) the exporter holds a live-stock export licence under the AMLI Act; and

(c) if another Commonwealth law requires the exporter to hold an authorisation (whatever it is called) for the export—the exporter holds such an authorisation; and

(d) the exporter has made the declaration mentioned in subsection 7(3C) of the Export Control Act 1982 *(about compliance with conditions of such a live-stock export licence under the AMLI Act and other requirements under that Act about export of live-stock); and*

(e) if the relevant importing country requirements include a requirement for a health certificate—a health certificate for the live-stock has been issued or will be issued when the permit is granted; and

(f) the Secretary is satisfied that:

(i) the live-stock have been prepared in accordance with the approved arrangement and any conditions on the approval of the arrangement; and

(ia) an accredited veterinarian has undertaken the activities in the approved export program held by the exporter under Subdivision A of Division 1A.7 that apply in relation to the preparation of the live-stock; and

(ii) the exporter has complied with importing country requirements in relation to the live-stock; and

(iii) no relevant circumstances have changed since the live-stock were inspected under section 1A.33 for the purposes of the issue of the health certificate (if required); and

(iv) the Australian Standards for the Export of Live-stock have been, and will continue to be, complied with in relation to the live-stock; and

(v) the exporter has complied, and is in a position to comply, with the approved ESCAS that applies to the export, unless an ESCAS is not required because of subsection 1A.19(4); and

(g) the live-stock are fit enough to undertake the proposed export voyage without any significant impairment of their health; and

(h) the travel arrangements for the live-stock are adequate for their health and welfare.

Note: Paragraph (1)(a) has the effect that the Secretary may grant an export permit only if the exporter has made an application for the permit that includes the declaration required by paragraph 1A.29(2)(b).

(2) In deciding whether to grant an export permit to an exporter, the Secretary may take into account whether the exporter has complied with:

(a) any conditions to which a live-stock export licence under the AMLI Act was subject; and

(b) any requirements under that Act that otherwise relate to the export of live-stock.

Registered premises

120. Prior to their export, live-stock may be held and assembled at registered premises. The Animals Order provides that these premises must be registered and sets out requirements for an application for registration in s 2.04.

121. Section 2.04(3)(d) of the Animals Order refers to an application for registration having to include a copy of an operations manual. Section 2.05 sets out the requirements for the operations manual.

122. Section 2.10 of the Animals Order sets out specified conditions for the registration of premises. It provides in part:

(1) The registration of premises is subject to the following conditions:

(a) that the operator must not accept an animal for holding and assembling for export except in accordance with the registration;

(b) that, subject to subsection (2), operations at the premises, and the maintenance of the premises, are carried out in accordance with the approved operations manual for the premises; …

JURISDICTION

123. The Applicants submitted that the scope of the Tribunal's review should be restricted to the content of the show cause notices.

124. Generally speaking, a show cause notice must state the grounds on which the Secretary formed the belief that resulted in the notice being given (see ss 23(3)(a) and 23(3)(aa)). The export licence holder is then given an opportunity to respond in the form of a written statement (s 23(3)(b)). After giving the show cause notice and considering the written statement of the export licence holder, the Secretary may, by written notice to the licence holder take action, including to cancel or suspend the licence, or to issue a reprimand (s 24(1)).

125. The Applicants submitted that the effect of these provisions is that the scope of the Tribunal's review is limited to the grounds raised in the Secretary's show cause notice.
The core of the Applicants' submission is that the requirement to afford procedural fairness under the AMLI Act, through the process of the Secretary giving a show cause notice, and the consideration of the written statement from the export licence holder by the Secretary, is a precondition to the Secretary's exercise of power under s 24(1). The Applicants also submitted that the Tribunal is subject to those same preconditions that were determined by the Secretary in the show cause notice.

126. If this submission were to be accepted, the Tribunal would have no jurisdiction to consider allegations that were not contained in the grounds in the show cause notices. The Tribunal could not then, for example, consider subsequent allegations of non-compliance with s 23(1) against the Applicants, such as the allegations concerning the Peel Feedlot, except to the extent that those alleged events were relevant to the grounds originally stated in the show cause notice.

127. In the Applicants' Amended Closing Submissions, the Applicants summarised their submissions about the Tribunal's jurisdiction as follows:

> *39. Since the Tribunal's power is subject to the same constraints as the Respondent's power, the ultimate question before the Tribunal, in determining whether the Respondent's decision to cancel Emanuel Exports' licence was the correct or preferable decision, is whether the Tribunal is satisfied of one or more of the matters mentioned in s 23(1) of the* AMLI Act *on the grounds set out in the show cause notices issued by the Respondent to Emanuel Exports.*

> *40. In considering whether it is satisfied of one or more of the matters mentioned in s 23(1) on the grounds alleged in the show cause notices the Tribunal may, if relevant, have regard to evidence of events which have occurred since the Respondent's decision, where that evidence is relevant to those grounds. But to consider allegations and evidence concerning grounds not raised in the show cause notices for being satisfied of one or more of the matters mentioned in s 23(1) of the* AMLI Act *would be to change the nature of the decision under review and would result in jurisdictional error by the Tribunal.*
>
> (Original emphasis.)

128. These submissions were further articulated by counsel for the Applicants at the hearing (transcript/20):

> *… coming back to what the High Court said in the Frugtniet case what is before the tribunal for determination cannot be any wider than what was before the respondent under section 24. That means that the grounds given in the original notices to show cause are the touchstone of determining what the issues are in these proceedings. You can't, as the respondent seeks to do, come along years later and start bolting on more and more issues and more and more reasons why they consider that the - one or both of the applicants has ceased to be a body corporate of integrity and competence.*
>
> *You have to go back to the original grounds given in the original show cause notice and ask is the material relevant to determining that question. It's not a free willy inquiry into whether or not today a licence can be given to Emanuel Exports. The focus here is - the assumption is it is a licence-holder, it is a body corporate of integrity and competence. The question is whether it ceased to be based on the evidence before the Tribunal. Ceased on the grounds given in 2018, not on some other grounds given in 2021 or 2020.*

129. Counsel for the Secretary submitted that the scope of the Tribunal's jurisdiction is not confined by the grounds or the reasoning contained within the show cause notices or the facts or evidence referred to in those notices. She submitted that this does not mean, however, that there are no limits to the Tribunal's jurisdiction. This was more particularly explained in the Secretary's Amended Closing Submissions as follows:

> *(a) The Tribunal is required to step into the shoes of the Secretary, and exercise afresh the powers of the Respondent under s 24 of the AMLI Act on the basis of the material before the Tribunal;*
>
> *(b) The statutory questions raised by s 24 of the AMLI Act for decision by the Respondent determine what considerations the Tribunal must or must not take into account in reviewing those decisions;*
>
> *(c) The Tribunal must review the actual decisions made by the Respondent namely the decisions to cancel the Applicants' licences, and is not constrained by the reasoning of the Respondent when making its decision to cancel the Applicants' licences;*
>
> *(d) The Tribunal must itself determine the substantive issues raised by the material and evidence before it. The obligation upon the Tribunal to*

> *consider relevant material and evidence is not dependent upon whether an applicant for review argues that those matters are, or are not, relevant as part of its case.*

130. We will now discuss the relevant case law concerning the nature and scope of the Tribunal's review.

131. In *Drake v Minister for Immigration and Ethnic Affairs* [1979] FCA 39; (1979) 2 ALD 60 (***Drake No 1***), Bowen CJ and Deane J provided guidance as to the question for determination that is before the Tribunal. Their Honours clarified that the Tribunal is subject to the same general constraints as the decision-maker, stating, at 68–69, that:

> *The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him.* ***The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal****. The Act offers little general guidance on the criteria and rules which the Tribunal is to apply in the performance of its task of reviewing administrative decisions which are subjected to its surveillance. Even in a case such as the present where the legislation under which the relevant decision was made fails to specify the particular criteria or considerations which are relevant to the decision, the Tribunal is not, however, at large. In its proceedings, it is obliged to act judicially, that is to say, with judicial fairness and detachment.* ***In its review of an administrative decision, it is subject to the general constraints to which the administrative officer whose decision is under review was subject****, namely, that the relevant power must not be exercised for a purpose other than that for which it exists …, that regard must be had to the relevant considerations, and that matters 'absolutely apart from the matters which by law ought to be taken into consideration' must be ignored ….*
>
> (Emphasis added.)

132. In a separate judgment in *Drake No 1*, Smithers J commented that it is the reviewable decision itself that the Tribunal must review, and not the reasons given by the decision-maker. His Honour stated, at 77–78:

> *It might be thought that it would be open to the Administrative Appeals Tribunal not to decide for itself whether a decision made by an administrator was the right decision which ought to have been made in the circumstances but rather to satisfy itself that the decision of the administrator was one which an administrator acting reasonably might have made. But to do this would be to review the reasons for the decision rather than the decision itself. It is the actual decision which by virtue of s 25(1) and (4) of the Administrative Appeals Tribunal Act the Tribunal is authorized and required to review. The duty of the Tribunal is to satisfy itself whether a decision in respect of which an application for review is duly instituted is a decision which in its view, was objectively, the right one to be made. Merely to examine whether the administrator acted reasonably in relation to the facts, either as accepted by him or as found by the Tribunal may not reveal this. In this connection the observations of Sheppard J in Horne v Locke [1978] 2 NSWLR 88 at 98–100*

are in point. It is to permit implementation of the function of the Tribunal, as so understood, that there has been conferred upon the Tribunal extensive powers of investigation. Those powers are conferred so that the Tribunal may equip itself to make an appropriate recommendation or affirm the decision: see s 43 of the Administrative Appeals Tribunal Act and Pt XXII of the Schedule thereto.

133. In the more recent decision of *Frugtniet*, Bell, Gageler, Gordon and Edelman JJ considered what standing in the shoes of the decision-maker required the Tribunal to do. Their Honours clarified that the Tribunal has the same powers and constraints as the decision-maker, and that the statutory question before the decision-maker marks the boundary of the Tribunal's review powers:

> *51. … the jurisdiction conferred on the AAT by ss 25 and 43 of the AAT Act, where application is made to it under an enactment, is to* ***stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision-maker for the purpose of making the decision under review****. The AAT exercises the same power or powers as the primary decision-maker, subject to the same constraints****. The primary decision, and the statutory question it answers, marks the boundaries of the AAT's review.*** *The AAT must address the same question the primary decision-maker was required to address, and the question raised by statute for decision by the primary decision-maker determines the considerations that must or must not be taken into account by the AAT in reviewing that decision. A consideration which the primary decision-maker must take into account in the exercise of statutory power to make the decision under review must be taken into account by the AAT. Conversely, a consideration which the primary decision-maker must not take into account must not be taken into account by the AAT.*
>
> (Emphasis added.)

134. In a separate judgment in *Frugtniet,* Kiefel CJ, Keane and Nettle JJ explained that, subject to the statute in question, the Tribunal can consider new evidence that was not before the original decision-maker, including evidence of subsequent events, provided that they are relevant to decide the same statutory question that was before the original decision-maker:

> *15. Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT.* ***The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the***

> ***original decision-maker.*** *As Kiefel J observed in Shi,* ***identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in connection with the decision****. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision.*
>
> (Emphasis added.)

135. At this point, we note that s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) provides some guidance about the Tribunal's role in undertaking merits review of a decision:

> *(1)* ***For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision*** *and shall make a decision in writing:*
>
> *(a) affirming the decision under review;*
>
> *(b) varying the decision under review; or*
>
> *(c) setting aside the decision under review and:*
>
> *(i) making a decision in substitution for the decision so set aside; or*
>
> *(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.*
>
> (Emphasis added.)

136. Section 43(1) of the AAT Act was discussed by Kiefel J (now Kiefel CJ) in *Shi*. Her Honour stated that:

> *134.* ***Section 43(1) expresses clearly that the Tribunal may exercise all of the powers and discretions conferred upon the original decision-maker. The Tribunal has been said to stand in the shoes of the original decision-maker, for the purpose of its review.*** *In Minister for Immigration and Ethnic Affairs v Pochi Smithers J said that,* ***in reaching a decision on review of a decision of the original decision-maker, the Tribunal should consider itself as though it were performing the function of that administrator in accordance with the law as it applied to that person****. In Liedig v Federal Commissioner of Taxation, Hill J adopted, as applicable to the Tribunal, what Kitto J said of the Taxation Board of Review in Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation, namely that* ***its function is 'merely to do over again*** *... what the Commissioner did in making the assessment', within the limits of the taxpayer's objection.*
>
> (Footnotes omitted, emphasis added.)

137. Consistent with the approach of Smithers J in *Drake No 1*, Kiefel J observed at [141]–[142] of *Shi* that it is the reviewable decision itself that the Tribunal is reviewing, and not the reasons for making that decision stated by the decision-maker. Further, her

Honour confirmed that the Tribunal must address the same statutory question as the original decision-maker:

> *140. The term 'merits review' does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the 'correct or preferable decision'. 'Preferable' is apt to refer to a decision which involves discretionary considerations. A 'correct' decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in* Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*, said that it is for the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration.*
>
> *141. The reasons of the members of the Full Court of the Federal Court in Drake v Minister for Immigration and Ethnic Affairs confirm what is apparent from s 43(1), that the Tribunal reaches its conclusion, as to what is the correct decision, by conducting its own, independent, assessment and determination of the matters necessary to be addressed. To the contrary of the argument put by the respondent on this appeal, that the Tribunal's exercise of power is dependent upon the existence of error in the original decision, Smithers J denied that the Tribunal was limited to something of a supervisory role. As his Honour said,* ***the Tribunal is authorised and required to review the actual decision, not the reasons for it****.*
>
> *142. In considering what is the right decision,* ***the Tribunal must address the same question as the original decision-maker was required to address****. Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision. The issue is then one of relevance, determined by reference to the elements in the question, or questions, necessary to be addressed in reaching a decision. It is not to be confused with the Tribunal's general procedural powers to obtain evidence.* ***The issue is whether evidence, so obtained, may be taken into account with respect to the specific decision which is the subject of review.***
>
> (Footnotes omitted, emphasis added.)

138. The Tribunal's role is to undertake an inquisitorial review, and it is therefore not obliged to limit its consideration to the case as articulated by the parties. In *Grant v Repatriation Commission* [1999] FCA 1629; (1997) 57 ALD 1, the Full Court of the Federal Court explained, at 6:

> *18. An inquisitorial review conducted by the AAT, as with the Refugee Review Tribunal, is one in which the tribunal is required to determine the substantive issues raised by the material and evidence advanced before it and, in doing so, it is obliged not to limit its determination to the 'case' articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant …*

139. Further, the inquisitorial nature of the Tribunal's review powers means that it has more flexibility than a court and is not confined to the issues articulated in the pleadings. In *Uelese v Minister for Immigration* [2015] HCA 15; (2015) 256 CLR 203 (***Uelese***) French CJ, Kiefel, Bell and Keane JJ observed:

> *62. … the Minister's submission seeks to import into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading. That approach is inappropriate to the kind of review undertaken by the Tribunal.*

140. Unlike a court undertaking judicial review, the Tribunal is not limited to only being able to consider issues raised in the case articulated by the Applicant if other issues are raised by the evidence. The following passage from the joint judgment of Bowen CJ and Deane J in *Drake No 1* at 68, is also relevant:

> ***The function of the Tribunal is, as we have said, an administrative one. It is to review the administrative decision that is under attack before it. In that review, the Tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised.*** *Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal.*
>
> (Emphasis added.)

141. Similarly, in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21; (1979) 2 ALD 1, Smithers J stated at 23:

> *It is important to observe that the Tribunal is not constituted as a body to review decisions according to the principles applicable to judicial review. In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government.*

142. In summary, the Tribunal's role is not to find flaws in the reviewable decision or the reasons for the reviewable decision. Instead, the Tribunal considers the matter "*de novo*", with the Tribunal's task being "*to do over again*" what the original decision-maker did (*Shi* at 315). For this reason, often, Tribunal members will have little or no regard to the reasons given by the decision-maker and will often determine an application on a different basis from that of the original decision-maker. This also has some practical benefit because, in reviewing the matter "*de novo*", the Tribunal is required to make its own

independent findings based on the facts and evidence before it and should not be influenced by the original decision-maker's reasoning.

143. The Tribunal is not, however, "*at large*" and has the same powers and constraints as the original decision maker. The Tribunal must confine its review to the same statutory question that was before the original decision-maker. However, in doing so, it can consider new evidence that was not before the original decision-maker, including evidence of subsequent events that are relevant to the statutory question, provided that the statutory question does not change. In undertaking a de novo review on the merits, (subject to the statute in question) the Tribunal is not limited to the grounds, reasons or facts set out in the decision-maker's reasons.

144. These general principles are, however, subject to the express wording of the statutory provision or provisions in question in an individual case. As Kiefel J observed in *Shi*, at 324 [132], "*The nature of the review conducted by the Tribunal depends upon the terms of the statute conferring the right*". In this regard, the Applicants have referred to two cases in support of their submission that the scope of the Tribunal's review is limited to the grounds identified in the show cause notices. We will now discuss these cases.

145. Firstly, the Applicants referred to *Murdaca v Australian Securities and Investments Commission* [2009] FCAFC 92; (2009) 178 FCR 119 (***Murdaca***). This case concerned the power of the Australian Securities and Investments Commission (**ASIC**) under s 206F(1)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) to disqualify a person from managing a corporation. In distinguishing the case of *Murdaca* from the present applications, the Applicants submitted that s 206F(1)(b) of the Corporation Act can be contrasted with ss 23(3) and 24(1)(b) of the AMLI Act because s 206F(1)(b) did not require ASIC to specify the grounds upon which they were considering disqualifying the person. Section 206F(1) of the Corporations Act provided:

> *(1) ASIC may disqualify a person from managing corporations for up to 5 years if:*
>
> *(a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):*
>
> *(i) the person has been an officer of 2 or more corporations; and*
>
> *(ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) … about the corporation's inability to pay its debts; and*

(b) ASIC has given the person:

(i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and

(ii) an opportunity to be heard on the question; and

(c) ASIC is satisfied that the disqualification is justified.

146. The Full Court of the Federal Court decided that ASIC was not confined to the areas of concern identified in the prescribed form and that it could make disqualification orders in relation to companies that were not identified in the prescribed form. The Court reasoned at 146–147:

> *121. We will now address the requirements of the notice contemplated by s 206F(1).*
>
> *122. Section 206F(1)(b)(i) refers to "a" notice. That is to say, the subsection refers to one single notice — not to notices (plural). In our view, the subsection contemplates the giving of only one notice.*
>
> *123. In addition, as already mentioned … the notice has to be in the prescribed form. The prescribed form is Form 5249 in Sch 2 to the Corporations Regulations. That form makes clear that the recipient of the notice may avail himself or herself of the opportunity to be heard which is outlined in the form or may choose to remain silent. The form invites the recipient to demonstrate why he or she should not be disqualified from managing corporations.*
>
> *124. Both the terms of s 206F and the language used in Form 5249 contemplate that a notice recipient may wish to put material and submissions before ASIC in support of his or her contention that he or she should not be disqualified and may also wish to attend a hearing before a delegate of ASIC.*
>
> *125. That process, the possibility of further s 533 reports and* ***the very real prospect that additional relevant material may come to ASIC's attention after the s 206F(1)(b) notice has been given all tend to negate the proposition that the show cause notice must contain everything upon which ASIC will or may rely when undertaking the third stage of the process. Such an approach is unduly restrictive and is not warranted by the terms of s 206F.***
>
> *126. That is not to say that s 206F(1)(b) is a complete statement of the content of the duty to afford procedural fairness owed by ASIC to the person under consideration for disqualification. In our view, the general law would oblige ASIC to accord procedural fairness to such a person prior to making any decision to disqualify him or her (see* Commissioner for ACT Revenue v Alphaone Pty Ltd *(1994) 49 FCR 576 at 589-592). The proper discharge of that obligation would compel ASIC to ensure that, immediately before it set about deciding the question of disqualification, the person affected was well aware of the allegations made against him or her and was well aware of the material that ASIC intends to rely upon in coming to a view about those allegations. ASIC would also be obliged to ensure that that person had had a fair opportunity to be heard in respect of those matters. Very often, in any event, it will not be possible for ASIC to comply fully with that duty at the time when the show cause notice is issued.*

> *127. For these reasons,* ***we do not agree that ASIC must refer to and address in the show cause notice all matters upon which it might rely in support of disqualification and we do not agree that ASIC is confined to such matters as are contained in the show cause notice when it comes to consider disqualification.***
>
> *128. The fact that, when deciding the question of disqualification, ASIC may have regard to the relevant person's conduct in relation to the management, business or property of any corporation, to the public interest and to any other matter that ASIC considers appropriate (see s 206F(2)(b)) supports the conclusions which we have reached.*
>
> (Emphasis added.)

147. In contrast, the Secretary submitted that the reasoning of the Full Court of the Federal Court in *Murdaca* is "*directly applicable to ss 23 and 24 of the AMLI Act*". The Secretary further submitted that although s 23(1) requires the Secretary to have "*reasonable grounds for believing*", s 24 does not state (either expressly or impliedly) that when the Secretary gives written notice to the licence holder under s 24(1) that they are limited to the "*reasonable grounds*" set out in the show cause notice. The Secretary further submitted that *Murdaca* is illustrative that procedural fairness can still be afforded to an export licence holder if the show cause notice procedure in the AMLI Act is understood in a similar manner to *Murdaca*. The Secretary also noted, as per the Court's observation in *Murdaca*, that the "*reasonable grounds*" may change once additional relevant material is submitted to the decision-maker after issuing the show cause notice. We agree with the similarities referred to by the Secretary in both statutory regimes. We further agree that *Murdaca* is in fact supportive of the Secretary's case, rather than that of the Applicants' case.

148. The Applicants also referred to the case of *Gribbles Pathology (Vic) Pty Ltd v Cassidy* [2002] FCA 859; (2002) 122 FCR 78 (***Gribbles***) in support of their submissions concerning jurisdiction. *Gribbles* concerned a statutory regime where the only grounds that could be relied upon in a second notice, and in a subsequent review by the Medicare Participation Review Committee (**MPRC**), were those specified in the first notice (s 23DL of the *Health Insurance Act 1973* (Cth) (**HIA**); *Gribbles* at 81–82). The notice procedure under s 23DL of the HIA was outlined by the Federal Court, at 81, as follows:

> *8. … If the Minister has 'reasonable grounds' for 'believing that such an authority has breached an undertaking', given for the purpose of s 23DF, he must give notice in writing to that authority 'setting out particulars of those grounds' and inviting it to make submissions as to why further action should not be taken against it. Such a notice is given pursuant to s 23DL(1) (the first notice).*

9. *The approved pathology authority then has 28 days within which to make any submissions: see s 23DL(2).*

10. *If the Minister, having had regard to any such submissions, remains satisfied that there are reasonable grounds '(being grounds that were specified in the notice referred to in subsection (1))' for believing that there has been a breach of the undertaking, he must, pursuant to s 23DL(4)(c), give notice in writing to a chairperson of an MPRC setting out particulars of those grounds (the second notice).*

11. *Where the Minister has made a decision pursuant to s 23DL(4) in relation to a person, he is required by s 23DL(5) to give that person notice in writing of the decision (the third notice).*

12. *Part VB makes provision for the establishment of MPRCs. Section 124E(3) provides that, upon receiving a notice under s 23DL(4) in relation to an approved pathology authority, a chairperson must establish an MPRC. Section 124C makes provision for the appointment of chairpersons, while s 124EA makes provision for the appointment of members.*

13. *Section 124FC(1)(c) provides that where an MPRC is established in relation to an approved pathology authority, or has made a determination that it should consider whether such an authority has breached an undertaking, it shall determine whether that authority has breached the undertaking given by it to the Minster* [*sic*]*. If the MPRC determines that there has been such a breach, it has available to it a number of options. These include taking no action against the authority, counselling or reprimanding the authority, or revoking any undertaking previously given by it and directing that no further undertaking given by it should be accepted by the Minister for a period of up to five years.*

149. The Court later explained the importance of the grounds stated in the first notice, which determined the content of the second notice and the validity of the subsequent notices, at 102:

> 132. *The giving by the Minister of a notice under s 23DL(1)* [the first notice]*, and his genuine consideration of any submissions in response to that notice, are preconditions to the giving of a notice under s 23DL(4)(c)* [the second notice]*. The first notice sets the outer limits of the second notice. The 'reasonable grounds' upon which the Minister relies in giving the second notice must be the very same grounds as are specified in the first notice. The giving by the Minister of a third notice, under s 23DL(5), is the final stage of the procedure for the establishment of an MPRC. The validity of that notice must, in turn, be dependent upon the validity of the antecedent notices upon which it rests.*

150. The Court in *Gribbles* further explained how a first notice made under s 23DL(1) is a precondition to the subsequent stages of the regulatory regime in the HIA, at 103:

> 136. *A notice under s 23DL(1) [the first notice] clearly serves a number of purposes. It gives the approved pathology authority notice that the Minister has reasonable grounds for believing that it has breached its undertaking. It provides the basis upon which that authority can make submissions as to why the Minister should take no further action. Finally, it sets the outer limits*

for any subsequent notice to the MPRC, and for its inquiry and determination.

151. We do not accept the Applicants' submissions with respect to *Gribbles* being a similar statutory regime to that under ss 23 and 24 of the AMLI Act. The show cause regime in *Gribbles* was instead, as submitted by the Secretary, "*materially different from ss 23 and 24 of the AMLI Act*". Specifically, under the relevant provisions of the HIA, being the relevant statutory regime in *Gribbles*, there are two notices issued by the Minister, whereas under the AMLI Act, only one notice is issued by the Secretary. Importantly, and unlike the AMLI Act, the HIA requires that a second notice is given to the chairperson of an MPRC which sets out particulars of the grounds upon which the Minister relies. No such notice to the Tribunal is required under the AMLI Act.

152. Additionally, the express wording of s 23DL of the HIA and s 24 of the AMLI Act differs. The first show cause notice under the HIA requires the Minister to provide "*particulars*" of the "*reasonable grounds*" the Minister has for believing the authority has breached an undertaking. No such "*particulars*" are required under s 23(3) of the AMLI Act, which merely provides that the show cause notice must "*state the grounds on which the Secretary formed the belief".* As mentioned in the preceding paragraph, the HIA also provides for a second notice, unlike the AMLI Act. If the approved pathology authority has not made submissions to the Minister, the Minister is required to give the second notice to the chairperson of the MPRC "*setting out particulars of the grounds referred to in subsection (1)*". If the approved pathology authority did make submissions to the Minister, and the Minister is satisfied there are reasonable grounds for believing there had been a breach of the undertaking "*being the grounds that were specified in the notice referred to in subsection (1)*", the Minister is required to give the second notice to the chairperson of the MPRC. This second notice is a further difference between the two statutory regimes that is of significance, because the express wording of s 23DL(4) of the HIA indicates that the only grounds that can be referred to in the second notice to the chairperson of the MPRC were those specified in the first notice, which, as the Court observed, set the outer limits for the MPRC's inquiry and determination. Thus, as well as there being no equivalent second notice in the AMLI Act, the AMLI Act is more general in its reference to "*grounds*" as distinct from the HIA also requiring "*particulars*" of those grounds. As such, the Tribunal is not of the opinion that *Gribbles* is helpful because it is not analogous to the show cause notice regime under the AMLI Act.

153. We will now consider the provisions of ss 23 and 24 of the AMLI Act. There are two stages both of which require satisfaction with respect to the matters in s 23(1) before the Secretary can move to cancelling or suspending the licence or reprimanding the licence holder.

154. The first stage requires that, before issuing a show cause notice, the Secretary must have reasonable grounds for believing, in relation to an export licence, any of the matters listed in the sub-sections of s 23(1).

155. The second stage applies after the show cause notice has been given and after the Secretary has considered any written statement by the holder of the licence in response to the show cause notice. At this second stage, s 24(1)(b)(i) requires the Secretary to be satisfied of any of the matters mentioned in s 23(1) before moving to cancel, suspend or reprimand.

156. The Tribunal is to stand in the shoes of the Secretary exercising the powers in s 24(1). As a pre-condition to the Tribunal exercising those powers, there must have been a show cause notice issued by the Secretary under s 23(1). The process of the Secretary issuing a show cause notice and the licence holder having the opportunity to respond is anterior to the application to the Tribunal. That anterior process of the show cause notice and a response provides procedural fairness to the licence holder before the Secretary can act to cancel, suspend or reprimand.

157. However, as one moves along the "*administrative continuum"* (*Frugtniet* at [53]) of the decision-making process from the Secretary to the Tribunal, there is nothing in s 24(1) which suggests that the Tribunal is confined to consideration of matters raised in the show cause notice. The show cause notice has served its purpose as being a requirement of procedural fairness before the Secretary may make the original decision. The procedure with respect to the show cause notice is not repeated before the Tribunal and it is not necessary for the purposes of achieving procedural fairness before the Tribunal for its decision to be confined to matters raised in the show cause notice. To the contrary, the role of the Tribunal is to determine what is the correct or preferable decision by considering the matters mentioned in s 23(1). Rather than being confined to the factual matters raised in the show cause notices, the Tribunal is confined to the same statutory questions that were before the original decision-maker. Those statutory questions were expressly stated in the show cause notices as whether:

(a) the holder of the licence has ceased to be a body corporate of integrity (s 23(1)(b)(i));

(b) the holder of the licence has ceased to be competent to hold the licence (s 23(1)(b)(ii));

(c) a person who participates in the management or control of the meat or live-stock export business of the holder of the licence has ceased to be a person of integrity: (s 23(1)(d)); and/or

(d) the licence holder has contravened a condition of the licence (s 23(1)(g)).

158. In making the First Reviewable Decision, the Secretary considered these statutory questions. These same statutory questions are raised before the Tribunal. The Tribunal may consider facts relevant to these statutory questions. For example, the Tribunal may have regard to facts that have become known or have arisen that are relevant to these statutory questions.

159. These statutory questions include issues which relate to the integrity and competency of the licence holder and participants in the business of the licence holder. It is evident from a reading of the AMLI Act as a whole, and in particular, ss 11, 12, 16, 17, 23 and 24, that it is an object of the AMLI Act that licence holders have qualities of integrity and competency. To achieve that object, the Tribunal must be able to consider all matters relevant to those qualities up to the date of its decision, even if they were not raised in the show cause notice. For example, if facts arose after the show cause notice that suggested the licence holder lacked integrity, then it would be appropriate for the Tribunal to consider that matter, but subject to the obligation to afford procedural fairness to the licence holder. The Tribunal has a statutory obligation under s 39 of the AAT Act to ensure that a party is given a reasonable opportunity to present their case. A material breach of the obligation to accord procedural fairness will give rise to a jurisdictional error (*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421). The Tribunal will adopt a procedure pursuant to s 33(1) of the AAT Act consistent with that obligation by, for example, requiring allegations to be articulated in a Statement of Facts, Issues and Contentions (**SFIC**) before the hearing.

160. In this case, the Applicants objected to evidence of their recent conduct relating to animal welfare issues at the Peel Feedlot as being beyond jurisdiction. Given that the

Applicants still participate in the animal live export industry (albeit not as an exporter, since their licences were cancelled), their recent conduct is relevant to the issue of their integrity.

161. Based on our analysis of the authorities outlining the fundamental principles of the nature of the review by the Tribunal, as well as our analysis of *Murdaca*, *Gribbles* and ss 23 and 24, we find that the correct approach is that the Tribunal's review is not limited to the grounds and the reasons stated by the Secretary in the show cause notices. The relevant statutory questions are broader than suggested by the Applicants. We have set out the correct formulation of the statutory questions in the "*issues*" section above.

The interpretation of section 23 of the amli act

162. We turn now to address the interpretation of ss 23(1)(b) and 23(1)(d) of the AMLI Act. The relevant parts of s 23 are as follows:

> *23(1) If the Secretary has reasonable grounds for believing, in relation to an export licence, that: …*
>
> *(b) if the licence is held by a body corporate, the holder of the licence has ceased to be:*
>
> *(i) a body corporate of integrity; or*
>
> *(ii) competent to hold the licence; or*
>
> *(iii) a body corporate of sound financial standing; or …*
>
> *(d) a person who participates in the management or control of the meat or live-stock export business of the holder of the licence has ceased to be a person of integrity; or …*
>
> *(g) the holder of the licence has contravened a condition of the licence;*
>
> *the Secretary may give a written notice under this section to the holder of the licence. …*

Section 23(1)(b)

163. We agree with both parties' submissions that the words "*integrity*" and "*competence*" (derived from "*competent*") should be given their natural and ordinary meaning, noting relevant dictionary definitions. This is consistent with the consideration of "*integrity*" in other decisions of this Tribunal (see *Mottaghi and Migration Agents Registration Authority* [2007] AATA 60; (2007) 98 ALD 424, 436 and *Salomonn and Migration Agents Registration Authority* [2013] AATA 146).

164. The *Macquarie Dictionary Online* (at entry 1) defines "*integrity*" as "*soundness of moral principle and character; uprightness; honesty*". It further defines "*competence*" (at entries 1 and 4) as "*the quality of being competent; adequacy; due qualification or capacity*" and "*the quality or position of being legally competent; legal capacity or qualification (which presupposes the meeting of certain minimum requirements of age, soundness of mind, citizenship, or the like)*".

165. The *Oxford English Dictionary Online* defines "*integrity*" (at entry 3b) as "*soundness of moral principle; the character of uncorrupted virtue, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity*". It defines "*competence*" (at entries 4a and 4b) as "*sufficiency of qualification; capacity to deal adequately with a subject"* and "*the quality or position of being legally competent; legal capacity or admissibility*".

166. The concepts of "*integrity*" and "*competence*" must be considered in the statutory context in which those words appear. For the purpose of s 23, the question of whether a body corporate is one of integrity is to be determined by reference to whether the corporation and those associated with it will conduct the business of exporting live-stock with integrity. With respect to competence, the question is whether the corporation has the qualifications and capability to satisfy us that their business will be conducted properly and with integrity.

167. The issue before the Tribunal with respect to s 23(1)(b) is whether Emanuel has ceased to be, in the sense of no longer being, a body corporate of integrity. This interpretation is supported contextually by the operation of s 12(1)(b)(i) which requires the Secretary to have been satisfied that Emanuel was a body corporate of integrity when it granted the export licence to Emanuel. It follows that Emanuel was a body corporate of integrity at the time that its export licence was granted. The Tribunal needs to consider the question of integrity as at the date of making its decision. The question for the Tribunal is therefore whether it is satisfied that Emanuel is no longer a body corporate of integrity. To answer this question the Tribunal would consider any conduct of Emanuel, since its licence was issued, that goes to its integrity and then decide whether Emanuel is a body corporate of integrity as at the date of making its decision. In other words, the Tribunal will consider both historical and current factors in determining the integrity of Emanuel for the purpose of exercising any of the powers under s 24(1). This may involve consideration of the concept of corporate rehabilitation if Emanuel has, at some time since its licence was granted, shown a lack of integrity, for example, but has since taken steps towards

establishing itself as a body corporate of integrity. Closely linked to this concept of corporate rehabilitation is whether Emanuel has taken steps to improve itself by removing Mr Graham Daws from involvement in Emanuel.

168. In determining what is the correct or preferable decision, the Tribunal must be satisfied of any of the specified matters in s 23(1), including s 23(1)(b), which states that "*if the licence is held by a body corporate"*, the holder of the licence has ceased to be a body corporate of integrity. The use of the present tense "*is*" does not require that s 23(1)(b) will only apply if a licence is currently held by Emanuel. That would lead to the absurd result that, despite being available to the Secretary as a ground upon which to cancel or suspend a licence, s 23(1)(b) could not be relied upon by the Tribunal upon review because the licence is no longer held by the body corporate. No party contended for that construction, but both parties contended that some weight in terms of interpretation should be given to the use of the present tense in s 23(1)(d). We disagree for the reasons that follow.

Section 23(1)(d)

169. Section 23(1)(d) provides that the Secretary may issue a show cause notice if *"a person who **participates** in the management or control of the meat or live-stock export business of the holder of the licence has ceased to be a person of integrity".* The use of the present tense in the phrase "*who participates*" does not limit the application of s 23(1)(d) to a person currently (namely at the time of this decision) participating in the management or control of the export business. That would lead to a similar and equally absurd result as for s 23(1)(b), because if the licence was cancelled or suspended by the Secretary, then the business would no longer be operating and therefore no person would be participating in it. Section 23(1)(d) refers to the conduct of "*a person who participates in*" the business but there is no temporal requirement with respect to that conduct. The phrase "*who participates*" is in the present simple tense. The present simple tense can refer to the present or the past (when it refers to the past it is called the "*historical present*"). If the legislator wished to make it clear that this provision referred to the present only, the present continuous tense - "*a person who is participating*" - could have been used. Further, the fact that a "*person who participates"* could be replaced with the noun "*a participant"* adds additional weight to the finding that the verb "*participates*" was not intended to indicate a particular point in time.

170. We find that the phrase "*who participates*" describes the person participating in the management or control of the business at any time.

171. Having identified the person by reference to their participation, the matter for consideration is whether that person ceased to be a person of integrity. Whilst not directly on point, we note the High Court decision of *Mikasa (NSW) v Festival Stores* [1972] HCA 69; (1972) 127 CLR 617 at 661, where a past participle was construed as being "*neutral in temporal meaning*". We consider that "*participates*" is also neutral in temporal meaning. We reject the contention that the person must participate at the time of the decision.

172. We note that, pursuant to s 12(1)(c), the Secretary must have been satisfied that a person who participates or would participate in the management or control of the business (such as Mr Graham Daws as managing director) was a person of integrity when it granted Emanuel's Licence. The issue for the Tribunal under s 23(1)(d) is whether that person has ceased to be, in the sense of no longer being, a person of integrity. The Tribunal needs to consider this question as at the date of making its decision.

173. The question for the Tribunal is whether it is satisfied that Mr Graham Daws is no longer a person of integrity. To answer this question the Tribunal would consider any conduct of Mr Graham Daws whilst participating in the control or management of the business of Emanuel that goes to his integrity and then decide whether Mr Graham Daws ceased being a person of integrity. In other words, the Tribunal will consider both historical and current factors when determining the question of the integrity of Mr Graham Daws for the purpose of exercising any of the powers under s 24(1). This may involve placing less weight on the historical conduct of Mr Graham Daws in the context of s 23(1)(d) if it were the case that he had effectively removed himself from the control or management of the business of Emanuel. Conversely, if his participation continued beyond his resignation as managing director, then greater weight would be placed upon his historical conduct and the Tribunal would take into account his ongoing involvement for the purposes of both ss 23(1)(b) and 23(1)(d). In some cases, there would be the prospect of the person in s 23(1)(d) showing that they had rehabilitated themselves, but that does not apply to Mr Graham Daws who chose to simply resign and has not attempted to show any personal rehabilitation.

174. Further, the Applicants contend that satisfaction of the elements in s 23(1)(d) is defined by s 8(1) which, it is contended, provides an exhaustive description of those

persons who fall within the meaning of a person who participates in the management or control of the live-stock export business. Section 8(1) contains a deeming provision by use of the phrase "*is taken to be*".

175. In *Muller v Dalgety & Company Ltd* [1909] HCA 67; (1909) 9 CLR 693 at 696 Griffith CJ observed that the word "*deemed*" may be used to indicate that a definition is exhaustive or as extending the sense which might otherwise have been given to that definition. This would apply equally to where the phrase "*is taken to be*" is used instead of "*deemed*". His Honour added:

> *The word 'deemed' may be used in either sense, but it is more commonly used for the purpose of creating what James L.J. and Lord Cairns L.C. called a 'statutory fiction' … that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced.*

176. In *Tay v Minister for Immigration and Citizenship* [2010] FCAFC 23; (2010) 183 FCR 163 (***Tay***) the Full Court of the Federal Court considered the meaning of the phrase "*is taken to*" in a legislative provision in the *Migration Act 1958* (Cth):

> *24. … Section 494C makes very detailed provision for determining when a document is taken (deemed) to have been received from the Minister. Those provisions must be construed in a statutory context of similarly detailed provisions concerning the methods by which the Minister may give documents to a person when this is a requirement (s 494B) and when it is not required (s 494A) and the identification of the authorised recipient of documents (s 494D). These provisions all evidence concern that there should be certainty in the transfer of documents from the Minister both as to the method and as to the time of delivery.*

177. The Applicants relied on the *Tay* decision. They referred to the statutory context in which ss 23(1)(d) and 8(1) appear in support of the contention that the drafter of the legislation was seeking to achieve certainty in identifying a person who participates in the management or control of a live-stock export business. We consider that the detailed provisions in s 8(1) as to participation and the important role of the deeming provision within the AMLI Act more generally indicate that s 8(1) is exhaustive. Section 8(1) expressly sets out matters that might or might not fall within the scope of the phrase "*participates in the management or control of the … business*" and thereby provides the certainty necessary for the effective operation of the AMLI Act.

178. It follows that the test for determining if Mr Graham Daws is a person who

participated in the management or control of Emanuel's live-stock export business for the purposes of s 23(1)(d) is whether he had authority to direct the operations, or an important or substantial part of the operations, of Emanuel's live-stock export business; or whether he had authority to direct a person in the exercise of that authority. This test is broadly consistent with the test applied in *Commissioner for Corporate Affairs (Vic) v Bracht* [1989] VR 821 at 830–831, which required "*real and direct*" participation in "*activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation*".

179. Having provided this context, we now turn to the specific issues for consideration.

issue 1: Whether Emanuel has ceased to be a body corporate of integrity—s 23(1)(b)(i)—a consideration of the historical events

180. The Tribunal has power to cancel or suspend a licence or to issue a reprimand to the holder of a licence under s 24(1) of the AMLI Act if satisfied, relevantly, of any of the matters in s 23(1). One of the matters in s 23(1) is that the holder of the licence has ceased to be a body corporate of integrity (23(1)(b)(i)). If the Tribunal is satisfied of this matter then it may cancel, suspend or reprimand the licence holder.

181. The principal historical event that goes towards integrity is the doubling of the PAT values by Mr Graham Daws in 2014, which we will now consider.

182. Mr Nicholas Daws gave evidence in his statement dated 16 May 2019 that for each consignment, the exporter is required by the ASEL to submit an agreed HSRA to the Department. The HSRA for the purposes of standard 4.12 of ASEL is calculated using a software package called "*HotStuff*" version 4. One of the inputs to the HotStuff program is a "*vessel file*", which includes data concerning the PAT for the areas of the ship in which live-stock are to be kept during transport. PAT (namely, the Pen Air Turnover) is the ratio of the air ventilation flow to the pen area in the ventilated section of the Vessel.

183. In June 2014, Mr Graham Daws asked Mr Nicholas Daws to find out what information was needed to create a HotStuff vessel file for the Vessel. On 24 June 2014, Mr Nicholas Daws contacted Dr Conrad Stacey by email asking what information and data was needed for the HotStuff program so that an HSRA could be produced. The email was written on Emanuel letterhead and asked for information/data "*so that **we** can produce an HSRA output*" (emphasis added). Dr Stacey responded with the information needed in

order to create a vessel file for the Vessel. Mr Nicholas Daws cut and pasted the information and passed it on to Mr Graham Daws by email on 24 June 2014. From that point onwards, Mr Nicholas Daws did not have any further involvement in seeking or providing the information required by Dr Stacey to create a vessel file.

184. Although Mr Graham Daws did not give evidence, we can draw a reasonable inference about what happened from relevant email correspondence. On 24 June 2014, Mr Graham Daws sent an email to a representative of the owners of the Vessel, Mr George Assaf, and said:

> *George, this data is from Conrad Stacey and is required to work out the PATs, however it would be preferable to have Bjoern* [*sic*] *work them out for each deck to be confident the correct loading capacity is all ok when the Hot Stuff is worked out … we cannot leave it to the last minute in case something is wrong in calculations. Can you please ask for the PATs from Bjoern* [*sic*] *urgently.*

185. The following day, Mr George Assaf provided by email information from the designer and installer of ventilation on the vessel. Mr Bjorn Clausen was then asked for help to calculate the PAT values for each deck. On 26 June 2014, Mr Clausen responded with a schedule of PAT values for each deck of the Vessel.

186. Mr Graham Daws responded immediately, stating, with reference to the PAT values, "*these are very low and will kill the carrying capacity*".

187. Mr Graham Daws then sent a further email to Mr Clausen asking him to:

> *please add the deckwise exhausts to the Air volume M3 deckwise so we can see how this works out. I cannot give Conrad any data until I know the answer is going to be acceptable.*

188. Mr Clausen responded, stating:

> *If you apply the principle that all fans are on supply the PAT figures I gave you last night should be multiplied by a factor 2.0 in all decks… Technically it will not be possible to defend the use of multiplying with factor 2.0 for two reasons: There is no way so much air will be able to escape the decks / holds and the exhaust fans cannot be reversed. You could use another argument which is also not holding water: That the supply is for half the pens and exhaust is for the other half of the pens and that this allows for the two figures to be added (factor 2.0), but better not use any arguments at all.*

189. Mr Graham Daws responded:

> *Thanks Bjorn, We all agree Hot Stuff is a hoax and AQIS stupid but Conrad can*

defend himself well and the science behind it has been verified but something is wrong with the formula that makes it useless.

190. We can infer from Mr Graham Daws' emails that, despite receiving advice from Mr Clausen that it would not be possible to defend the doubling of the PAT values, he decided that the PAT calculation formula was wrong and that he was going to disregard it. The next day, on 27 June 2014, Mr Graham Daws doubled the PAT values and sent them to Dr Stacey. Mr Graham Daws does not appear to have explained to Dr Stacey that he was being provided with PAT values calculated on a false assumption. Dr Stacey stated in his statutory declaration dated 14 August 2018 that he did not receive any of the information that he had requested from Mr Nicholas Daws on 24 June 2014 and nor did he receive any contact from Mr Graham Daws or anyone else from or on behalf of Emanuel asking him to calculate the PAT values. It is apparent from Mr Graham Daws' email of 24 June 2014 to Mr George Assaf that he had decided not to use Dr Stacey to calculate the PAT values but had instead used Mr Clausen.

191. On 1 July 2014, Dr Stacey provided Mr Graham Daws with the HotStuff vessel file for the Vessel. Mr Graham Daws then sent an email to Mr Mike Stanton on Emanuel letterhead reporting that:

We now have the hot stuff and looks as though the PATS are sufficient not to worry about de-stocking for summer months …

192. The conduct of Mr Graham Daws in doubling the PAT values in June 2014 has had a lasting effect. Those incorrect values formed the basis of nine HSRA plans submitted by Emanuel in connection with applications for an export permit for subsequent voyages, including Voyage 25 in August 2017. Emanuel took no steps to correct the PAT values during this period. Mr Ben Stanton, the export services manager for Emanuel, was responsible for providing HSRA plans for these subsequent voyages.

193. It is apparent from the emails discussed above, that to calculate PAT values, Emanuel needed information specific to the Vessel. There were three variables in the equation for the calculation of a PAT value, namely the volume of deck space, the areas of pens on the vessel and the number of "*air changes*" per hour. To obtain this information, Emanuel reached out to both the owner of the Vessel (through Mr Assaf) and the designer of the Vessel (through Mr Clausen). It was a relatively simple task to take the information provided by Mr Assaf on 25 June 2014 and feed it into the PAT equation for the purpose of calculating a PAT value for each deck on the vessel. This is what Mr Clausen did in his

email on 26 June 2014. Mr Graham Daws expressed concern that the PAT values calculated by Mr Clausen were "*very low and will kill the carrying capacity*". He put forward a false assumption, namely, to include both supply and exhaust fans which would increase the third variable relating to "*air changes*". He asked Mr Clausen what difference that would make. Mr Clausen said it would result in the PAT values being multiplied by a "*factor of 2.0*". In other words, it would double the PAT values, but Mr Clausen provided two reasons why such an action was indefensible. His email of 26 June 2014 is clear in this regard. This was advice from the person employed by the designer of the Vessel based on information from the designer and installer of the ventilation system on the Vessel. Mr Graham Daws had very appropriately sought their advice but having received it in writing, chose to ignore it because it would impact negatively on the carrying capacity of the Vessel.

194. The incorrect PAT values were used by Dr Stacey (through no fault of his own) to provide electronic files that enabled Emanuel to create the HSRA. Emanuel submitted nine HSRAs with incorrect PAT values to the Department with applications to obtain export permits for voyages of the Vessel in June 2017 (Voyage 24), July 2017 (Voyage 25) and August 2017 (Voyage 26).

195. It was not until April 2018 that Dr Stacey was provided with all the relevant information that was in Emanuel's possession. He used that information to calculate PAT values and realised that Mr Graham Daws had previously provided him with incorrect PAT values. Dr Stacey then used the correct PAT values to calculate an HSRA which involved calculating data for each of the 17 lines of live-stock (referred to as stocking entries) on the Vessel. Dr Stacey stated in his statutory declaration:

> *29. The column entitled '5% Mortality Risk Less Than' shows the probability of 5% mortality for each stocking entry. The figures in that column range from 0.36% for one line on Deck B to 7.08% for the 52 kg wethers on Deck 4. Eight stocking entries exceed the industry-nominated acceptable mortality risk of 2% chance of 5% mortality. If one stocking entry exceeds the acceptable risk, then the HSRA will not meet ASEL and I understand that the export permit would be refused. On the basis of this HSRA, I understand that the export permit for this consignment would not have been approved had the correct PATs been used.*

196. Dr Stacey calculated the number of live-stock that would have been loaded on the Vessel if the correct PAT values had been used. He said in his statutory declaration that:

> *32. in order for all lines to meet the acceptable mortality risk, only 60,816 livestock should have been in the loading plan for the vessel. This means*

that 4,234 animals in excess of the acceptable loading were in the loading plan.

197. Mr Graham Daws was aware of the relationship between PAT values and loading capacity because he had said in his 1 July 2014 email that the false PAT values "*are sufficient not to worry about de-stocking for summer months*". One can infer from this wording, and from the reference to the PAT values calculated by Mr Clausen being "*very low and will kill the carrying capacity*", that Mr Graham Daws was worried that Emanuel would have to de-stock (that is, reduce the number of live-stock) on the Vessel during the northern hemisphere summer months and that he deliberately doubled the PAT values so as to avoid that outcome. Mr Nicholas Daws said that there is no commercial benefit to Emanuel in over-stocking an export vessel, but clearly there was some benefit to Emanuel, given the statement of Mr Graham Daws in his 1 July 2014 email.

198. Dr Stacey said in his report dated 27 August 2019 that the relevance of HSRAs for voyages during northern hemisphere summer lies in preventing those voyages which would have a high chance of heat stress (mortality) in one or more lines of live-stock. All the experts agreed that over-stating the PAT values is a serious issue which would significantly increase the risk to animals.

199. The doubling of the PAT values and the resultant increase in live-stock on board led to an increased risk of harm and death for the animals on board the Vessel. Mr Graham Daws had over 45 years of experience in the export of live-stock to the Middle East. He played a central role in that trade, advising government bodies and serving in numerous industry leadership roles, including as a founding member and later chair of the Australian Livestock Exporters' Association. Mr Graham Daws must have been aware of the increased risk to the welfare of the animals, but he decided to ignore the expert advice he had received and instead proceeded to overload the vessel. It is fair to say that this increased risk eventuated when the 2,400 sheep died on the vessel, representing a mortality rate of 3.76% exceeding the reportable mortality of 2% under ASEL.

200. The parties made lengthy and detailed submissions regarding the issue of attribution of the conduct of Mr Graham Daws to Emanuel. The Applicants argued for a more restrictive interpretation of attribution, in accordance with common law principles of corporate responsibility, agency, and the attribution of the conduct of individuals to corporations that are used in civil penalty and criminal prosecutions. However, in the

context of administrative decision-making, we accept the Secretary's submission that the correct approach is that described in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 (***ABT v Bond***). The context in *ABT v Bond* is similar to the current circumstances in that it concerned whether a company was a "*fit and proper person*" to hold a broadcasting licence due to the conduct of Mr Bond who was able to control the licensee companies due to his shareholdings and ability to control the board. In their joint judgment, Toohey and Gaudron JJ provided the following guidance regarding the attribution of an individual's conduct to a company. Their Honours stated, at 382–383:

> *When the question is whether, having regard to its character or reputation, a company is fit and proper, the answer may be given by reference to the conduct, character or reputation of the persons by and through whom it acts or who are otherwise relevantly associated with it. The identity of the persons relevant to the character and reputation of a company will necessarily vary according to the circumstances of the company under consideration. At one extreme, if a person regularly exercises control in all important matters affecting the company's activities, then, ordinarily, the question will be sufficiently answered by reference to that person. At the other extreme, if no person is in a position of control or if one person, although in a position to exercise control, regularly delegates that control to others, then it will ordinarily be necessary to have regard to the persons who manage the company's affairs and activities. The question whether it is sufficient to have regard to one person or necessary to have regard to others when determining whether a company is fit and proper is one that depends on the circumstances of the company and not on any legal requirement imported by the expression 'fit and proper'. It follows that, in appropriate circumstances, the question of the fitness and propriety of a company to hold a commercial licence under the* Broadcasting Act *may be determined by reference to the conduct, character or reputation of a single person associated with it.*

201. In a separate judgment, Mason CJ stated, at 349–350:

> *The degree of an individual's capacity for control may not be so great as to warrant an inference that his character should be identified automatically with that of the licensee; in that event it would be necessary to look to the character and performance of the directors and the management. In another case, where the capacity of the individual for control of the licensee is great, the inference may be justified without examining the character and performance of the directors and the management of the licensee. Especially is this so when it is established that the person having the capacity to control participates in the decision-making processes of a licensee and procures the making of reprehensible decisions which are designed to enhance and protect his own interests.*

202. The Secretary also referred us to the following passage from the United States case of *Merrimack College v KPMG LLP* 480 Mass 614 (2018), 628 (***Merrimack***), which was cited by the *Inquiry Under Section 143 of the Casino Control Act 1992 (NSW) Report* dated 1 February 2021, volume 1 (***Casino Report***), page 337:

> *Where the plaintiff is an organization that can only act through its employees, its*

> *moral responsibility is measured by the conduct of those who lead the organization. Thus, where the plaintiff is a corporation … we look to the conduct of senior management – that is, the officers primarily responsible for managing the corporation, the directors, and the controlling shareholders, if any.*

We agree that this passage is consistent with *ABT v Bond* and accurately summarises the relevance of the conduct of senior management of a corporation.

203. The doubling of the PAT values, despite clear advice to the contrary, showed a distinct lack of integrity on the part of Mr Graham Daws. We find that, in doing so, Mr Graham Daws was acting in his capacity as managing director of Emanuel. Emanuel was obliged to provide the HSRA and did so through its managing director, Mr Graham Daws. He was the person who led, managed and controlled the organisation. The degree of control he exercised as managing director was so great as to warrant the inference that his character should be attributed to Emanuel (*ABT v Bond; Merrimack*). Consequently, we find that the conduct of Mr Graham Daws in doubling the PAT values is to be attributed to Emanuel. We find that, by extension, Emanuel engaged in conduct that showed a distinct lack of integrity. Emanuel, as the holder of an export licence, ceased to be a body corporate of integrity because of its conduct in doubling the PAT values and thereby increasing the risk of harm to animals and misleading the Secretary to issue an export permit.

204. Each of the nine HSRAs contained false and misleading information which had its genesis with the doubling of the PAT values in June 2014. This means that each of those subsequent voyages were overloaded. Mr Graham Daws knew that he incorrectly doubled the PAT values and therefore must have known that it would have the effect of continuing to mislead the Department each time an HSRA was submitted for a subsequent voyage. Further, he must have known of the increased risk of harm to the live-stock during these voyages. It follows that Emanuel's lack of integrity continued throughout the period that it submitted these misleading HSRAs, namely up until and including 2017.

205. Emanuel has made no challenge to the Secretary's finding in her decision of 21 August 2018 that Mr Graham Daws did not act in good faith. Emanuel accepted that Mr Graham Daws submitted the PAT data to Dr Stacey with disregard for Emanuel's obligations under the regulatory framework. Further, Emanuel accepted that the HSRAs contained inaccurate PAT figures, which had the propensity or the risk that it would, or could, mislead the Secretary into issuing an export permit.

206. The Secretary in her show cause notice dated 22 June 2018 expressly referred to the conduct of Emanuel in submitting nine HSRA plans with incorrect PAT values to the Secretary. The Secretary relied on this ongoing conduct as one of the reasons for concluding that there were reasonable grounds for believing that Emanuel:

(a) "*knew or ought to have known that the PAT scores provided to Stacey Agnew and the Secretary for the purposes of obtaining export permits were incorrect*"; and

(b) "*has ceased to be: (a) a body corporate of integrity; and (b) competent to hold the licence*".

207. The Applicants submitted that Mr Graham Daws' conduct is not attributable to Emanuel and that he was acting for ILE, the company that was the charterer of the Vessel. We reject that submission for the following reasons.

208. The regulatory framework provides that it is an obligation of Emanuel as an exporter of live-stock to submit the HSRA in accordance with the 2012 EA Notice. The stated purpose of that notice was to advise exporters of the requirement for submission of the HSRA to the Department. The 2012 EA Notice provided that under the ASEL, exporters must load live-stock on sea vessels in accordance with an agreed heat stress model and that the assessment of heat stress risk for live export voyages from Australia is performed by a software program called "*HotStuff*". The 2012 EA Notice included instructions with which exporters were required to comply for every consignment of live-stock by sea from
1 May 2012, where an HSRA was required. These instructions included how the HotStuff vessel data file was to be provided.

209. Mr Nicholas Daws accepted in his witness statement dated 16 May 2019 that Emanuel, as "*the exporter*", had a duty under the regulatory framework to submit an HSRA to the Secretary. He admitted that he was involved in that process. At the time, he was a fulltime employee of Emanuel. He wrote his emails on Emanuel letterhead. He was not employed by ILE and was not engaged in any conduct on behalf of ILE.

210. Mr Graham Daws, as we have said, was managing director of Emanuel in 2014 and was a director of ILE but, according to Mr Nicholas Daws, "*was not involved in the operations of ILE*". Mr Graham Daws wrote his emails on Emanuel letterhead. When he stated in his 1 July 2014 email that "*We now have the hot stuff*", he was clearly speaking

on behalf of Emanuel and as its managing director. As we have seen from the emails referred to above, Mr Graham Daws was closely involved in the process of preparing the HSRA for submission in support of an export permit. The fact that he was managing director of Emanuel at the time, that he wrote on Emanuel letterhead, and that it was Emanuel's obligation to submit the HSRA (which it subsequently did) are all very strong indicators that he was acting in his capacity as managing director of Emanuel.

211. The work carried out by Mr Nicholas Daws and Mr Graham Daws in obtaining, preparing and providing information for the HSRA was work of Emanuel, not ILE, done in preparation for the export of live-stock on the Vessel. The fact that Mr Nicholas Daws was not aware at the time that his father had doubled the PAT values does not mean that Mr Graham Daws' conduct should not be attributed to Emanuel.

212. We find that the historical events of the doubling of the PAT values establishes that Emanuel ceased to be a body corporate of integrity, that Mr Graham Daws was acting on behalf of Emanuel and that his conduct can be attributed to Emanuel. This finding of itself does not result in satisfaction of s 23(1)(b)(i) because the Tribunal must consider whether the grounds for that finding still exist as at the date of its decision. In other words, we need to consider whether Emanuel has taken any effective steps to rehabilitate itself so as to resume its status as a body corporate of integrity. We will consider that issue separately below.

issue 2: whether any person who participates in management or control of the live-stock export business of Emanuel has ceased to be a person of integrity—s 23(1)(d)

213. There is no dispute that Mr Graham Daws was, when he was the managing director of Emanuel, a person who participated in the management or control of Emanuel. As we have found above, his conduct (which can be attributed to Emanuel) demonstrated a lack of integrity.

214. Mr Graham Daws resigned as managing director of Emanuel on 29 June 2018. However, there is an issue about whether he continues to nevertheless participate in the management and control of Emanuel. This issue is directly relevant to s 23(1)(d) but is also relevant to the question of Emanuel's current integrity under s 23(1)(b)(i).

215. It is important to put this issue in context to determine the weight that should be given to findings on this issue. The issue arises because Emanuel relies on Mr Graham

Daws' resignation as managing director as evidence of its rehabilitation and current integrity. In response, the Secretary seeks to downgrade any positive effect of his resignation on Emanuel's integrity by establishing on the facts his ongoing involvement. The Secretary submitted that we should apply the principles in the following passage from the *Casino Report*, page 338:

> *It is accepted that a company's suitability may ebb and flow with changes to the composition of the company's Board and Management, and others who influence its affairs, over time. If a company's character and integrity has been compromised by the actions of its existing controllers, then it may be possible for a company to 'remove a stain from the corporate image by removing the persons responsible for the misdeeds'. However, this would only be possible if the company could 'isolate the wrong done and the wrongdoers from the remaining corporate personnel'. It would be necessary to ensure that 'the corporation has purged itself of the offending individuals and they are no longer in a position to dominate, manage or meaningfully influence the business operations of the corporation.'*
>
> (Footnotes omitted.)

216. We agree with the principles in this passage. However, we also consider that whilst the extent of the involvement of Mr Graham Daws is an important issue, it is not necessarily determinative of Emanuel's integrity. It is only one factor to be considered amongst many.

217. The Applicants contend that Mr Graham Daws was the only person from Emanuel who was involved in the provision of the incorrect PAT values and that, soon after the licence suspension, he resigned as a director and secretary of Emanuel and has not participated since in the management and control of Emanuel. The Applicants also contend that Mr Graham Daws' conduct is historic and is not indicative of the current integrity and competency of Emanuel because of the steps taken to remove him from his involvement in Emanuel.

218. In support of the submission that Mr Graham Daws participates in the management and control of Emanuel, the Secretary referred to Mr Graham Daws' 49.85% shareholding in Emanuel and his interests in other family companies. The Secretary submitted that these interests give Mr Graham Daws the ability to directly (and indirectly) control voting rights. However, there is no evidence that Mr Graham Daws has used his shareholdings to exert any control or influence over Emanuel. We reject the Secretary's submission in this regard. Indeed, the evidence shows that from the time of his appointment as managing director, Mr Nicholas Daws was the directing mind and will of the Applicants.

219. The Secretary submitted, based on a minute of a meeting held on 8 January 2020, that Mr Graham Daws had opposed the appointment of independent directors to protect his interest in Emanuel, thus exerting his control on the strategic direction of the company. Mr Nicholas Daws was cross-examined about this meeting. He gave evidence that he told Mr Graham Daws that he proposed appointing independent directors and that Mr Graham Daws had not raised any concern. The only evidence relied upon by the Secretary to the contrary is the minutes of the meeting, which does not name Mr Graham Daws and does not refer to any opposition having been expressed by anyone with respect to the appointment of independent directors. Further, Dr Ludeman, who was the author of the minutes and present with Mr Nicholas Daws at the meeting, explained the reference to "*shareholders needs and concerns about multiple family interests"* as being a reference to concerns expressed by Mr Nicholas Daws (transcript/633). She rejected the proposition that Mr Nicholas Daws told her that Mr Graham Daws did not want independent directors appointed. We found Mr Nicholas Daws and Dr Ludeman to be honest and credible witnesses. We accept their evidence and reject the Secretary's submission in this regard. We discuss the issue of the appointment of independent directors further below under Issue 5 with respect to changes Emanuel has made to its governance and compliance processes.

220. Mr Nicholas Daws gave evidence about the extent of Mr Graham Daws' ongoing involvement, in his statement dated 29 January 2021:

> *128. I am aware that Graham likes to keep himself informed about Emanuel's affairs. He has a general interest in knowing about the supply of livestock to Emanuel's customers, the livestock prices, and the numbers of animals supplied, the costs involved and the shipping schedules.*
>
> *129. I have no difficulty with Emanuel's staff keeping Graham informed on these matters or asking him for advice. He has a wealth of industry knowledge and a significant financial interest in the success of Emanuel.*

221. Mr Nicholas Daws stated further:

> *189. I am aware that Ben speaks with Graham about Emanuel's business. I am also aware that Ben asks Graham for advice and other information on issues relating to his role and the livestock industry.*

222. These concessions made by Mr Nicholas Daws about Mr Graham Daws' ongoing involvement mean that it is unnecessary to set out the numerous examples where Emanuel's staff have conferred with Mr Graham Daws about Emanuel business and seek his advice.

223. However, Mr Graham Daws' involvement went beyond conferring with and advising staff, because he continued to be involved with external parties in relation to the business of Emanuel. He maintains an office within Emanuel's place of business. Up until October 2020, he sent emails on Emanuel letterhead to external parties and his email address included a reference to Emanuel. He had dealings with actual and potential clients and service providers of Emanuel.

224. Mr Graham Daws continues to drive two vehicles owned by Emanuel. He receives income from the management services agreement, but no longer performs any duties under it.

225. Mr Edwards gave evidence in his statement about Mr Graham Daws' involvement in seeking to re-open Saudi Arabian trade through his membership of an industry body known as ALEC (the Australian Livestock Exporters Council):

> *170. ALEC along with other Industry bodies have been trying to re-open that trade for a number of years. I know that Graham has an interest in that topic. Also, as a result of his many contacts in the Industry and elsewhere, he is able to provide assistance and advice to ALEC and me about how we may re-open that trade.*

226. There were many emails between Mr Edwards and Mr Graham Daws in relation to efforts to re-open that trade and in relation to other matters of interest for both Emanuel and the live-stock industry as a whole. They were both long-standing members of ALEC. We find that the efforts of Mr Graham Daws were directed to benefitting the industry as a whole, but in so doing would have benefitted Emanuel as the largest exporter in the industry. Mr Edwards was cross-examined about his ongoing communications with Mr Graham Daws and said (transcript/453):

> *Nicholas had advised me early in the developments around the cancellation of the Emanuel's licence, that I should not be sending emails to Graham Daws, and what transpired was an oversight, but an oversight purely around, as I have explained, keeping Graham informed of industry issues and developments, and the larger aspects of the trade.*

227. Mr Graham Daws also became involved with the business of Emanuel when a shipment of sheep was delayed due to crew members contracting COVID-19 in June 2020. Those sheep needed to be sold into the domestic market instead of exported. Mr Graham Daws fielded calls from potential purchasers to assist with the crisis.

228. After resigning as managing director, Mr Graham Daws continued to communicate with Mr Osama Boodai, the CEO of Emanuel's largest live-stock export client, KLTT (transcript/207). They had a long-standing relationship. Mr Nicholas Daws copied in his father to his email communications with KLTT regarding a contract extension in 2019. Mr Nicholas Daws was cross-examined about this and said (transcript/310):

> *… it was more out of respect from their long history. They now don't have him in the emails.*

229. Mr Nicholas Daws denied that Mr Graham Daws was present at a meeting held in Australia with Mr Boodai in November 2019 (transcript/312). Mr Stanton's evidence was that Mr Graham Daws was present at the meeting with KLTT but simply performed the formal introductions and then handed over to his son, Mr Nicholas Daws.

230. With respect to an earlier meeting with KLTT in November 2018, the evidence was that Mr Graham Daws presented the financial information up to 30 June 2018 (the date he resigned) and then Mr Nicholas Daws presented the outlook for going forward (transcript/318–319).

231. Under cross-examination Mr Nicholas Daws accepted that his father continued to be given information about KLTT and routinely spoke on the telephone with Mr Boodai regarding Emanuel's business.

232. We make the following findings with respect to Mr Graham Daws' involvement in Emanuel.

(a) He resigned as managing director and director of Emanuel on 29 June 2018. He is not an employee of Emanuel.

(b) He does not provide consultancy services to Emanuel, but he continues to receive monthly payments paid under the management services agreement.

(c) As a long-standing participant in the live-stock export industry, Mr Graham Daws maintained that interest and involvement after his resignation from Emanuel. This meant that he would often discuss industry issues and the business of Emanuel with Emanuel employees and management. For a period after his resignation, he continued to use Emanuel letterhead and an Emanuel email address, but he no longer does so.

(d) There is some evidence of his dealing with clients of Emanuel after his resignation, but he was not given authority or responsibility for negotiating any contract or transaction for and on behalf of Emanuel. There was no evidence of any concluded transaction of Emanuel with respect to live-stock exports brought about by the conduct of Mr Graham Daws. For example, although Mr Graham Daws continued after his resignation to have discussions with Mr Boodai from KLTT, a major client of Emanuel based in Kuwait, it was Mr Nicholas Daws who negotiated contract extensions and provided financial information to KLTT for the period after 30 June 2018.

(e) It was not uncommon for Mr Graham Daws to speak about the business of Emanuel with its management and to provide advice, but the evidence does not establish that he made any decisions on behalf of Emanuel or that he was able to direct how the management of Emanuel would be conducted. There is some evidence that Mr Graham Daws assisted the business of Emanuel by drawing upon his connections in the industry and his long-standing relationships with some clients.

233. We conclude that Mr Graham Daws had some ongoing participation in the affairs of Emanuel after he resigned his position as managing director, particularly up to the period ending in about October 2020. It is fair to say that Mr Graham Daws did not take all the steps that were available to him to disassociate himself from Emanuel and its operations after his resignation. However, his participation did not involve him binding Emanuel in any dealings with third parties nor did it involve him directing or exerting a controlling influence over the management or operations of Emanuel. Further, the evidence does not establish that he had authority to direct an important or substantial part of the operations of Emanuel's business, or in the words of the *Casino Report*, "*to dominate, manage or meaningfully influence the business operations of the corporation*". That authority had passed to Mr Nicholas Daws as the new managing director. Consequently, Mr Graham Daws, for the period after his resignation, does not come within the deeming provision of s 8(1) of the AMLI Act, as a person who is taken to participate in the management or control of Emanuel. We find that upon Mr Graham Daws' resignation, he no longer participated in the management or control of Emanuel's export business. His effective resignation was a positive step towards the rehabilitation of Emanuel as a body corporate of integrity for the purposes of s 23(1)(b)(i).

234. With respect to s 23(1)(d), Mr Graham Daws' effective resignation means that we place less weight on his earlier participation because he is no longer a person who participates in the management or control of Emanuel's export business.

issue 3: whether Emanuel has contravened a condition of Emanuel's Licence—s 23(1)(g)

235. As noted above, compliance with the ASEL was a condition of Emanuel's Licence. In a schedule filed with the Tribunal on 18 November 2020, the Secretary alleges nine breaches of the ASEL by Emanuel during Voyages 24, 25 and 26, constituting a contravention of a condition of Emanuel's Licence. One alleged breach concerning wool length, which was initially in dispute, was not pressed by the Secretary at the hearing and so we have not made a finding on it. The remaining alleged breaches of the ASEL will now be discussed.

The submission of HSRA plans to the Department based on incorrect PAT values

236. The first breach, which the Secretary alleges is of high severity, is the submission of HSRA plans to the Department based on incorrect PAT values. The Secretary alleges that this is a breach of Standard 4.12 of the ASEL which requires, amongst other things, that stocking densities must be in accordance with an agreed HSRA, which the 2012 EA Notice states to be HotStuff version 4.

237. The Applicants, on the other hand, submitted that ASEL Standard 4.12 is not concerned with the submission of PAT data, and that it should be read together with the 2012 EA Notice. They submitted that, when read together, ASEL Standard 4.12 and the Notice "*stipulate an objective requirement that stocking densities and pen-group weight-range tolerances for species of livestock on a vessel must be such that HotStuff version 4 calculates less than a 2% risk of 5% mortality*". The Applicants further submitted that this risk was not actualised for Voyages 24, 25 and 26 because the actual stocking densities of sheep did not result in a greater than 2% chance of a 5% mortality. Specifically, although the mortality rate for Voyage 25 was 3.76%, which exceeded the reportable mortality rate of 2% under the ASEL, it did not exceed 5%.

238. The Applicants did, however, acknowledge Mr Nicholas Daws' admission during cross-examination that the incorrect calculation of PAT values caused Voyage 25 to be overstocked with sheep. This admission was made during the following exchange

(transcript/229):

> *COUNSEL:* *You agree that the effect of the incorrect calculation of the PAT values in relation to voyage 25, the MV Awassi Express caused that ship to be overstocked with sheep?*
>
> *MR NICHOLAS DAWS:* *Yes.*
>
> *COUNSEL:* *Do you agree with me that this was a very serious issue that the ship would have more sheep on it than would be permitted to load by the Department?*
>
> *MR NICHOLAS DAWS:* *Yes.*

239. In our view, whether the risk was realised is not material. One does not have to wait for the mortality rate to exceed 5% for the ASEL to be breached. We note that the first point of the "*Guiding Principles*" in s 5 of the *Australian Position Statement on the Export of Livestock* (attached to the ASEL) states that, "*The health and welfare of animals is a primary consideration at all stages of the livestock export chain*".

240. As we have noted above, all the experts agreed that over-stating the PAT values is a serious issue which significantly increased the risk to animals. We noted the evidence of Dr Stacey above that the doubling of the PAT values resulted in the overstocking of live-stock on board by 4,234 animals. Our conclusion was that doubling the PAT values resulted in an increased risk of harm and death for the animals on board.

241. We find that submitting HSRA plans to the Department that were based on incorrect PAT values was a breach of a condition of Emanuel's Licence. Standard 4.12 of the ASEL requires stocking densities to be within "*an agreed stress risk assessment"*. We find that the 2012 EA Notice clearly states that there is an obligation for the exporter to provide correct PAT values to the Department. It specifically states that "*exporters are required to*" use HotStuff version 4 (unless a variation had been approved), which is to be submitted to the Department with the exporter's NOI and CRMP. The provision of correct PAT values is an integral part of the process leading to the grant of an export permit. The exporter cannot export live-stock without this permit (s 1A.01(i) of the Animals Order). Section 1A.30(2) of the Animals Order provides that, in deciding whether to grant an export permit to an exporter, the Secretary may take into account whether the exporter has complied with any conditions to which its licence was subject and any requirements under the AMLI Act relating to the export of live-stock.

242. The accuracy of the PAT values is, as we have mentioned, integral in this process, and the integrity of the exporter in providing correct data is critical. If the Department was aware that the PAT values had been doubled, it is likely that it would not have granted the export permit due to the potential for the health and welfare of animals to be compromised.

243. We therefore find that Emanuel's submission to the Department of HSRA plans based on incorrect PAT values breached Standard 4.12 of the ASEL and that it was a serious breach.

Pregnant ewes prepared for export to the Middle East by sea between May and October

244. Standard 3.9(a) of the ASEL provides that the operator of a registered premises must not prepare pregnant ewes for export to the Middle East by sea during the period from May to October. The Applicants have accepted that a small number of lambs were born during Voyages 25 and 26, specifically eleven on Voyage 25 and six on Voyage 26. The parties' agreed that there is no evidence that Emanuel knowingly prepared pregnant ewes for export. We accept the evidence of Dr Madin that the low number of lambs born in proportion to the number of ewes loaded, suggested that errors in scanning may have been responsible. We therefore accept that there was a breach, but that it was of low severity.

245. Emanuel has now taken steps to prevent future breaches. Specifically, Mr Ben Stanton's evidence was that Emanuel now requires pregnancy testing of all Dorper ewe lambs regardless of weight, which exceeds the requirements of the ASEL.

Sheep had long horns that were not tipped back to one full curl or less

246. Standard 1.7 of the ASEL requires that live-stock must not be prepared for export if they meet the rejection criteria. This rejection criteria includes having "*Untipped sharp horns*", and specifically for sheep, "*long horns greater than one curl, except in approved NOI and CRMP*". Standard 1.16(d) provides that "*Horned sheep or rams must only be sourced for export as slaughter and feeder animals if the horns … are one full curl or less, or are tipped back to one full curl or less*". The Secretary referred to video evidence of sheep with untipped horns on Voyages 24 and 25. The Applicants accept that there is some video evidence of sheep with untipped horns on Voyages 24 and 25. We therefore

find that there was a breach of these Standards.

247. The parties agree that these breaches were of "*low severity*". We agree with this characterisation of the breach and note the opinion of Dr Madin that the number of sheep with untipped horns was apparently a small proportion of the total number of horned sheep. Dr Madin further opined that there was no evidence of harm being caused to any sheep and that, "*Given the combination of tip sharpness, length and extension away from the head of the horns, it seems that the untipped horns identified in the video presented a low risk of damage to other sheep*". We therefore agree that these breaches are of low severity.

Allegations concerning onboard management of the health, welfare and physical needs of live-stock during Voyage 25

248. The Secretary also alleged that Emanuel breached several ASEL Standards concerning onboard management of the health, welfare and physical needs of live-stock on Voyage 25 (Standards 5.1, 5.6 and 5.7).

249. The Applicants, however, submitted that other persons were responsible for these breaches. Specifically, the Applicants submitted that once the live-stock are loaded onboard the vessel, there is a transfer of responsibility from the exporter to the ship's master, accredited veterinarian and/or stockperson. In making this submission, the Applicants referred to Standard 4.16, which states that "*As the livestock for export are loaded on board the vessel at the port of export, responsibility for the livestock transfers to the master of the vessel* …".

250. The Applicants referred to ss 5.3(2), 5.3(3) and 5.3(4) of the ASEL, which provide an overview of onboard management by the Master, accredited veterinarian, and accredited stock persons:

> *(2) Once loading begins at the point of embarkation, the master of the vessel assumes overall responsibility for the management and care of the livestock during transport on the vessel. This responsibility continues until the point of disembarkation …*
>
> *(3) Where an accredited veterinarian is required to accompany the consignment, that person is responsible for monitoring and regular reporting of consignment conditions on board during and after the voyage.*
>
> *(4) Accredited stock persons accompanying the consignment are responsible for providing appropriate care and management of the livestock on board during the voyage.*

251. The Applicants further referred to s 5.4(2) of the ASEL, which provides, in part, that, "*At disembarkation, the master of the vessel transfers responsibility for the animals to the importer in the importing country* …".

252. Additionally, the Applicants referred to Standard 5.1 of the ASEL, which they submitted reflects a passing of responsibility from the exporter to the accredited stock person and accredited veterinarian. It provides:

> *The onboard management of livestock for export by sea must ensure that the health, welfare and physical needs of livestock are met during the voyage:*
>
> *(a) An accredited stock person must accompany each consignment of livestock and must remain with the consignment until the vessel has completed discharging at the final port of discharge.*
>
> *(b) An accredited veterinarian must accompany each consignment of livestock where required by the relevant Australian Government agency and must remain with the consignment until the vessel has completed discharging at the final port of discharge.*
>
> *(c) Accredited stock persons and/or veterinarian must work with the vessel's master and crew to maintain the health and welfare of the livestock onboard.*

253. The Applicants submissions are effectively that the exporter abdicates responsibility for compliance with the ASEL during the voyage. We reject that submission because it is the exporter who holds the export licence, and it is the exporter who bears the ultimate responsibility of compliance with applicable laws and the regulatory regime. Specifically, s 17(5)(a) of the AMLI Act, reproduced in the "*legislative framework*" section above, provides that an export licence is subject to the condition that the holder of the licence must comply with orders made, and directions given under s 17. As we also stated in the above section, s 3(1) of the Standards Order provides that the holder of a live-stock export licence must not export live-stock except in accordance with the ASEL, with the applicable version being version 2.3, dated 27 April 2011.

254. Further, s 6 of the *Australian Position Statement on the Export of Livestock* sets out the responsibilities of key participants of the live export industry. Section 6.1 outlines that the ultimate responsibility rests with the exporter throughout the export process. It provides:

> *The exporter must comply with the Australian animal health and welfare system, including all Australian Government and state, territory or local government laws that apply to the health and welfare of livestock in a particular jurisdiction. The exporter is also responsible for ensuring that importing country requirements are met and that verification systems are established to meet audit scrutiny throughout*

> *the livestock export chain.* ***Where the exporter subcontracts to service providers, the exporter is responsible for instructing the service provider to comply with the Standards and importing country requirements, and to ensure that all of the above requirements are met.***
>
> *In particular, the exporter must source suitable livestock that meets consignment specifications, such as species, class, condition, animal health and welfare status and number of livestock.* ***The exporter must also ensure sufficient livestock services are maintained throughout the voyage and on-board care and management of the livestock is adequate to maintain animal health and welfare. To achieve this, the Standards prescribe that the exporter must engage an accredited stock person and, when required, an accredited veterinarian*** *(see also Sections 6.4 and 6.5).*
>
> (Emphasis added.)

255. Thus, whilst the exporter holds the export licence, in order to facilitate the export of a consignment of live-stock, the exporter needs to employ or subcontract with persons to assist. These persons include the ship's master, the accredited veterinarian and accredited stock persons. Although these persons have certain responsibilities imposed upon them by the ASEL, this does not mean there is an abdication of responsibility to these persons by the exporter to ensure compliance with the ASEL and other laws. The exporter holds the export licence and bears ultimate responsibility, notwithstanding any further responsibility placed upon persons engaged to facilitate the export of a consignment. An exporter, by necessity, needs to delegate some responsibilities to others during the voyage but does not abdicate those responsibilities.

256. We therefore reject the Applicants' submission that, if there were any breaches of the ASEL (specifically Standards 5.1, 5.6 and 5.7) during Voyage 25, the persons responsible for those breaches were the ship's master, accredited veterinarian, and accredited stock person, and not Emanuel.

257. We now turn to the specific breaches.

258. Firstly, the Secretary alleges that onboard management failed to ensure the health, welfare and physical needs of live-stock during Voyage 25, in breach of sub-paragraphs of Standard 5.1, which commences with, "*The onboard management of livestock for export by sea must ensure that the health, welfare and physical needs of livestock are met during the voyage*". Specifically, the Secretary referred to video footage showing moribund sheep being left alive amongst decomposing carcasses on Voyage 25's return to Australia after it had completed discharge at the final port. The Secretary did, however, submit that

although the Tribunal should find that this breach occurred, it was of low severity and there is now a procedure in place to address the issue. Emanuel conceded that, on Voyage 25, the veterinarian and stock person's final check did not occur because they departed the Vessel before discharge was completed. In its response dated 31 July 2018, Emanuel further accepted that if the video footage was correct, this was an "*unacceptable outcome*". It suggested that the breach was "*due to human error in failing to identify such sheep via routine inspections following discharge*", and that Emanuel had implemented a procedure in its voyage instructions to ensure that all live sheep depart the Vessel on discharge.

259. Secondly, the Secretary also alleged breaches of ASEL Standards 5.6(b) and 5.6(f) which provide:

> *Livestock and livestock services on the vessel must be regularly inspected (day and night) to ensure that the health and welfare of the livestock are maintained while the livestock are on the vessel: …*
>
> *(b) Livestock must be systematically inspected to assess their health and welfare. …*
>
> *(f) Washing down of decks and disposal of faeces and litter must be carried out with regard to the health and welfare of livestock.*

260. The alleged breach of Standard 5.6(b) concerned sick and injured animals on Voyage 25 not being treated or removed to hospital pens. However, this Standard relates to the inspection of live-stock, and instead, the applicable Standard appears to us to be Standard 5.7. This Standard provides:

> *Any livestock identified as being sick or injured must:*
>
> *(a) be given prompt treatment;*
>
> *(b) be transferred to the hospital pen, if required; and*
>
> *(c) if necessary, be euthanased humanely and without delay …*

261. In a letter to the Secretary dated 15 May 2018, Mr Nicholas Daws referred to mitigating circumstances including the extreme heat event and the "*sheer number*" of sick animals in a short time frame, which overwhelmed the crew, accredited veterinarian and stock person, who did everything they reasonably could to maximise welfare outcomes. Mr Nicholas Daws further stated in his letter:

> *On a day and night basis animals were being attended to. However, the sheer number of cases in a short timeframe that were being rescued and treated or destroyed put understandable strain on the ability of the crew to keep up.*

262. We note the witness statement of the stockman, Mr Adi Tiawarman, dated 23 June 2016, that some sheep that were not sick were moved into the hospital pens to lower the stocking density. We also note the efforts described by the chief officer of the Vessel, Mr Muhammad Gulzar, regarding the extreme weather event which occurred during Voyage 25 from 15 to 17 August 2017. This included, for example, day and night monitoring of the animals, increasing the frequency of watering including by re-deploying hands to undertake continuous watering, allowing some sheep into the walkway, and expediting the discharge of animals. Considering the volume of animals affected, we are satisfied that sick and injured live-stock were not able to be given prompt treatment, or to be removed to the hospital pens. Also, given the measures that were undertaken to reduce the density of animals on board, which included the use of hospital pens, we find that sick or injured animals were not necessarily transferred to the hospital pens. We also note that in Mr Nicholas Daws' letter of 15 May 2018, he stated that, "*The Vessel deploys one captive bolt gun out on deck, which is usually controlled by the AAV* [the Accredited Veterinarian on board the Vessel] *so there will inevitably be some delay given the nature and scale of the crisis between the AAV being advised of the need to destroy an animal and the action being taken*". We therefore find that Standard 5.7 was breached. However, due to the mitigating circumstances, including the extreme weather event, and the accredited veterinarian and stock person doing all that they could to minimise adverse animal welfare outcomes for a large volume of affected animals, we agree with the Secretary's submission that the breach should be regarded as being of low severity.

263. The alleged breach of Standard 5.6(f) of the ASEL concerned pen conditions, specifically decks not being washed down and faeces and litter not being disposed of. This included "*sticky pens*", being a build-up of manure, which has become soft or boggy underfoot due to a build-up in moisture, as well as coat contamination. Emanuel accepts that this occurred in some parts of the Vessel and explained the circumstances leading to the boggy pad, which was contributed to by the extreme heat event. Emanuel further explained that washing down the decks in those circumstances could result in further heat stress, which would be detrimental to animal welfare. We note that the Secretary accepted that the sticky pens were, in large part, caused by the severe weather, which was outside Emanuel's control. We note that in his report dated 9 July 2019, Dr Madin refers to the wording of Standard 5.6(f), specifically, that a decision to wash down decks is made "*with regard to the health and welfare of livestock*". We agree with Dr Madin's conclusion that, "*This would vindicate a decision not to wash if it was felt that the washing process would be detrimental to the health and welfare of the livestock to a greater degree than the*

benefits of washing". Dr Madin also stated that he was "*not aware whether convective heat loss would increase or decrease in animals with coat contamination*". We agree with the opinion of Dr Madin and consequently find that Standard 5.6(f) of the ASEL was not breached in these circumstances, where to wash down decks could have resulted in further adverse animal welfare outcomes.

264. In Emanuel's Amended SFIC dated 3 February 2021, Emanuel accepted that Standards 5.1(a) and 5.1(b) of the ASEL were breached because the accredited veterinarian and accredited stockperson departed the Vessel before final discharge of Voyage 25. Specifically, the date of final discharge according to the end of voyage report was 24 August 2017. However, the stock person, Mr Tiawarman, ceased working at approximately 2.00 pm on 22 August 2017 and his flight itinerary shows a departure time from Dubai on 22 August 2017.

265. In a written statement to the Assistant Secretary of the Department, the accredited veterinarian, Dr David Scharp, confirmed that he "*left the vessel before all of the animals were discharged*". We accept that these early departures were not at the direction of Emanual, nor did Emanuel have any knowledge of them. We also accept that these early departures were contrary to the specific voyage instructions which Mr Ben Stanton gave to the accredited veterinarian and stock person, which stated that they "*must remain with the consignment until the Vessel has completed discharging at the final port of discharge*". We note the statement in Emanuel's Amended SFIC dated 3 February 2021 that "*the Applicant accepts that it is responsible for upholding the conditions of the Licence for the duration of any voyage*". We agree with the statement and find that Emanuel breached Standards 5.1(a) and 5.1(b) of the ASEL. However, we accept that Emanuel has taken steps to ensure that this breach does not recur. Specifically, Emanuel has amended its voyage instructions to require the accredited veterinarian to confirm in the end of voyage report the completion of discharge and time of departure of the accredited veterinarian and stock person from the vessel. Further, Emanuel will then provide a signed declaration to the Department confirming its receipt of this confirmation. We therefore agree with the Secretary's characterisation of this breach as being of low severity.

Findings on Issue 3

266. In summary, we have found that Emanuel did breach a condition of its Licence by breaching the following Standards in the ASEL: Standards 4.12, 3.9(a), 1.7, 1.16(d),

5.1(a), 5.1(b) and 5.7. We are satisfied pursuant to s 24(1)(b)(i) of the matter mentioned in s 23(1)(g), namely that Emanuel contravened a condition of its licence.

267. We have found that the breach of Standard 4.12, being the submission of HSRA plans to the Department based on incorrect PAT values, is serious. However, we found the remaining breaches to include mitigating circumstances and to be of low severity. With respect to these remaining breaches, we also found that Emanuel now has procedures in place to reduce the risk of similar breaches occurring in the future. We did not find that Standard 5.6(f) was breached.

issue 4: Whether emanuel has ceased to be competent to hold Emanuel's Licence—s 23(1)(b)(ii)

268. There is some overlap between the facts that are relevant to this issue of competence under s 23(1)(b)(ii) and the other issues before us including whether Emanuel ceased to be a body corporate of integrity and whether Emanuel contravened a condition of Emanuel's Licence.

269. We have already found that Mr Graham Daws doubled the PAT values and that he knew or ought to have known that the PAT values he provided to the Department for the purposes of obtaining export permits were incorrect.

270. We found that in doing so, he was acting in his capacity as managing director of Emanuel and that his conduct should be attributed to Emanuel. We further found that this conduct demonstrated that Mr Graham Daws, who was the managing director of Emanuel at the time he provided the information, a person who participates in the management or control of a live-stock export business, was not a person of integrity. Our findings concerning this conduct of Mr Graham Daws on behalf of Emanuel also support our being reasonably satisfied that Emanuel ceased to be competent to hold Emanuel's Licence.

271. This conclusion is further supported by the lack of systems in place at the time to ensure that the correct information was provided to the Department, including any steps to confirm the accuracy of the information or to check errors. For example, Mr Ben Stanton gave evidence to the Tribunal about the limited ability to check HSRAs in Emanuel's offices because no one at Emanuel had the software or the computer system to run HotStuff (transcript/401–403).

272. In the preceding section we found that Emanuel contravened a condition of Emanuel's Licence by breaching various Standards of the ASEL. We found that most of the breaches were of low severity and were, relevantly, mitigated by the severe weather event. Accordingly, we find that those breaches alone are not a sufficient basis upon which to conclude that Emanuel was not competent to hold an export licence. However, we also found that there was a breach of Standard 4.12 of the ASEL by the submission of HSRA plans to the Department based on incorrect PAT values, which we regarded as being serious. In our view, the severity of this breach adds further weight to our conclusion that Emanuel ceased to be competent to hold an export licence.

273. Although Emanuel ceased to be competent and ceased to be a body corporate of integrity between 2014 and 2017 when it submitted HSRA plans to the Department based on incorrect PAT values, we must determine whether this remains so as at the time of our decision. Thus, in the following section, we consider whether, at the time of our decision, Emanuel is sufficiently rehabilitated so as to be a body corporate of integrity and competent to hold an export licence. This will inform our decision regarding the appropriate regulatory action that should be taken regarding Emanuel's Licence and EMS's Licence.

issue 5: Whether Emanuel has taken sufficient steps to address the integrity and competence concerns

274. We have found that Emanuel, through its conduct in 2014, showed a lack of integrity which continued with the submission of each HSRA until 2017. By doubling the PAT values and by allowing that false information to be included as part of the HSRAs submitted to the Department, Emanuel ceased to be a body corporate of integrity. The question that then arises is whether there is any evidence of rehabilitation such that Emanuel can now be considered a body corporate of integrity despite its previous conduct. Emanuel submitted that it has taken steps which it says establishes that it has reformed its practices, such that it is now competent and a body corporate of integrity which should be entitled to hold an export licence. We have found that these issues of current integrity and competency of Emanuel are properly before the Tribunal as being relevant to the statutory questions which must be answered. We note that the Secretary's SFIC dated 21 February 2019 addressed the issue as to whether changes to management and governance of Emanuel were sufficient to address integrity and competency issues. The Applicants then provided evidence on the topic by way of written

statements from Dr Ludeman and Mr Nicholas Daws. Prior to the hearing, the Secretary particularised the allegations relating to integrity and competence issues in the Further Amended Supplementary SFIC dated 19 February 2021.

275. It may be thought that there is a practical difficulty for Emanuel to establish its integrity because its licence to export was cancelled on 21 August 2018, now over three years ago. However, Emanuel has continued to trade in the live-stock industry since this time by operating the Peel Feedlot and preparing live-stock for export by RETWA. Despite not acting as a licensed exporter, we are able to consider this ongoing conduct for the purpose of determining Emanuel's current integrity. It is not merely Emanuel's conduct as a licensed exporter (which concluded upon cancellation of the licence) that is relevant to integrity. We can also rely on the evidence as to changed practices which is relevant to the question of integrity to hold an export licence in the future.

276. Before we turn to the reforms made by Emanuel and the issues raised by the Secretary concerning the Peel Feedlot, we will make three observations that are relevant to rehabilitation and specifically to competence and integrity. These observations concern Emanuel's initial response to the allegations regarding Mr Graham Daws in the Second Show Cause Notice; the resignation of Mr Graham Daws; and our observations regarding the current management team.

General observations regarding rehabilitation

Emanuel's initial response to the allegations regarding Mr Graham Daws

277. On 6 July 2018, Emanuel responded to the Second Show Cause Notice by denying the allegations relating to integrity and competence. More particularly, Emanuel said that Mr Graham Daws acted in good faith and provided what he understood to be the correct PAT values for the Vessel. There was no expression of remorse, rather an explanation that Mr Graham Daws had relied on others to form an honest and reasonable belief that the PAT values from Mr Clausen could be doubled. Quite clearly, the views expressed by Emanuel in response to the Second Show Cause Notice cannot be accepted. However, Emanuel has now changed its position, conceding in their written closing submissions:

> *48. … that the PAT scores used to generate the HSRAs supporting the NOIs for the relevant 9 voyages of the MV Awassi Express were incorrect … that Graham Daws ought to have known when submitting the PAT score data for*

the MV Awassi Express to Dr Conrad Stacey in 2014 that the data he provided to Dr Stacey was not calculated the way Dr Stacey would have calculated it and its submission therefore was capable of leading to error.

278. Emanuel's initial response showed a concerning lack of remorse and responsibility. However, in our view, their change of position indicates an acceptance of the gravity of the conduct by Mr Graham Daws and, consequently, Emanuel.

The resignation of Mr Graham Daws

279. Mr Graham Daws resigned as managing director of Emanuel as part of the company's attempt to rehabilitate itself and to establish its current integrity. We have already considered the resignation as managing director of Mr Graham Daws and any ongoing involvement he may have in Emanuel. The Secretary raised concerns with respect to Mr Graham Daws not being a person of integrity and yet continuing to be involved in the business of Emanuel. However, as we have found above, the evidence does not support a finding that Mr Graham Daws is in any position to control Emanuel or to direct how the management of Emanuel is to be conducted. We found above that after Mr Graham Daws' resignation, he no longer participated in the management or control of Emanuel's export business. Mr Nicholas Daws took over as managing director and became the directing mind and will of Emanuel. Mr Graham Daws' continued presence in the business is therefore not significant.

The current management team of the Applicants

280. We do not have any concerns that the current management team are not persons of competence and integrity. Mr Nicholas Daws, the current managing director, and Dr Ludeman, the corporate governance and compliance officer, were credible witnesses who we found to be frank and honest. We formed a similar view with respect to Mr Ben Stanton and Mr Edwards.

281. Mr Nicholas Daws was not aware that his father, Mr Graham Daws, had doubled the PAT values in 2014. On 24 June 2014, Mr Nicholas Daws emailed his father setting out the information needed by Dr Stacey to create the vessel file, but he had no further involvement until he received the vessel file from Dr Stacey on 1 July 2014. Upon receiving the vessel file, Mr Nicholas Daws created an HSRA for the Vessel's maiden voyage to the Middle East (Voyage 2). The HSRA for later voyages were prepared by Mr Alastair Solomon of RETWA on Emanuel's behalf because Emanuel did not have the

necessary HotStuff software on its computers. There was no reason to revisit the vessel data file for these later voyages because the Vessel had not undergone any material changes since 2014. That does not absolve Mr Graham Daws because he alone was aware of the incorrect doubling of the PAT values.

282. It was not until April 2018 that Mr Nicholas Daws became aware of the incorrect PAT values. It was Mr Mike Stanton who at that time reviewed them and informed Mr Nicholas Daws that "*they are half what was provided to Conrad in 2014*"' (Mr Nicholas Daws' witness statement dated 16 May 2019).

283. Mr Ben Stanton was not involved with the provision of the incorrect PAT values to Dr Stacey in 2014. He said (and we accept) that he had no reason to doubt the accuracy of the PAT values. He only became aware they were incorrect at around the time that the 60 Minutes program aired in April 2018.

284. The finding of a lack of integrity of Mr Graham Daws for his conduct in doubling the PAT values in 2014 should not be visited upon Mr Nicholas Daws or any of the current management of Emanuel or EMS. Mr Graham Daws acted alone in providing the incorrect PAT values to Dr Stacey and it was not discovered by any of the current management team until April 2018.

285. We also observe that the Applicants, through their management team were open and transparent, by fully cooperating and disclosing information to the Tribunal, including significant volumes of email correspondence involving Mr Graham Daws.

286. We will now consider the issues relevant to rehabilitation described in the first two paragraphs of this section. Firstly, we will consider whether there has been any other conduct on the part of Emanuel suggesting a continuing lack of integrity or competence. This will involve a consideration of allegations made by the Secretary concerning Emanuel's operation of the Peel Feedlot. Secondly, we will consider the related issue of the adequacy of the changes made by Emanuel to its governance and compliance processes in order to address the issues of integrity and competence.

Whether there has been any other conduct suggesting a continuing lack of integrity or competence

287. As has already been mentioned, Emanuel is the registered operator of the Peel

Feedlot. Animals are delivered to the Peel Feedlot prior to being transported to the port for export. The Secretary argues that recent conduct on the part of Emanuel as the registered operator of the Peel Feedlot indicates a continuing lack of integrity or competence.

288. Based on an inspection of the Peel Feedlot undertaken on behalf of the Secretary on 17 October 2020, the Secretary alleges that Emanuel breached standards of the ASEL, did not comply with its operations manual for the Peel Feedlot and did not comply with an approved arrangement that Emanuel had in place under s 1A.05 of the Animals Order. The Secretary submitted in its Further Amended Supplementary SFIC that this demonstrates that the Applicants' improved compliance systems are inadequate and that they are not competent to hold an export licence.

289. The parties disagree about the condition of the animals inspected on 17 October 2020 and about the interpretation of relevant regulatory provisions including the ASEL. For example, there was disagreement regarding when and whether animals should be removed from the herd and the process of identifying which animals should be rejected.

290. Before we address the issues arising from the 17 October 2020 inspection, we will outline the regulatory provisions referred to above in the "*Legislative framework*" section in further detail.

Overview of regulatory provisions

Approved arrangements

291. Firstly, with respect to the approved arrangements, we agree with the Applicants' submission that the approved arrangements ceased to have effect when Emanuel's Licence was cancelled. Section 1A.01 of the Animals Order states that the export of live-stock is prohibited unless certain listed conditions are complied with. These include that "*the exporter holds a live-stock export licence under the AMLI Act*" (s 1A.01(a) of the Animals Order) and "*an approved arrangement for the exporter is in effect in relation to the live-stock*" (s 1A.01(g) of the Animals Order). Section 1A.02 of the Animals Order states that the application for the approved arrangement is made by "*An exporter who wants to export live-stock*". Also, for the avoidance of any doubt, s 1A.18(2) of the Animals Order states that, "*An approval of an arrangement ceases to have effect if the person who applied for approval of the arrangement ceases to be an exporter*". It was RETWA who was the exporter of the consignment in question, being consignment LNC 11853, and not

Emanuel or EMS. Whilst we accept the Applicants' submission that the approved arrangements do not apply to Emanual because it was not the exporter, we can place some weight on any conduct that may otherwise be a breach because it would be relevant to ongoing integrity.

Standard 3 of the ASEL

292. Standard 3 of the ASEL concerns the management of live-stock in registered premises. Condition 8 of the Notice of Registration for the Peel Feedlot states that the operator (Emanuel) must comply with Standard 3. Sections 3.1 and 3.2 of the ASEL relevantly state the following "*guiding principle*" and "*required outcomes*":

> ***3.1 Guiding principle***
>
> *Livestock are assembled at registered premises, where the husbandry and management practices ensure that the livestock are adequately prepared for the export voyage.*
>
> ***3.2 Required outcomes***
>
> *(1) Facilities at registered premises are appropriate for the type and species of livestock to be held.*
>
> *(2) The health and welfare needs of the livestock are appropriately catered for in a secure environment.*
>
> *(3) Livestock leaving the premises are fit for the export voyage and meet importing country requirements.*
>
> *(4) Livestock rejected for export are managed humanely.*

293. Standard 3.1 of the ASEL provides:

> *The operator of registered premises must employ sufficient appropriately trained staff for the effective day-to-day operation of the premises and management of the livestock.*

294. Standard 3.16 of the ASEL provides:

> *Daily monitoring of health, welfare and mortality must include the following:*
>
> *(a) All livestock must be inspected daily by a competent stock person*
>
> *(b) All sick or injured livestock must be given immediate treatment, and veterinary advice must be sought if the cause of a sickness or injury is not obvious, or if action taken to prevent or treat the problem is ineffective*
>
> *(c) Investigation by a registered veterinarian must be conducted if mortalities in any one paddock or shed exceed 0.1% or 3 deaths, whichever is the greater, on any one day for cattle and buffalo, or 0.25% or 3 deaths, whichever is the greater, on any one day for any other species of livestock. Dead livestock must be collected and disposed of on a daily basis. Animals must not be able to access the area for disposal of carcases*

(d) Records of each consignment must be kept for at least 2 years after the date of export.

295. Standard 3.17 states what should happen when live-stock are identified as being distressed, injured or unsuitable for export:

> *Any livestock identified at unloading as being distressed, injured or otherwise unsuitable for export must be marked by a permanent method and isolated from the rest of the consignment. A record must be kept that details identity, the method of treatment or euthanasia and disposal of all rejected animals. Criteria for rejection are outlined in Appendix 3.1.*

296. The rejection criteria for sheep are included in Table A3.1.2 of Appendix 3.1 of the ASEL. They are numerous, but include lameness, blindness, scabby mouth and pink eye.

Operations Manual

297. As mentioned above in the "*legislative framework*" section, for an application to operate a registered feedlot to be approved there must be an operations manual. The relevant manual is the *Registered Premises Operations Manual for Peel Feedlot* (**Manual**). A new version of the Manual was submitted to the Department for approval in August 2020 to coincide with the commencement of ASEL version 3 in November 2020 and a copy of that manual has now been provided to the Tribunal.

298. The Manual contains a "*Rejected Stock Procedure*", which is consistent with the ASEL. It provides that stock with certain health conditions including pink eye, scabby mouth, limpy, cripples, downers as well as other listed ailments and injuries, are to be removed from the consignment. It further provides that stock that have been rejected (and not held as a re-look) are to be "*isolated from other consignment stock*", "*identified and recorded*" and "*diseased or injured animals must be treated appropriately and/or removed from the Feedlot as soon as possible*".

299. The Manual also sets out a "*Daily Inspection Procedure*". It provides that:

> *Resident Manager to arrange to:*
>
> *1. Check livestock daily for general health and injury. …*
>
> *6. Ensure stock only handled when necessary, with care to reduce stress.*
>
> *7. Ensure stock handled in accordance with ASEL VERSION 2.3*
>
> *8. Monitor for sickness and injury.*
>
> *9. Isolate sick or injured animals as soon as possible in a separate area for*

immediate treatment.

10. Identify problem through consultation with a vet if cause or treatment of problem is not obvious or effective. …

14. Humanely destroy any sick animal. …

20. Immediately inform EMANUEL (who will inform a Government Veterinary Officer) if mortalities exceed 0.25% on any day in any paddock or shed. Also arrange Vet to perform post-mortem examination of stock. …

24. Report as per the Reporting Procedure. …

26. Animal waste is removed using a bobcat from under the shed and loaded into a tip truck.

300. Relevantly, condition 5 of the Notice of Registration for the Peel Feedlot states that "*the Operator must ensure that the overall health of the consignment is assessed each day with animal mortality, disease occurrences and states of any animals being treated, reworded on a day to day basis…*".

Export Advisory Notice 2016 – 16 Management and Removal of Rejects

301. The Secretary has published an *Export Advisory Notice 2016 – 16 Management and Removal of Rejects*, dated 10 June 2016 (**2016 EA Notice**). The purpose of the 2016 EA Notice is stated as being: "*To provide advice to livestock exporters, Australian Government Accredited Veterinarians (AAVs), registered premises operators and departmental officers on managing livestock rejects*". The 2016 EA Notice further states: "*I*t *is the responsibility of livestock exporters to have effective systems in place to ensure consignments of export livestock are compliant with both the relevant importing country requirements and the Australian Standards for the Export of Livestock (ASEL)*".

302. The section titled, "*Removal of rejects prior to inspection*" provides:

Before a consignment is presented for inspection by the department's authorised officer, an exporter:

- *must have had the consignment inspected by an AAV.*
- *must have removed all livestock ineligible for export on the grounds of blood or fecal test results. These livestock present a high risk to maintaining market access as well as to the welfare of all animals in the consignment and must not be exported.*
- *should have removed livestock which do not meet ASEL or importing country requirements (for reasons other than test results). The department acknowledges there can be circumstances where removing these livestock from a consignment prior to inspection may not result in the best animal welfare outcome. In these cases the exporters must provide the authorised officer with a written plan for managing rejected livestock at the time of*

inspection. The plan must clearly identify the rejected animals, their location, reason for rejection and when they will be removed from the consignment. The inclusion of tag numbers to identify animals where possible is encouraged. There is no template for the plan, an example is attached for reference.

303. The section titled, "*Rejected Livestock*" provides in part, that:

Animals identified by the authorised officer at inspection as ineligible for export must be removed from the consignment before it is loaded onto trucks. These livestock cannot be exported as part of that consignment and cannot be reassessed by an AAV and included back into that consignment at a later stage.

Ineligible livestock can be included in future consignments if, at the time of the future consignment, they meet importing country requirements, ASEL and are fit to travel.

It is up to each exporter to implement an effective identification system for rejected livestock which is suitable for their business. Exporters should keep records of actions taken to remove any rejected livestock from the consignment.

Exporters should ensure that any animals rejected from the consignment have been removed from final tag lists provided to the Department. This will prevent possible delays to export permits and health certificates being issued.

This EAN does not prevent AAVs or exporters from removing any additional animal/s from a consignment if, following an inspection by the department's authorised officer, they are not considered as fit for export.

Fremantle Model

304. In the Applicants' Amended Closing Submissions, the Applicants submitted that, in addition to complying with the ASEL, the Manual and the 2016 EA Notice, they also complied with the "*Fremantle Model*" (also called the "*Fremantle System*"). In his report dated 3 February 2021, Dr Madin stated that:

2.2.3. …the so-called 'Fremantle model' gave greater confidence that more animals were being rejected before loading onto the vessel. In my opinion it also gives greater confidence that the animals which are being exported were in good health and have been subject to less unnecessary stress.

305. The following description of the Fremantle System (from a 2008 report prepared by the Department) was cited in a September 2012 report by Dr Nigel Perkins and Dr Madin, titled "*Review of sheep pre-embarkation inspection procedures*", at 4.2.1:

On arrival at the registered premise, sheep are drafted into lines according to sex and weight. Unfit sheep are drafted off and rejected. On the day prior to loadout (transport to the port), flock inspections are carried out independently by both an AQIS vet and an accredited vet. The intent of the flock inspection is to assess the health of the flock as a whole, rather than to identify problems with individual sheep. If problems – most notably scouring, pink eye or scabby mouth – are identified amongst a significant number in the flock, the vets may request that the

pens be redrafted to remove the unfit sheep, or reject a pen in its entirety. Ear-tag numbers and location of injured or sick individuals are noted but no action is taken at this point

The accredited vet inspection involved walking in a random pattern through a shed of 10–12 pens housing approximately 6000 sheep. Not all pens were entered during this process.

Inspection of sheep in the paddocks involved driving through the yards and inspecting the flock through binoculars.

The inspection by the AQIS vet involved walking slowly through the sheds and paddocks to more closely observe the flock's general health.

At loadout the sheep were moved into a system of holding pens before being loaded onto the truck. There were no facilities for drafting off unfit sheep during the loadout process. Sheep exited a funnelling pen single file and ran up the loading ramp onto the trucks.

On arrival at the port, sheep were unloaded via a ramp and onto an elevated race. The race led to a drafting gate and pen. An inspector was positioned along each race to view the sheep as they exited the truck and passed by individually at shoulder height. Inspectors noted unfit sheep as they passed and alerted the drafter, who drafted the rejects off. The raised platform inspection system afforded a good view of the legs and underbelly which are not clearly visible during ground level inspections.

(Footnotes omitted.)

The 17 October 2020 inspection

306. On 17 October 2020, the Departmental Veterinarian, Dr Dowd, undertook a pre-export inspection of a consignment of sheep, LNC 11853, at the Peel Feedlot. The consignment was being exported to Kuwait by RETWA on the vessel Al Messilah. The proposed date of export was 19 October 2020. She was accompanied by Dr Macpherson, the accredited veterinarian engaged by RETWA.

307. After her inspection, Dr Dowd produced an inspection record in which she expressed concerns about what was, in her opinion, a significant number of animals that had lameness and ocular issues, and which required immediate treatment or euthanasia.

308. Dr Dowd's report summarised her "*feedlot concerns*" as follows:

Sheds are required to be attended to by RP stockmen daily. Stockman had already done morning rounds at the RP prior to inspection. AAV also advised that he has been checking the animals daily and was surprised at how quickly the ocular issues had worsened, with the animals not presenting with blindness yesterday. Severity and numbers of impacted animals raise concerns as to the level of daily inspection by RP stockmen and AAV. Consignment presented to VO contained significant number of animals requiring immediate euthanasia or treatment.

309. Dr Dowd's report also stated the following "*maintenance concerns at feedlot*":

> *Of the three sheds inspected, multiple pens had significant faecal build up underneath sheds rising up through slatted mesh floor creating mounds of compacted faeces above ground level of mesh slatted floors. The sheds are elevated to a significant raised heights off the ground and the faecal piles appear very similar to those visualised in March/ April before the May northern summer export break – we were advised that these would be cleared out for the October period.*

310. On 23 October 2020 at 2.00 pm, Dr Dowd sent Dr Macpherson an email, to which Mr Mike Gordon at RETWA was copied. The email stated:

> *Hi Rob*
>
> *Further to my inspection at Peel feedlot on Saturday 17/10, you were going to redraft pens as well as recheck the rest of the sheds for lameness and ocular issues. Can you please advise which pens were redrafted, your reject numbers and your inspection findings of the other sheds.*

311. It appears that Dr Dowd did not receive a response, because she sent a follow up email to Dr Ludeman on 26 October 2020 at 3.19 pm, which stated:

> *Hi Holly*
>
> *Can you please follow this up and advise on the outcome of the reinspection and redrafting?*

312. Dr Ludeman sent an email to Dr Macpherson on 26 October 2020 at 4.01 pm. It stated, in part:

> *Hi Rob*
>
> *I was just speaking on the phone with Karen Dowd (RVO) regarding Peel Feedlot manual being reviewed in the coming days to have approval for 1st of November to be operating under ASEL 3.0.*
>
> *Karen mentioned during her sample inspection she was unhappy with the pen she was presented and inspected and she was going to progress to a full inspection based on 4 of 20 pens having:*
>
> - *Multiple animals needing immediate euthanasia*
> - *Multiple animals 20-30 4/5 lame/cripple*
> - *Multiple animals 20-30 with sever* [*sic*] *pinkeye or blind*
>
> *Karen indicated she had asked you to report back on further inspections and what drafting had occurred. …*

313. Dr Macpherson responded to Dr Ludeman on 26 October 2020 at 5.38 pm. His email stated, in part:

Please also note regarding Karen's claims:

1. *Only 1 animal required euthanasia and I did it immediately after inspection*
2. *Karen asked to see the worst pens and was shown the pens that were going to be subsequently redrafted and was told such.*
3. *Karen was told that there was a normal flush of pinkeye around this time – always to be expected. As we know the vast majority will be over it in a week or 2 without treatment including many of the blind ones.*
4. *Lame animals do not need euthanasia unless they are obviously badly infected, have a broken or paralysed leg or losing condition. Just because they are limping is not a necessity to euthanase.*
5. *I did report back to Karen as the feedlot were redrafting any way as she had been told but feel it was a long stretch of her authority to require a report on numbers.*
6. *Her level of veterinary knowledge continues to underwhelm!*

314. Dr Dowd gave evidence about her inspection of the Peel Feedlot in her affidavit dated 22 December 2020. Her evidence was that in Shed 1, South Pen 4 and South Pen 3, there were "*a number of animals with significant eye issues*". She stated:

> *42. I identified a significant number of animals (20 +) in each pen that displayed significant ocular symptoms including marked blepharitis, blepharospasm, ocular discharge, conjunctivitis and corneal opacity. I identified multiple animals with bilateral blindness (4-5 in each pen) requiring immediate treatment or euthanasia. …*
>
> *43. I said to Dr Macpherson words to the effect of '*I am concerned with the numbers in these pens with advanced ocular symptoms and also the number of other animals displaying ocular symptoms of varying severity. These are not displaying mild symptoms and need to be removed from South Pens 4 and 3*.' I was of the understanding that this process to remove animals would likely require the pens to be drafted, to separate the healthy animals within the consignment from those that needed to be removed. The reason for this is because removing individual animals from a pen housing 600 sheep, without infrastructure to support this being done in a low stress way, was problematic in this Registered Premise. I identified the requirement to remove the animals because of the significant numbers of animals displaying symptoms which were non-compliant with the ASEL rejection criteria, which were not considered 'mild', and also because many ocular diseases with symptoms consistent with what I observed are infectious and are likely to spread further through the pen and shed. I recall Dr Macpherson saying to me words to the effect of, '*I am surprised they are this bad. This has happened quickly because they went this bad yesterday'.
>
> *44. I then inspected Shed 1 south pen 1, where I identified an animal with severe lameness requiring immediate euthanasia. This animal had what appeared to be a fractured hock joint (ankle) with dried blood around the joint. I advised Dr Macpherson that this animal required immediate attention (being veterinary medical treatment or euthanasia).*

315. Dr Dowd stated that she inspected Shed 3 North Pen 1, which Dr Macpherson had identified in his reject management plan as requiring redrafting due to a high level of lameness. She stated:

> *46. … In this pen I identified a number of animals (more than 20) which had severe lameness, being unable to weight bear on one of their limbs. I said to Dr Macpherson, '*These need to be removed from the consignment and those which are severely lame will require immediate attention*'. By this I meant veterinary medical treatment or euthanasia. …*
>
> *48. Any animal with a lameness, particularly one causing pain, requires veterinary attention. The decision to euthanise an animal due to lameness is made on the basis of (i) the value of the animal, (ii) if treatment is available and/or feasible, (iii) the cost of treatment and (iv) the likelihood of treatment being successful for recovery or long term management. Realistically for production animals such as sheep for live export, and animal exhibiting a grade four or five out of five lameness is likely to be euthanised.*
>
> *49. On this scale, I rated the animals that I observed in North Pen 1 of Shed 3 as being either four out of five lame and five out of five lame. Many animals that I observed where at the tail end of the mob, because they were unable to move within or keep up with the mob movements due to the severity of their lameness. I said to Dr Macpherson words to the effect of, '*There are a number of animals here with serious non-weightbearing lameness. You need to remove these animals from the consignment and treat them*.' By 'treat them' I meant provide the animals with veterinary care, being medication or euthanise the animals. Dr Macpherson responded with words to the effect of '*I will get onto this as soon as we finish this inspection. This has happened quickly because they weren't like this yesterday*'.*

316. Dr Dowd stated that she then inspected North Pen 2 in Shed 3, in which she "*identified two animals with severe lameness requiring immediate treatment or euthanasia*". Dr Dowd stated that she "*advised Dr Macpherson that these animals required immediate attention (being veterinary medical treatment or euthanasia)*".

317. Dr Dowd stated that after inspecting North Pen 3 in Shed 3, the animals "*presented like normal consignments*". She then inspected South Pen 4 in Shed 3 and "*observed two more animals that were severely lame (four out of five on the symptomatic scale) and multiple animals (10 +) with ocular disease symptoms of varying severity*". Dr Dowd stated that she "*also identified two animals with bilateral blindness that required immediate veterinary attention (being veterinary medical treatment or euthanasia)*".

318. Dr Dowd observed a "*similar situation*" in South Pen 2 in Shed 3, including "*multiple animals (5) with ocular disease symptoms of varying severity and one animal with bilateral blindness that required immediate veterinary attention (being veterinary*

medical treatment or euthanasia)".

319. Further, Dr Dowd stated that she then inspected Shed 7 and South Pens 1 to 4, which contained reject animals and observed that "*generally the animals remaining in the reject pens looked to be in better condition than some of the animals in the sheds* [she] *had inspected*". She stated that she next inspected North Pen 4 of Shed 7 and "*observed a number of animals which were severely non-weightbearing lame (four out of five and five out of five on the symptomatic scale)*". Her affidavit indicates that there was some confusion as to whether the animals in North Pen 4 were rejects that should be included on the reject management plan. This was because Dr Macpherson was unsure if they were part of the consignment, although he agreed to follow up.

320. Dr Dowd stated that she inspected North Pen 2 in Shed 7 and that she "*identified multiple animals (8) exhibiting lameness but of a lesser severity than the other pens, being two out of five and three out of five lame on symptomatic scale*".

321. Dr Dowd then stated that she inspected North Pen in Shed 7 and that:

> *61. … I again observed a number of animals (more than 20) with severe ocular symptoms, including at least 8 animals which were bilaterally blind. I advised Dr Macpherson that he needed to identify and remove these animals and provide them with immediate veterinary attention (being veterinary medical treatment or euthanasia). As we were nearing the exit of this North Pen 1, there were multiple bilaterally blind sheep that were standing near the exit - I recall at least 5 animals. We were required to move them out of the way in order to get past as these animals had no ability to orient themselves due to their blindness. I took video footage of these animals.*

322. Dr Dowd's evidence was that, after the inspection, she spoke with Dr Macpherson in the Feedlot office. Her evidence in this regard was that:

> *63. … I advised him of which pens and sheds I had identified issues with and that they required immediate veterinary attention and he took these down in his notes. I advised him that he was required to remove the animals from the identified pens and provide veterinary attention to the reject animals and those with severe symptoms.*

323. Dr Dowd then stated that, "*Dr Macpherson advised that he would go immediately and start addressing the issues*" and that "*the stockman will be back later this afternoon so we can do it then*".

324. Dr Dowd's overall impression of the inspection was:

> *69. I have attended Peel Feedlot approximately 10-12 times in the last 12 months. The presentation of the animals in consignment LNC 11853 as* [*sic*] *the worst I had seen at the Peel Feedlot during the last 12 months with respect to the severity of symptoms and numbers of animals affected. I was particularly concerned about the number of animals that were displaying severe presentations of ASEL rejection criteria and were still contained within the pens presented to me as being included in the consignment (that is, they had not been removed from the pens or been provided veterinary attention). …*

325. In her affidavit, Dr Dowd said that she was so concerned by what she had observed that she telephoned her manager and "*detailed what* [she] *had observed and* [her] *concerns regarding the serious animal welfare issues* [she] *had observed*". She further stated that she "*advised Dr Wells that* [she] *had serious concerns regarding the animal welfare of the animals* [she] *had been presented for this consignment*".

326. Dr Dowd's perceptions and recollections of the 17 October 2020 inspection were substantially different from those of Dr Macpherson. We now turn to his evidence.

327. By way of an overview, Dr Macpherson gave evidence about the process of sheep being quarantined and the process of treating and removing rejected sheep (for example with sheep with pink eye, scabby mouth, and lameness) in accordance with the ASEL. Dr Macpherson also gave evidence about the process of record keeping, preparation of the reject management plan and the process of ensuring that only healthy sheep were loaded onto the vessel for export, as well as the 17 October 2020 inspection.

328. The evidence of Dr Macpherson indicated that he did not think that there were any significant issues that arose during the inspection on 17 October 2020 and that, at the time of the inspection, there was substantial agreement between himself and Dr Dowd as they inspected the sheds. Essentially, his evidence was that nothing arose during the inspection that would give him cause for any concern.

329. After the 17 October 2020 inspection, there was disagreement between Dr Dowd and Dr Macpherson about whether animals required immediate treatment and euthanising and about who had first identified sick or injured sheep (transcript/523–530). Dr Macpherson was clear in his evidence that many of the concerns in Dr Dowd's inspection report and affidavit were not raised with him. He stated in his witness statement dated 29 January 2021:

> *135. I accompanied Dr Dowd on her inspection of the sheds at the Peel Feedlot.*

During and after the inspection Dr Dowd did not communicate to me that she had any serious or significant animal welfare concerns.

330. Specifically, Dr Macpherson's evidence was that, during the inspection, both he and Dr Dowd were concerned about the number of sheep showing symptoms of pink eye and that they both agreed that the pens should be redrafted. It was Dr Macpherson's opinion that the severity of the symptoms was moderate. He confirmed his statement that he was surprised at how quickly the ocular issues had worsened from the previous day. Dr Macpherson disagreed that Dr Dowd said during the inspection that the sheep needed re-drafting because they needed immediate treatment or euthanasia (transcript/523–525).

331. Dr Macpherson agreed that both he and Dr Dowd observed an animal with a severe infection in its hock joint which he euthanised later that day (transcript/525). This was mostly consistent with Dr Dowd's evidence, although Dr Dowd stated that she had observed this animal and had directed that it be treated or euthanised. However, Dr Macpherson's recollection was that this was the only animal identified during the inspection as requiring euthanasia.

332. Dr Macpherson disagreed that Dr Dowd pointed out a significant number of lame animals (approximately 20) in another pen, stating that he "*was the one that pointed them out to her*". Dr Macpherson disagreed that Dr Dowd said the animals needed to be removed and needed immediate attention because he told her those animals were going to be drafted. He stated, "*to clarify I told her I would euthanise that individual animal in pen one immediately but we would get onto drafting as soon as possible*" (transcript/526–527).

333. Dr Macpherson had different views to Dr Dowd as to when animals needed treatment (transcript/569), whether lame or injured sheep should be removed to different pens (transcript/536–552), and whether ASEL breaches occurred by not removing sheep (transcript/561).

334. In his witness statement, Dr Macpherson gave the following evidence regarding the complexities of removing sick or injured sheep from the flock:

> *27. … whether or not it is appropriate and necessary to remove rejects before load out depends on an assessment of the condition and the impact on the mob and the risk of transmission of infectious diseases (such as pink eye or scabby mouth) to the rest of the sheep in the pen.*
>
> *28. Identification of a sick or injured animal for which 'immediate treatment' needs to be given, as required by S3.16 in ASEL 2.3 (now 'prompt and*

humane handling, care, treatment, euthanasia and/or disposal' in S1.1.6 of ASEL 3.0), is a matter of clinical assessment and judgment.

29. Sheep with the conditions pink eye and scabby mouth must be and are rejected from a consignment. However, there is no clinical or welfare reason for individual sheep with these conditions to be immediately treated or isolated from the mob. In the vast majority of cases, pinkeye and scabby mouth will resolve within 2 to 3 weeks without any treatment. Even if sheep with pinkeye is temporarily blinded, so long as the individual is eating and drinking satisfactorily it is not necessary to treat the animal or remove it from the pen.

335. Dr Macpherson further explained in his witness statement how seriously ill sheep are identified:

32. Individual sheep that are suffering and require euthanasia or treatment are easily identified. The conditions that usually require euthanasia are lameness resulting from fractures or other serious injury, a severe infection, loss of condition, not eating, or inability to stand up. The conditions that usually require immediate treatment are those that have serious health impacts for the individual or the mob, such as severe scouring or signs of salmonellosis, fly strike, signs of severe systemic disease, or signs of severe lameness, including fractures or severe infections.

33. The signs that the stockmen use to identify seriously ill and suffering animals are clear. Seriously unwell sheep become moribund and lie down without rising when approached. Lame sheep generally stay at the back of the flock when moved and their movement makes their problem obvious. Blind sheep tend to stay at the back or just wander around. If these sheep require treatment or euthanasia it is usually easy to get them out of the pen without disturbing the mob because these sheep are usually much less active and move slowly, and are therefore easier to catch.

336. Dr Macpherson said in his witness statement that it is sometimes not in the best interests of animal welfare to separate an animal from the mob:

36. Every time a line of sheep is moved or drafted there is a risk of injury to the sheep or the potential to initiate or spread disease. Drafting causes stress to the sheep, which adversely affects the animals' immune systems. This increases the risk of diseases such as pink eye and scabby mouth. It also increases the risk of transmission of pinkeye and scabby mouth because the sheep are forced together during drafting. Dust created by the drafting can also spread pinkeye. Physical injuries are caused by the sheep jostling each other or trying to jump a fence or gate.

37. If, as determined by an inspection, the number of rejects in a pen is more than about 0.5% to 1% of the total, I will usually recommend that the line be drafted to remove the rejects. This is because, in my view, once the number of 'rejects' exceeds this level, the benefit from containing the spread of conditions such as pink eye and scabby mouth will generally outweigh the risk of injury or further contagion from a redraft. Here we are talking about preventing other sheep from getting pinkeye or scabby mouth.

38. Additionally, if the stockmen observe sheep with pinkeye or scabby mouth

in a pen is more than about 0.5% to 1% they report it to the Peel Feedlot Manager, Jim Tillett. Jim Tillett notifies me or Michael Kerr (the importer's QA inspector) or both of us and we discuss and decide how to deal with the problem. Generally, Michael Kerr makes more of these judgments and anyone else. He is present at the Peel Feedlot from receival right up until the last truck leaves the feedlot for the wharf.

39. Otherwise, best practice in the management of sheep is to leave them alone.

337. Dr Macpherson said in his witness statement:

180. After the inspection, Dr Dowd and I went back to the Feedlot office. I told her I would euthanise the lame animal in Shed 1 (which I did immediately after the inspection). If there was an actual need to euthanise more animals I would have done it at that time but I had not identified any other animals that required immediate euthanasia.

181. Jim Tillet [the Peel Feedlot Manager] *was in the Feedlot office. He and I discussed in Dr Dowd's presence the increase in the numbers of ASEL rejects in Sheds 1, 3 and 7 compared to what I had observed the previous day. We decided then that, whether or not the vessel was to be loaded the next day, we would draft out the rejects in the affected pens in those sheds.*

182. We also decided that the Feedlot staff and I would inspect all the other sheds and, if necessary, we would draft out any rejects in pens in other sheds. Dr Dowd asked me to give her the numbers of rejects after the draft. …

190. Whilst I acknowledge there were significant numbers of animals in individual pens that had ASEL reject criteria, I dispute that there were significant numbers that required euthanasia or immediate treatment. …

196. In my opinion there were no significant or serious animal welfare concerns that day, even in the hospital pens. There was nothing being done at the Peel Feedlot that, in my opinion, was likely to cause harm to animals or adversely affect animal welfare. I did not observe anything during the RVO inspection that in my opinion could possibly trigger the provisions of the Animal Welfare Act.

197. In fact, the general condition of the whole consignment was very good.

198. Certain disease processes will occur on a rolling basis, but I saw nothing serious. There were animals that might eventually require euthanasia but they were not candidates for euthanasia at the time of Dr Dowd's inspection.

199. As I mentioned earlier in this statement, even blindness will resolve in time. Animals may be blind, but when you are inspecting them you are looking at the condition of the animals. So long as they are drinking, eating and in good condition they are better off staying in the pens, even if they are blind.

200. It takes sheep a couple of days to get used to their new group once they come off the trucks and are drafted into lines. If a sheep becomes blind, it still has comfort because it is in its group. The blindness then resolves and the animal is still in its group.

201. Sheep can develop lameness during quarantining. If the weather is wet the sheep have soft hooves and walking on the grating in the sheds can cause

> *soreness. This mainly affects heavy sheep, which is why they are quarantined in the paddocks. If there is a hole in the flooring a sheep may fall and injure its leg. There is a lot of stress on the wire mesh near the feeders and the grating can develop holes, even though the sheds are checked daily. Sheep can also develop foot abscesses, or get a foot caught in a gate or fence, or shearing cuts can become infected. Just because a sheep is lame does not mean the animal has to be euthanised. I do not euthanise a lame sheep unless the condition is very serious, such as gross infection, fracture, paralysis or joint infection.*

338. There are significant conflicts with respect to the factual and opinion evidence of Dr Macpherson and Dr Dowd. We note that the purpose of considering the conduct of Emanuel at the Peel Feedlot is because it is a factor relevant to a determination as to integrity and competence. We do not have the benefit of a show cause notice and the usual subsequent procedure. If there was uncontroverted evidence of breaches of the ASEL or poor animal welfare practices at the Peel Feedlot, then a finding to that effect would be relevant to that determination as to integrity and competence. We conclude that the evidence falls short of such a finding. We have a general preference for the evidence of Dr Macpherson over Dr Dowd and find that the evidence does not establish that animals needed immediate treatment or euthanising at the time of the 17 October 2020 inspection. Dr Macpherson has over 25 years' experience in the live export industry. He has worked fulltime as an accredited veterinarian for the past 18 years, preparing goats, sheep and cattle for export.

339. Dr Dowd's experience is not as extensive as that of Dr Macpherson. From 1996 to 2006, she undertook a mixed veterinary practice treating live-stock as well as farming and companion animals. In 2006, Dr Dowd joined the Department as the Perth district veterinarian officer, but also continued a part-time mixed veterinary practice as a mobile veterinarian until 2012. This veterinary practice included work with sheep, horses, pigs, alpacas, and goats. She worked in a policy role between 2009 and 2011 and from 2011 to 2019 worked in aquatic biosecurity for the Department. Dr Dowd has not practiced as an Australian accredited veterinarian, has not been employed as a veterinarian for a live sheep export vessel, and has not provided services regarding sheep and live-stock on a large scale (transcript/748–750).

340. Dr Madin's evidence supports our finding that Dr Macpherson's evidence should be preferred. We note Dr Madin's extensive experience in the Australian live-stock industry since graduating in 1994. He has worked with sheep throughout his career and has been involved in pre-export inspections since the 1990s. Between 1998 and

approximately 2006 he worked as a government veterinary officer, conducting pre-export, loading and post-loading inspections of live-stock for export. In this role Dr Madin was responsible for signing export certification and health statements. Since 1999 he has conducted research into the live export trade.

341. Dr Madin was cross-examined in some detail about appropriate treatment for sheep with lameness and pink eye, when to separate sick sheep, and the difficulties in doing so. His evidence was generally consistent with the evidence of Dr Macpherson. For example, Dr Madin noted that there can be animal welfare issues resulting from trying to separate an animal from the flock (transcript/699):

> *… it would be or could be the case that in trying to isolate one animal from a pen of five or six-hundred or however many in that pen, I can't tell, that in trying to separate that animal off it would cause perhaps more risk of other animals jumping out of the way, increased risk of trauma. Were it possible to gently and quietly lead that animal out, yes, absolutely. Were it necessary to move all those animals through the draft and race system to separate it and take it off then I would be weighing up the benefit of the individual animal against the risk to the whole group.*

342. Dr Madin's evidence regarding the treatment of pink eye was also consistent with Dr Macpherson's. For example, Dr Madin stated that (transcript/705, 708):

> *in sheep there's generally little or no benefit from treatment and you may find that instituting a course of treatment over the course of a week or more might reduce the duration of the condition by a day or two at best. …*
>
> *it can last for one to two weeks, I would say that would be the most extreme cases, and that most would have recovered within that time.*

343. Also, in his report dated 3 February 2021, Dr Madin explained that he had been asked to conduct:

> *3. … a comprehensive assessment of the livestock holding and assembly systems and processes employed at the Peel Feedlot, reject management practices and provide my opinion on adequacy or otherwise of those systems to ensure that the livestock are adequately prepared for the export voyage.*

344. Dr Madin attended the Peel Feedlot on several occasions between 11 December 2020 and the end of December 2020 (transcript/694). He opined that after observing all these stages for consignment LNC 11965:

> *3. … I am of the opinion that the Peel Feedlot is a well-run operation, with high levels of staff training and effective procedures to ensure a high standard of animal health and welfare is maintained during the livestock export preparation process. From my observations and enquiry, I am of the opinion that the operations of the feedlot are compliant with the ASEL*

standards outlined above, subject to the limitations discussed below.

These ASEL Standards cited by Dr Madin included ss 3.4(1), 3.4(2) and Standards 3.13(b), 3.16 and 3.17.

345. The only instance of non-compliance observed by Dr Madin was with ASEL s 3.4(1), which provides that "*only fit livestock … can be accepted into the registered premises*". Dr Madin stated that during his inspection, he observed that one lame animal was unloaded, as was one animal with severe pink eye. However, Dr Madin opined that compliance with this section is "*unlikely to be possible, and may contravene the guiding principle of animal welfare*". This is because an animal's fitness cannot be ascertained until it is unloaded, and once unloaded it cannot be re-loaded due to biosecurity considerations. Further, attempting to reload the animal could cause "*extreme stress and risk of injury to all livestock on the truck*".

346. Later in his report Dr Madin stated, "*I have seen nothing in the photos, video or inspection records that were presented to me that would suggest inappropriate management of these conditions in the feedlot or would change the views expressed above*". Under cross-examination, Dr Madin confirmed that these related to prior voyages, and not just LNC 11965.

Manure build-up

347. Dr Dowd also referred to an issue with a manure build-up in one of the sheds at the Peel Feedlot. A manure build-up was initially identified during a Departmental audit undertaken on 20 December 2019. The audit "*observations and comments*" stated, "*piles of manure under the pens need to be kept to a level that is not allowing the manure to compact in the wire of the flooring*". However, this was marked as an "*observation*" and the overall finding of the audit was "*the registered premise was found to be operating in accordance of the requirements for a registered premise*".

348. Dr Dowd stated in her affidavit that "*in multiple pens in multiple sheds, the faecal pile which is usually below the slatted mesh floor was piling up on the inside of the shed's slatted wire mesh floor*". She stated that she recalled having a conversation with Mr Mike Curnick (who was the live-stock manager of Emanuel from August 2009 to July 2020) in April or May 2020 during one of her inspections where she raised this issue, and yet the pile did not appear to her to have been cleared out.

349. In his witness statement, Dr Macpherson stated:

> *270. A build-up of manure in the pens does not mean that there is an animal welfare issue. There is still ventilation through the walls and under the mesh floors and I have not identified any additional lameness in the pens where there has been a build-up of manure.*

350. Under cross-examination, Dr Macpherson agreed that the best option is for sheep to be separated from the manure because, if the manure became wet, there was an increased risk of disease, however that this was a "*one-off situation*" (transcript/572–575).

351. In his report dated 3 February 2021, Dr Madin stated that, at the time of his visits in December 2020:

> *8.1.1. … While there was faecal material built to the level of the floor of a few pens at the time of my visits, it was only in a limited area. Where this manure was above mesh level, it was firm and dry (and presumably free draining), and the sheep appeared quite comfortable standing on the manure.*

352. Dr Madin also gave evidence with respect to the issue of the manure build-up at the hearing. Dr Madin's evidence was that he was not of the opinion that an animal lying on a dry manure pad was more at risk than an animal lying on a steel mesh floor. His evidence was that if manure became wet, it would need to be managed to reduce the risk of salmonella outcomes, although this was unlikely because the sheds had roofs and the manure was in the middle of the sheds (transcript/725–726). Overall, Dr Madin's evidence was consistent with the finding in the report of the Departmental audit dated 20 December 2019 that the manure build-up was an "*observation*" rather than a non-compliance.

Findings regarding other conduct suggesting a continuing lack of integrity or competence

353. In conclusion, we are not satisfied that there has been more recent conduct by Emanuel with respect to the Peel Feedlot which suggests a continuing lack of integrity or competence. The evidence does not establish that Emanuel is not compliant with Standard 3 of the ASEL, and with the Manual. We note that Emanuel follows the Fremantle Model, which is considered by experts such as Dr Madin to be best practice in the industry, as well as the 2016 EA Notice.

354. The evidence does not establish that the animals in the Peel Feedlot were not inspected daily. Indeed, in his report dated 3 February 2021, Dr Madin found that "*all*

mobs were inspected daily by stock persons".

355. As we have stated above, we prefer the evidence of Dr Macpherson and Dr Madin to the evidence of Dr Dowd with respect to the 17 October 2020 inspection. We are not of the opinion that Dr Ludeman only finding out about the result of the 17 October 2020 inspection from Dr Dowd on 26 October 2020 was a breach of any compliance procedures in the Manual. This was because Dr Macpherson correctly believed that there were no serious issues identified with the consignment, and that any ASEL rejects would be drafted out before loading, as he agreed with Dr Dowd. However, Dr Macpherson's surprise at how quickly the ocular issues had worsened from the previous day may indicate that the compliance system was not working as effectively as it should have been, and that Dr Ludeman should have been informed earlier than she was.

356. We accept the opinion of Dr Madin, who determined at his inspections in December 2020, that the Peel Feedlot is a well-run operation that is compliant with the ASEL standards. The only non-compliance with ASEL s 3.4(1) identified by Dr Madin during his visit in December 2020 was a result of it being practically impossible to comply with that section. That is because live-stock could not be loaded again after being unloaded due to biosecurity and animal welfare concerns.

357. Further, although the manure build-up does appear contrary to item 26 of the Daily Inspection Procedure in the Manual, it is a very minor breach. Indeed, it was initially recorded in the 20 December 2019 audit inspection as an "*observation*". Additionally, the expert evidence of Dr Madin, which we accept, was that there were no adverse animal welfare outcomes from the manure build-up.

Changes made by Emanuel to its governance and compliance processes to address issues of integrity and competence

358. As we noted above, the Applicants submitted that they have implemented changes to their governance systems and their procedures to ensure legislative compliance. The Secretary, on the other hand, submitted that these systems are inadequate and that we should not be satisfied that the Applicants are competent to hold an export licence.

359. The first step taken by Emanuel to review its regulatory compliance system was to appoint Dr Ludeman as corporate governance and compliance officer of Diverse Management Group Pty Ltd, of which Emanuel and EMS are subsidiary companies, in

December 2018. Dr Ludeman gave evidence that she reviewed and updated the companies' compliance systems when she commenced her employment and formalised a new framework to measure compliance with the ASEL and to measure animal welfare. She implemented procedures of internal audits, management review meetings, operations meetings, and corrective action reports required under the approved arrangement. Dr Ludeman delivered an audit report in October 2019 that made recommendations for improving Emanuel's compliance systems. Since then, Emanuel has taken steps to implement those recommendations. Dr Ludeman gave evidence that Emanuel and EMS adopted corporate governance policies on 10 March 2020, which included an animal welfare policy and an independent Advisory Council Charter. Dr Ludeman was cross-examined extensively as to the operation and effectiveness of the new compliance framework, particularly with respect to the Peel Feedlot. Our impression of Dr Ludeman was that she was highly competent, well versed in regulatory and compliance issues and that she had undertaken a thorough and extensive review and implementation of improvements in the compliance mechanisms of the group of companies to which the Applicants belong.

Frequency of meetings and incident reporting

360. Notwithstanding the extensive improvements in the compliance mechanisms, it appeared to us from Dr Ludeman's evidence that, at times, the new compliance framework was not working as effectively as it could. For example, monthly management operations meetings did not always occur, but according to Dr Ludeman, there were "*a lot of unofficial meetings*" (transcript/621) and monthly meetings were not operationally realistic. Dr Ludeman agreed that between March 2020 to October 2020 there were no regular meetings to discuss open corrective action requests (transcript/622) but said that there were regular discussions about corrective actions and incidents (transcript/622–623). She disagreed that the failure to hold regular management meetings was because of a lack of commitment to the process of holding those meetings (transcript/627). She also disagreed that the operations and governance manual was being made less prescriptive to reduce meetings and internal reporting requirements (transcript/623).

361. A further example that the compliance system was not working as effectively as it should have been, was that Dr Ludeman only became aware of the high prevalence of eye problems and lameness at the Peel Feedlot (that were noted by Dr Macpherson and Dr Dowd during their inspection on 17 October 2020) during a telephone conversation

with Dr Dowd about an unrelated matter on 26 October 2020 (transcript/655–656). As we noted above in our findings regarding the 17 October 2020 inspection, we are not of the opinion that Dr Ludeman only finding out about the result of the 17 October 2020 inspection from Dr Dowd on 26 October 2020 was a breach of any compliance procedures in the operations and governance manual, however it suggests that the compliance system was not working as effectively as it should have been.

362. We note that in October 2019, Dr Ludeman identified in her internal audit that there had been inadequate recording of management meetings. Dr Ludeman was cross-examined about the lack of formal meetings, despite the stated intention to hold them. Her evidence was that the management team was small, being made up of three or four people all in the office together, and that while formalised minuting of meetings may not have taken place, there were regular conversations and discussions (transcript/615). She said that "*unofficial*" meetings were held at which they discussed incident reporting and corrective action reporting. She accepted that from a compliance perspective, the meetings were not adequate because the planned monthly meetings from March 2020 did not take place. We do, however, note the minutes of a management meeting dated 11 March 2020, which recorded that meetings over the last 12 months had been "*valuable*" but that "*meeting dates between operational activities can be difficult and monthly has not been practical*".

363. The Secretary also referred to only one corrective action report being prepared between
1 February 2020 and 28 October 2020, and no incident reports concerning the Peel Feedlot between 22 May 2020 and 26 October 2020 (transcript/136). We are, however, satisfied from Dr Ludeman's evidence that she was adequately monitoring corrective action reports and discussing them at informal management meetings. Several corrective action reports were left open on the register to ensure they were reviewed and updated when the new ASEL version 3 commenced (transcript/615). We accept Dr Ludeman's evidence that there were no incident reports between May and September 2020 due to the moratorium on the export of live-stock to the Middle East, which meant that large numbers of animals were not arriving in the Peel Feedlot until September through to October 2020. We accept her evidence that when animals were received into the Feedlot at this time, there were daily reports that would trigger any incidents that needed to be discussed (transcript/670–671). We are not satisfied that there was any failure in reporting and in addressing incidents as they arose.

364. We find that the failure to hold formal management meetings, identified as being non-compliant in Dr Ludeman's audit report of 20 June 2018, has not been adequately addressed. However, we accept that, because of the regular informal discussions and monitoring by Dr Ludeman, the failure to hold and document formal meetings did not compromise the health and welfare of live-stock. Accordingly, we give this factor minimal weight when considering whether the Applicants are competent to hold an export licence. We also note that although formal meetings were not held as frequently as Mr Nicholas Daws and Dr Ludeman had intended in October 2019, that does not support a finding that the Applicants do not have adequate governance and compliance systems in place and that they are not competent to hold an export licence.

Independent Directors vs Advisory Council

365. Mr Nicholas Daws had initially contemplated the appointment of two independent directors to the Emanuel board. This was communicated to the Secretary in a letter dated 9 August 2018 from the Applicants' legal representatives.

366. However, as Mr Nicholas Daws explained in his witness statement dated 16 March 2020, he changed his mind about the appointment of the two independent directors, and instead decided that an alternative structure of an independent Advisory Council would best serve Emanuel's interests. In his statement dated 16 March 2020, Mr Nicholas Daws explained:

> *8. I have carefully considered and reviewed my plan to appoint one to two independent directors to the board of Emanuel.*
>
> *9. Given the current size and nature of Emanuel's activities, I have, in consultation with Dr Holly Ludeman (**Holly**), considered alternative structures to best serve Emanuel's interests.*
>
> *10. Following completion of the Australian Institute of Company Directors (AICD) course by Holly, we further discussed the role of independent directors and whether Emanuel could achieve its objectives through the appointment of an Independent Advisory Council (**Advisory Council**) instead of expanding the board of directors at this stage of the company's development.*
>
> *11. As Emanuel is effectively transitioning from a family business which has good financial positioning and internal skills, I considered that the best interests of the company could be served for the time being by appointing an Advisory Council to provide effective independent advice to, and oversight of, the Group*[*] *and to support me in my role as Managing Director in regards to governance, risk and strategy and animal welfare.*
>
> *12. The Advisory Council is to comprise members with a mix of expertise in corporate governance, risk, and animal welfare agribusiness and/or livestock*

production. Identified by me as necessary to support the Group. This is the skill set identified by me as necessary to support the Group's objectives.

[*] the 'Group' is the group of companies controlled by Mr Nicholas Daws under Diverse Management Group Pty Ltd including Emanuel and EMS – see statement of Mr Nicholas Daws dated 16 March 2020 at [4]]

367. Mr Nicholas Daws gave similar evidence during cross-examination (transcript/254). He also confirmed that prior to his discussion with Dr Ludeman after she completed the AICD course, he thought that the only option available was to appoint independent directors (transcript/253 and 255).

368. The evidence of Mr Nicholas Daws is consistent with Dr Ludeman's evidence. In her statement dated 13 March 2020, Dr Ludeman gave the following evidence:

> *20. Following my completion of the Australian Institute of Company Directors (**AICD**) course in January 2020, I reviewed possible alternate structures in light of internal concerns and Emanuel's size and activities and its business and management requirements. I had discussions with Nicholas Daws and recommended that an Independent Advisory Council (**Advisory Council**) be established as an alternative to the appointment of independent directors.*
>
> *21. The purpose of the Advisory Council is to provide independent advice to the Group relating to livestock agribusiness operational activities. Specifically, the Advisory Council is to:*
>
> *(a) provide the Board with non-binding informed guidance on the Groups strategic direction and activities; and*
>
> *(b) support the Group's working groups and/or committees with specific subject matter expertise.*

369. In cross-examination, counsel for the Respondent took Mr Nicholas Daws and Dr Ludeman to management meeting minutes dated 8 January 2020. The following minute appeared under the agenda item, "*Director and board structure options – Legal advice*":

> ***Discussion Points:***
>
> - *Seek legal advice on how best to set up board to meet shareholders needs and concerns about multiple family interests while still ensuring independent input and oversight to strengthen compliance and company position.*

370. Both Mr Nicholas Daws (transcript/255–256) and Dr Ludeman (transcript/632–633) denied the proposition that it was Mr Graham Daws who had expressed concerns about the appointment of independent directors. In fact, Dr Ludeman stated several times during cross-examination that she believed that she was referring to Mr Nicholas Daws' concerns and that she was not aware of any concerns expressed by Mr Graham Daws. She understood Mr Nicholas Daws as being concerned about appointing people he could trust

because he had observed other dysfunctional boards, and as being concerned about balancing independent advice with the interests of what was originally a family business whilst maintaining the success of the business (transcript/632–633).

371. The Secretary submitted that there was inconsistency between the evidence of Mr Nicholas Daws and Dr Ludeman regarding why the proposal to appoint independent directors was abandoned. However, as is evident from the above discussion, we find there is no inconsistency in their evidence. The Secretary further submitted in written closing submissions that we should draw the following inference:

> *339. … The reasonable inference, given the conflict and in the absence of evidence from Graham Daws, is that the proposal to appoint independent directors was not favoured by Graham Daws as he feared it would dilute his control and influence over the management and operational activities of Emanuel Exports and that the resulting decision not to pursue this change in governance was a direct result of Graham Daws' views.*

372. Such an inference is, in our view, not supported by the evidence. We find Mr Nicholas Daws and Dr Ludeman to be credible and honest witnesses. We accept the evidence of Mr Nicholas Daws and Dr Ludeman that the option of an independent Advisory Board was considered and decided after Dr Ludeman attended the AICD course and not in response to any concerns of Mr Graham Daws regarding the appointment of independent directors. We accept that any concerns were those of Mr Nicholas Daws. We therefore refuse to draw the requested inference.

373. Dr Ludeman developed the independent Advisory Council Charter. In her statement dated 13 March 2020, Dr Ludeman summarised the role of the Advisory Council as follows:

> *22. The Advisory Council is to consist of between three and five members and will comprise the following skill sets:*
>
> *(a) regulatory and/or corporate governance expertise;*
>
> *(b) animal ethics and/or animal welfare expertise; and*
>
> *(c) agribusiness and or livestock production.*
>
> *23. The Advisory Council is required to meet at least 4 times a year and additional meetings may be requested to address a specific issue or to assist a working group. Importantly, out of session recommendations may be requested by the Managing Director, Company Secretary or Compliance Officer in response to an internal or regulatory incident.*
>
> *24. To progress this alternative structure, I developed the Independent Advisory Council Charter …*

> *25. The responsibilities of the Advisory Council are set out in Section 4 of the Advisory Council Charter at Annexure 'HL6'. These responsibilities largely centre on best practice governance, risk management and regulatory compliance.*

374. The Advisory Council Charter was adopted on 10 March 2020 when it was approved by Mr Nicholas Daws. It provides for the appointment of a minimum of three independent members (and no more than five) including one member with regulatory and corporate governance experience and one member with animal welfare expertise. As was referred to in Dr Ludeman's evidence above, the purpose of the Advisory Council includes to "*provide the Board of Directors with non-binding, but informed guidance on the Group's strategic direction and activities*". The Charter further provides that "*the Advisory Council will meet at least four times per year*".

375. The Advisory Council became operational from the date of the appointment of its first member and chair on 31 August 2020. Two other members were appointed to the Advisory Council on 24 November 2020 and 22 January 2021. The Advisory Council first met on 3 December 2020. The Secretary raised concerns about the time that it took to establish any independent oversight, given that Mr Nicholas Daws, through his legal representatives, had initially contemplated the appointment of the two independent directors in August 2018. The Secretary submitted that the steps taken to appoint members to the Advisory Council were "*too little, too late to demonstrate a meaningful change to Emanuel Exports' governance and competency*".

376. The reasons for the delay in the appointment of independent directors in 2019 are not entirely clear to us. However, we note the resolution in the management meeting minutes of 8 January 2020 that legal advice was being sought about the issue of appointing the two additional directors, which may have resulted in some delays. We agree with Mr Nicholas Daws' answer during cross-examination that, "*you don't rush governance, it takes time*" (transcript/260). We are not of the view that there was an unreasonable delay in establishing the Advisory Council from the time the Charter was adopted on 10 March 2020 until the Advisory Council became operational on 31 August 2020. We also note that in late March 2020, the COVID-19 pandemic resulted in disruptions, including lockdowns in Western Australia in April 2020. The pandemic also impacted on Emanuel when there was an outbreak of COVID-19 on the Al Kuwait vessel, which was due to depart in May 2020. Due to that outbreak Emanuel had to apply for an exemption from the Northern Summer Order to undertake the voyage in June. We accept

Dr Ludeman's evidence that this COVID-19 outbreak caused "*a significant disruption in business and led to the exemption application and exemption voyage*" (transcript/615).

377. The Secretary submitted that we should draw an inference that the Advisory Council is "*far weaker (and essentially ineffective) compared to the initial proposal of independent directors*". The Secretary refers to concessions in the evidence of Mr Nicholas Daws and Dr Ludeman during cross-examination that an Advisory Council is a form of oversight that is "*not as strong*" as the appointment of independent directors. We think this submission is somewhat unfair to the Applicants. This is firstly because, as was correctly submitted by the Applicants, the Applicants were under no obligation under the regulatory regime to appoint independent directors or to establish an Advisory Council. Secondly, there is no evidence to suggest that Mr Nicholas Daws is anything but competent to direct the management of the operations of the Applicants. We therefore are not concerned that the Advisory Council's advice is "*non-binding*" in circumstances where Mr Nicholas Daws is entirely competent. We also note that the members who have been appointed to the Advisory Council, particularly Dr Terry Enright and Dr Andrew Way, are eminently qualified for their roles and have extensive industry experience. In her witness statement dated 29 January 2021, Dr Ludeman described the Advisory Council members and their expertise:

> *311. Three appointments have been made to Emanuel's Advisory Council.*
>
> *312. Terry Enright was engaged as the Chairman of the Advisory Council on 31 August 2020. He has agribusiness expertise and is a former livestock and grain producer. He was chairman of the Grains Research and Development Corporation (GRDC) and chairman of the Australian Livestock Export Corporation (Livecorp), both national research corporations. In 2008 he was awarded an Honorary Doctorate of Science in Agriculture by the University of Western Australia.*
>
> *313. Mr Enright is experienced in live export markets particularly Asia and the Middle East and worked in Kuwait during Eid in 2013-2015 assisting management of Australian sheep in that supply chain. He participated in International Agricultural Research projects through his role with the Crawford Fund and was a member of the team to review the Australian Centre for Agricultural Research (**ACIAR**) for the Australian Government. He maintains a number of industry related positions. …*
>
> *315. Andrew Way was appointed as a member of the Advisory Council on 24 November 2020. He holds a Bachelor of Veterinary Science from the University of Melbourne, obtained in 2002 and completed a Master of Applied Epidemiology in human health from the Australian National University in 2010. He is an accredited veterinarian under the Accreditation Program for Australian Veterinarians and also holds accreditation as an AQIS Accredited Export Veterinarian. Andrew has worked in small business, corporate agriculture, State and Commonwealth government roles.*

316. Emma Walczak, recommended by the Chair, was appointed to the Advisory Council on 22 January 2021. She is a lawyer specialising in contracts.

378. We find that the establishment of the Advisory Council demonstrates that Emanuel takes seriously its animal welfare and corporate governance obligations. It supports our finding that the Applicants have rehabilitated and are now bodies corporate of integrity.

379. In conclusion, we find that that the Applicants have taken appropriate steps to address the issues of competence and integrity.

issue 6: The exercise of discretion by the Tribunal

380. Our findings with respect to Emanuel's breaches of its licence and lack of competency and integrity enliven the discretion to cancel or suspend the licence or to impose a reprimand. Emanuel's conduct, through its previous managing director, showed bad faith and a serious lack of integrity. Emanuel was aware that providing false PAT values endangered the welfare of the live-stock. Emanuel preferred its own interests over animal welfare interests and proceeded to provide false information to Dr Stacey and to the Department so that more live-stock could be loaded on to the Vessel. The experts agreed that over-stating the PAT values was a serious issue which significantly increased the risk of harm to live-stock. This increase in the risk of harm eventuated when 2,400 live-stock died on Voyage 25 to the Middle East in 2017.

381. Emanuel did not challenge the finding that Mr Graham Daws did not act in good faith and accepted that the PAT values were provided in disregard of Emanuel's obligations under the regulatory framework. We have found that Emanuel breached conditions of its licence by failing to comply with the regulatory regime that applies to live-stock exporters. After the Second Show Cause Notice was issued, Mr Graham Daws resigned as managing director and Emanuel has since embarked upon a project of self-improvement, which addresses its lack of integrity and competence. Emanuel has taken further steps towards rehabilitation since the reviewable decisions were made in August and September 2018. An important step in that regard was the appointment of Dr Ludeman as a corporate governance and compliance officer in December 2018. Dr Ludeman identified a lack of formality at Emanuel, with respect to compliance systems, corrective action processes, management reports, meetings and records, as requiring attention. It is fair to say that this lack of formality has not been adequately addressed but there have been improvements in terms of the substance of these areas of deficiency.

Importantly, a three-member Advisory Council has been appointed to provide advice to Emanuel in accordance with a written Charter. The third and final member was appointed in January 2021. An animal welfare policy has been developed along with other corporate governance policies and operations systems. We have heard evidence from the management team at Emanuel and we are satisfied that Emanuel has implemented the policies and systems necessary to redeem itself and satisfy us that it is a body corporate of integrity and competence.

382. We consider that the correct or preferable decision is not cancellation of the licences but rather a suspension until seven calendar days after the making of this decision. We note that the effect of our decision is that the licences of Emanuel and EMS will have been suspended for over three years. Accordingly, we are satisfied that the correct or preferable decision is to set aside the decisions under review and replace them with decisions to suspend the export licences.

ISSUE 7: EMS's LICENCE

383. EMS is a wholly owned subsidiary of Emanuel and is therefore an "*associate*" of Emanuel, as contemplated by s 25A of the AMLI Act. Suspension of EMS's Licence was appropriate due to its close association with Emanuel.

384. We found above that Emanuel has sufficiently rehabilitated itself so as to be a body corporate of integrity and competent to hold an export licence. We found that a period of suspension of Emanuel's Licence was the appropriate exercise of discretion. It is therefore appropriate that there should be a corresponding period of suspension of EMS's Licence (commencing from the date EMS's Licence was initially suspended) because of the degree of association between Emanuel and EMS. It is appropriate that the suspension should end on the same day that Emanuel's Licence suspension ends.

Decision

385. The First Reviewable Decision (application 2018/5307) of the First Assistant Secretary dated 21 August 2018, to cancel Emanuel's Licence, is set aside. The Tribunal substitutes a new decision that Emanuel's Licence is suspended from 22 June 2018 to 3 December 2021, being seven calendar days from the date of this decision.

386. The Second Reviewable Decision (application 2018/5541) of the First Assistant

Secretary dated 5 September 2018, to cancel EMS's Licence, is set aside. The Tribunal substitutes a new decision that EMS's Licence is suspended from 11 July 2018 to 3 December 2021, being seven calendar days from the date of this decision.

I certify that the preceding three hundred and eighty-six (386) paragraphs are a true copy of the reasons for the decision herein of Deputy President Britten-Jones and Senior Member Dr M Evans-Bonner

.....[Sgd].....

Associate

Dated: 26 November 2021

Dates of hearing:	22 February 2021–26 February 2021 2 March 2021– 5 March 2021 17 March 2021 5 May–7 May 2021
Solicitors for the Applicant:	HFW Australia
Counsel for the Applicant: Solicitors for the Respondent:	Mr M J Feutrill SC and Mr E M Heenan Sparke Helmore Lawyers
Counsel for the Respondent:	Ms T L Wong SC and Mr M P Cleary

Glossary

DEFINED TERM	DEFINITION
2012 EA Notice	*Export Advisory Notice 2012 – 08* dated 8 May 2012
2016 EA Notice	*Export Advisory Notice 2016 – 16 Management and Removal of Rejects* dated 10 June 2016
AAT Act	*Administrative Appeals Tribunal Act 1975* (Cth)
AICD	Australian Institute of Company Directors
AMLI Act	*Australian Meat and Live-stock Industry Act 1997* (Cth)
Animals Order	*Export Control (Animals) Order 2004* (Cth)
ASEL	Australian Standards for the Export of Livestock Version 2.3, 27 April 2011
Conditions Order	*Australian Meat and Live-stock Industry (Conditions on live-stock export licenses) Order 2012* (Cth)
CRMP	Consignment risk management plan
Emanuel	Emanuel Exports Pty Ltd
Emanuel's Licence	Emanuel licence number L006
EMS	EMS Rural Exports Pty Ltd
EMS Show Cause Notice	Show cause notice issued to EMS on 22 July 2018
EMS's Licence	EMS licence number L366
ESCAS	Exporter Supply Chain Assurance System
Export Control Act	*Export Control Act 1982* (Cth)
First Assistant Secretary	The delegate of the Secretary who made the First and Second Reviewable Decisions. For convenience, we have referred to the delegate as the "*Secretary*" throughout our reasons
First Reviewable Decision	Decision of the First Assistant Secretary (**Secretary**) dated 21 August 2018 to cancel Emanuel's Licence
First Show Cause Notice	Show cause notice issued to Emanuel on 1 May 2018
HSRA	Heat stress risk assessment
ILE	International Livestock Export Pty Ltd
Interpretation Act	*Acts Interpretation Act 1901* (Cth)
KLTT	Kuwait Livestock Trading Company
LiveCorp	Australian Export Corporation Ltd
NOI	Notice of Intention to Export

PAT	Pen Air Turnover
RETWA	Rural Export and Trading (WA) Pty Ltd
Second Reviewable Decision	Decision of the First Assistant Secretary (**Secretary**) dated 5 September 2018 to cancel EMS's Licence
Second Show Cause Notice	Show cause notice issued to Emanuel on 22 June 2018
SFIC	Statement of Facts, Issues and Contentions
Standards Order	*Australian Meat and Live-stock Industry (Standards) Order 2005* (Cth)
Manual	Registered Premises Operations Manual for Peel Feedlot
Transitional Act	*Export Control (Consequential Amendments and Transitional Provisions) Act 2020* (Cth)
Vessel	MV Awassi Express