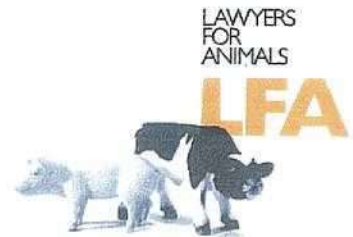


nsw
YOUNG LAWYERS



13 February 2009

The Hon. Bob Debus
Minister for Home Affairs
Parliament House
Canberra ACT 2600

The Hon. Simon Crean MP
Minister for Trade
Parliament House
Canberra ACT 2600

Dear Ministers

Ban on import and export of fur produced in contravention of minimum animal welfare standards

We refer to the letter from the Hon. Chris Ellison to Lawyers for Animals (LFA) dated 27 September 2006 and the letter from Senator Ellison to the NSW Young Lawyers Animal Law Committee (ALC)¹, dated 28 November 2006.

Copies of the above letters are enclosed for your reference and we refer to the following correspondence by way of background:

1. Letter from LFA to the Hon. Chris Ellison dated 5 June 2006.
2. Letter from LFA to the Hon. John Howard dated 9 June 2006.
3. Letter from the Hon. John Howard to LFA dated 14 July 2006.
4. Letter from the Hon. Chris Ellison to LFA dated 19 July 2006.
5. Letter from LFA to the Hon. Chris Ellison dated 21 August 2006.
6. Letter from ALC to the Hon. Chris Ellison dated 6 November 2006.

We enclose our draft Regulation 4WA which we propose for insertion in the *Customs (Prohibited Imports) Regulations 1956* (Cth), and our draft Regulation 9ABB for insertion in the *Customs (Prohibited Exports) Regulations 1958* (Cth). The combined effect of draft Regulations 4WA and 9ABB to extend the current ban on the import and export of dog and cat fur contained in the *Customs (Prohibited Imports) Regulations 1956* and the *Customs (Prohibited Exports) Regulations 1958* to the import and export of fur and fur products produced in contravention of minimum animal welfare standards.

¹ Formerly the Animal Rights Committee

Evidence obtained by Swiss Animal Protection (contained in its report *Fun Fur? A report on the Chinese fur industry*) demonstrates the cruel treatment suffered by fur-bearing animals (such as rabbits, foxes and mink) in countries where animal welfare is not adequately protected. In particular, investigators observed and documented the following on Chinese fur farms:

- Stunning of animals by repeatedly striking their heads and bodies with metal or wooden sticks or the swinging of animal by their hind legs so that their head strikes the ground repeatedly.
- Animals hung by their legs or tails to be skinned, many of which are still alive, conscious and struggling.
- The use of knives to cut through the belly of live animals and workers wrenching the live animals' skin from their suspended bodies until the skin comes off the body and over the head.
- The bloodied bodies of animals being thrown into a pile of carcasses, many of the animals still alive, breathing in ragged gasps and blinking slowly.

The above practices are common in several countries from which Australia presently imports fur, but are prohibited under Australian domestic law. By allowing the importation of fur products produced in such an inhumane manner, Australia undermines the morality of its own laws, government and citizens.

At present, Australian consumers are unable to exercise a choice to purchase fur produced more humanely, because our market is flooded with less humane fur imports, and our labelling laws (which are not applicable in the case of fur trim) do not require disclosure of production methods. We believe this is unacceptable the vast majority of Australians.

If the Australian Government is to consider extending the ban on the import and export of dog and cat fur to the import and export of fur produced in contravention of minimum animal welfare standards, it will be necessary to consider Australia's international trade obligations. We have undertaken a preliminary assessment of these issues, however we urge the Government to conduct its own comprehensive assessment.

Australia's obligations under the GATT

Article I (1) of the *General Agreement on Tariffs and Trade (GATT)* provides:

"any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

Article III (4) of the *GATT* provides:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

The requirement that 'like products' be given no less favourable treatment

There may be concern that if Australia takes the position that fur products from countries such as China can be distinguished from fur products produced in Australia (because of the methods used to produce them) this could be overturned by a GATT panel, given past GATT panel decisions stating that production methods cannot be taken into account in deciding whether products are 'like' for the purposes of the GATT Articles.

However, previous GATT panel decisions – particularly those in the *Tuna-Dolphin* cases² – are not determinative of the issue. We note that neither of the Panel Reports in the two *Tuna-Dolphin* cases were approved by the GATT Council, and hence are not binding.

Further, there is reasoning by the Appellate Body in the *European Communities-Asbestos* case³ that provides support for the argument that fur from animals whose treatment violates Australia's moral codes, is not 'like' fur from animals treated humanely. That is because community attitudes treat those products differently.

In the *Asbestos* case, the Appellate Body reversed the GATT Panel's finding that it is not appropriate to take into account the health risks associated with chrysotile asbestos fibres in examining the 'likeness', under Article III:4, of those fibres and certain substitutes. The Appellate Body also reversed the finding that safer substitutes are relevantly 'like' asbestos fibres.

The Appellate Body's reasoning was that, in determining whether two apparently similar products are 'like', the views, tastes and preferences of consumers must be taken into account. In this regard the Appellate Body said:

"The extent to which consumers are willing to choose one product instead of another to perform the same end-use is highly relevant in assessing the 'likeness' of those products."

The Appellate Body went so far as to say that in such a case the GATT panel cannot conclude that products are 'like' products if it does not examine evidence relating to consumer tastes and habits.

We submit that this is highly relevant to the proposed ban on the import of fur produced in contravention of minimum animal welfare standards. It is highly likely that a survey of community attitudes in Australia would find that consumers prefer to buy fur from animals humanely treated and killed.

The Appellate Body in the *Asbestos* case also noted with approval the statement by the Appellate Body in *Japan-Alcoholic Beverages*⁴ that the GATT panel must use its best judgment when determining likeness and that no single approach will be appropriate in every case. Instead, the Appellate Body stressed the need for an assessment involving an element of "individual discretionary judgement" to be made on a case-by-case basis.

This offers further support for the *de facto* consideration of production methods in making decisions about trade barriers, although such consideration would be expressed as coming within the compass of considering the moral concerns of Australian consumers of fur imports.

The morals exception: Article XX(a)

Article XX of the GATT states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals."

The morals exception in Article XX(a) appears to have rarely been challenged as a trade barrier under GATT.

² *United States – Restrictions on Imports of Tuna*, ruling not adopted, circulated on 3 September 1991. Case brought by Mexico, etc; and *United States – Restrictions on Imports of Tuna* ruling not adopted, circulated on 16 June 1994. Case brought by the EU.

³ *European Communities – Measures affecting asbestos and asbestos – containing products*, WTO case No. 135, Ruling adopted on 5 April 2001. Case brought by Canada.

⁴ *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, adopted 1 November 1996.

Moral exceptions to free trade have a long history, however. Most countries have been concerned that new obligations in trade treaties should not interfere with their self-determination of moral standards. In several cases, moral exceptions have included bans on the products of animal cruelty. For instance: both Australia and the European Union have banned the import of dog and cat fur⁵; Taiwan has banned the import of dog meat⁶; and the Netherlands' is extending its existing ban on the import of harp seals and hooded seals, to Cape fur seals that are hunted in Namibia⁷.

It has been accepted that public morality cannot be objectively assessed; judgments about public morality are a matter for internal decision making.

In *Tuna-Dolphin I*⁸, the GATT Panel considered Article XX(g)⁹ and found that the US embargoes:

"were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins".

A fur import restriction based on the morals exception could be defended against similar charges by arguing that the measure would not be aimed at protecting the animals treated inhumanely in the exporting country; but at protecting Australians from harm to their morals as a result of the purchase and use of products of animals treated inhumanely (wherever they originate). Such an argument would need to address the requirement that the measure proposed is 'necessary' to achieve the result desired.

The relevant case law here includes *European Communities - Asbestos* where the Appellate Body found that a measure is 'necessary' within the meaning of Article XX(b):

"if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is [not] available to it".

We are unaware of an available alternative measure which Australia could reasonably be expected to employ other than a ban on fur from animals that have been treated and killed in contravention of minimum animal welfare standards.

Moreover, we note that in the first *Tuna-Dolphin* case¹⁰, the (dissenting) Australian representative postulated that Article XX(a):

"could justify measures regarding inhumane treatment of animals, if such measures applied equally to domestic and foreign animal products; a panel could not judge the morals of the party taking the measure, but it could judge the necessity of taking measures inconsistent with the General Agreement, and their consistency with the Preamble of article XX."

Clearly it is accepted under international law that we have a right to observe our own (reasonable) moral standards within our own territory. The production of fur in Australia is governed by Codes of Practice that are intended to embody our morals. We submit that those Codes of Practice provide ample justification for applying the same standards to imports; so as to avoid charges of 'arbitrary discrimination'.

The draft Regulations have been prepared on the basis of the minimum Australian standards for fur production, including the standards contained in the *Victorian Code of Practice for the Intensive Husbandry of Rabbits* and apply the same standards to imports and exports.

⁵ EU ban on dog and cat fur is to take effect from 1 January 2009. See: http://www.hsus.org/about_us/humane_society_international_hsi/hsi_europe/dog_cat_fur/

⁶ See: para 46 of The Secretariat's Report in WT/TPR/S/165 (20 June 2006) available at: http://www.wto.org/english/tratop_e/tp_r_e/s165-3_e.doc

⁷ See: www.teknikengel.gov.tr/docs/NLD_83_text_EN.doc

⁸ *United States – Restrictions on Imports of Tuna* ruling not adopted, circulated on 16 June 1994. Case brought by EU.

⁹ "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"

¹⁰ *United States – Restrictions on Imports of Tuna*, ruling not adopted, circulated on 3 September 1991. Case brought by Mexico, etc.

Accordingly we submit that a ban on the import of fur produced in contravention of minimum animal welfare standards will not violate Australia's international trade obligations.

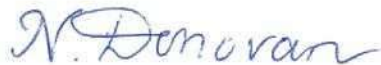
We consider that it would be an unjust result if we, as Australians endeavouring to be responsible and ethical consumers, were prevented from doing so because Australia was required (by *GATT*) to accept imports from producers whose treatment of animals falls well short of Australian standards. Such a result would, in effect, mean that we were forced to give products from other countries more favourable treatment than our own products.

Thank you for considering this important issue and we look forward to receiving your response.

Yours sincerely



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SENATOR THE HON. CHRISTOPHER ELLISON

Minister for Justice and Customs
Senator for Western Australia
Manager of Government Business in the Senate

Ms Eliza Poulton
Chair, Law Reform Committee
Lawyers for Animals
PO Box 14 Kindness House
228 Brunswick Street
FITZROY VIC 3065

27 SEP 2006

Dear Ms Poulton

Thank you for your further correspondence of 21 August 2006 on behalf of the LIA requesting that Australia identify non-compliant sources of fur farming and introduce additional controls on the import of fur products.

I have noted your comments that the introduction of import controls rests within my portfolio and your suggestion that further research be conducted into developing appropriate controls to restrict the trade in fur products. Where the Government agrees to introduce appropriate border controls, these measures underpin policy objectives, which typically rests with relevant Government portfolios.

The issues you have raised potentially cross a number of portfolios, however in the first instance it is predominantly a matter of trade. Accordingly, in my reply to your initial correspondence, I advised that your concerns had been referred to the Deputy Prime Minister and the Minister for Trade, the Hon Mark Vaile MP, for consideration.

Minister Vaile has considered the proposals you raised in your letter of 9 June 2006. The Minister has advised me that he does not support the suggestion that Australia ban fur imports from China, the Philippines, Thailand, Korea and Romania. However, he noted that the Australian Embassy in Beijing has raised community unease about the treatment of animals in China with the Chinese Government on a number of occasions. Australia intends raising these issues, including those raised by you, again with relevant Chinese authorities in Canberra and Beijing.

Minister Vaile has also indicated that there are some encouraging signs the Chinese Government and fur industry are responding to international and domestic concerns about the ill-treatment of animals. Australia is aware that China plans to introduce the country's first animal welfare regulations, possibly by the end of the year.

It is important to keep in mind the volume of Australia's fur imports from these countries is minimal. However, if Australia was to impose a ban on fur imports, Australian exporters of leather hides could suffer retaliatory action from the

countries affected. Australian exports of leather hides are significant. In 2005, Australia exported \$195 million worth of leather hides to China alone. Any additional control measures also would have to be considered within the context of Australia's obligations under the World Trade Organisation (WTO), the General Agreement on Tariffs and Trade (GATT) and the Agreement on Technical Barriers to Trade.

If the Australian Government were to consider extending prohibitions on the import/export of domestic cat and dog fur to include other fur products from those countries nominated by you, a detailed assessment of the domestic and international trade implications of these controls, including their consistency with Australia's WTO obligations would be necessary. As part of the whole-of-government approach, particular account would need to be taken of Australia's obligations under the GATT to accord no less favorable treatment to imported products than that accorded to like domestic products (Article III: 4 GATT 1994) and to eliminate quantitative restrictions in accordance with Article 11 GATT 1994.

The GATT also provides for a range of exceptions (under Article XX GATT 1994) which permit Members to derogate from substantive GATT commitments – including where a member takes measures necessary to protect animal health. Article XX requires that relevant measures be necessary, and that they cannot be used as a disguised restriction between countries where the same conditions prevail. There is substantial WTO jurisprudence on the application of Article XX, and detailed analysis would be required to assess whether any measure proposed to introduce controls on imports of fur materials from unregulated jurisdictions might fall within the exceptions offered under Article XX.

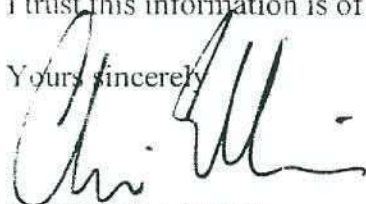
At this stage both Minister Vaile and I believe direct negotiations are the most appropriate way to progress animal welfare issues.

In the matter of product labelling, the *Commerce (Trade Descriptions) Act 1905* and the *Commerce (Imports) Regulations 1940* (the Regulations) set out the requirements for labelling on goods imported into Australia. Details may be found on the Customs website under <http://www.customs.gov.au/site/page.cfm?c=2585>

Under the Regulations the importation of articles of apparel is prohibited, unless there is applied to those goods a trade description, which must be in English and include the name of the country in which the goods were made or produced and a true description of the goods. The trade description must be affixed in a prominent position and in as permanent a manner as practicable to the goods.

I trust this information is of assistance.

Yours sincerely



CHRIS ELLISON
Senator for Western Australia

Customs (Prohibited Imports) Regulations 1956 (C'th)

DRAFT Regulation 4WA

Importation of fur produced in contravention of minimum animal welfare standards

(1) In this Regulation:

"adequate space" means –

- (a) in relation to a rabbit: not less than the minimum space requirements specified in Schedule 13;
- (b) in relation to any other fur farm animal: sufficient height to allow the animal to sit upright with ears fully erect and sufficient floor area to allow the animal to move around, to feed and drink without difficulty, and to lie on its side without touching another animal or the side of its enclosure.

"animal" means a mammal (other than a human being).

"authorised person" means a person authorised in writing by the Minister for the purposes of this Regulation.

"demonstrably dead" means not showing any signs of life, such as a pulse.

"farmed animal fur" means the fur of a fur farm animal.

"farmed animal fur product" means a product or other thing that consists, wholly or in part, of farmed animal fur.

"fox" means an animal of the tribe *vulpini* within the family *Canidae*.

"fur" means the pelt of an animal.

"fur farm" means a place where one or more animals is kept or used commercially for its fur, among other possible purposes.

"fur farm animal" means an animal that has spent any portion of its life on a fur farm.

"importer" means a person who imports goods into Australia.

"rabbit" means an animal of the species *Lagomorpha*.

"slaughtered in accordance with minimum animal welfare standards" means that the animal was humanely transported, restrained and handled before being electrically stunned, or instantly rendered unconscious and insensible to pain by other humane method, and, while unconscious and insensible to pain, was put to death.

- (2) (a) The importation into Australia of farmed animal fur or of a farmed animal fur product – excluding that derived from a fox – is prohibited unless permission to import the fur or product has been granted under subregulation (3);
 - (b) The importation into Australia of farmed animal fur or a farmed animal fur product derived from a fox is prohibited.
- (3) The Minister, or an authorised person, may, on application by an importer, grant permission, in writing, for the importation of farmed animal fur or a farmed animal fur product if the Minister or an authorised person holds a reasonable belief that:
 - (a) the fur farm animal from which the fur derives has, throughout the period of its confinement within a fur farm, been provided with adequate space; and
 - (b) the fur farm animal from which the fur derives was slaughtered in accordance with minimum animal welfare standards and was demonstrably dead prior to the removal of its fur.
- (4) An application:
 - (a) must be in writing; and
 - (b) must be lodged with the Minister or an authorised person.
- (5) The Minister, or an authorised person, may request an applicant importer to provide to the Minister or authorised person any information the Minister or authorised person may reasonably require for the purpose of making a decision in relation to the application.
- (6) In deciding whether to grant permission for the import, the Minister, or an authorised person, may take into account any matter that the Minister or authorised person considers relevant.
- (7) As soon as practicable after making a decision to grant, or not to grant, permission, the Minister or authorised person must give written notice of the decision to the applicant importer.

Schedule 13.

Minimum space requirements for rabbits

Type of rabbit	Minimum floor space requirements	Minimum height requirements
Doe and litter to 5 weeks of age	0.56 m ² total area	45 cm high
Doe and litter to 8 weeks of age	0.74 m ² total area	45 cm high
Rabbits 5-12 weeks	0.07 m ² per rabbit	see below
Rabbits 12 weeks and over (other than those used for breeding) in cages or other areas in which several rabbits are kept	0.18 m ² per rabbit	45 cm high
Adult does and bucks for breeding	0.56 m ² per rabbit	45 cm high

Enclosures for rabbits over 12 weeks old must be of sufficient height to allow rabbits to sit upright with ears fully erect. All rabbits must be provided with a floor area sufficient to allow them to move around, to feed and drink without difficulty, and to lie on their sides without touching another animal or the side of their enclosure

Customs (Prohibited Exports) Regulations 1958 (C'th)

DRAFT Regulation 9ABB

Exportation of fur produced in contravention of minimum animal welfare standards

(1) In this Regulation:

“adequate space” means-

- (c) in relation to a rabbit: not less than the minimum space requirements specified in Schedule 7AA;
- (d) in relation to any other fur farm animal: sufficient height to allow the animal to sit upright with ears fully erect and sufficient floor area to allow the animal to move around, to feed and drink without difficulty, and to lie on its side without touching another animal or the side of its enclosure.

“animal” means a mammal (other than a human being).

“authorised person” means a person authorised in writing by the Minister for the purposes of this Regulation.

“demonstrably dead” means not showing any signs of life, such as a pulse.

“exporter” means a person who exports goods from Australia

“farmed animal fur” means the fur of a fur farm animal.

“farmed animal fur product” means a product or other thing that consists, wholly or in part, of farmed animal fur.

“fox” means an animal of the tribe *vulpini* within the family *Canidae*.

“fur” means the pelt of an animal.

“fur farm” means a place where one or more animals is kept or used commercially for its fur, among other possible purposes.

“fur farm animal” means an animal that has spent any portion of its life on a fur farm.

“rabbit” means an animal of the species *Lagomorpha*

“slaughtered in accordance with minimum animal welfare standards” means that the animal was humanely transported, restrained and handled before being electrically stunned, or instantly rendered unconscious and insensible to pain by other humane method, and, while unconscious and insensible to pain, was put to death.

- (2) (a) The exportation from Australia of farmed animal fur or of a farmed animal fur product – excluding that derived from a fox – is prohibited unless permission to import the fur or product has been granted under subregulation (3);
 - (b) The exportation from Australia of farmed animal fur or a farmed animal fur product derived from a fox is prohibited.
- (3) The Minister, or an authorised person, may, on application by an exporter, grant permission, in writing, for the exportation of farmed animal fur or a farmed animal fur product if the Minister or an authorised person holds a reasonable belief that:
 - (a) the fur farm animal from which the fur derives has, throughout the period of its confinement within a fur farm, been provided with adequate space; and
 - (b) the fur farm animal from which the fur derives was slaughtered in accordance with minimum animal welfare standards and was demonstrably dead prior to the removal of its fur.
- (4) An application:
 - (a) must be in writing; and
 - (b) must be lodged with the Minister or an authorised person.
- (5) The Minister, or an authorised person, may request an applicant exporter to provide to the Minister or authorised person any information the Minister or authorised person may reasonably require for the purpose of making a decision in relation to the application.
- (6) In deciding whether to grant permission for the export, the Minister, or an authorised person, may take into account any matter that the Minister or authorised person considers relevant.
- (7) As soon as practicable after making a decision to grant, or not to grant, permission, the Minister or authorised person must give written notice of the decision to the applicant exporter.
- (8) A permission granted under subregulation (3):
 - (a) may specify conditions or requirements to be complied with by the holder of the permission; and
 - (b) for any such condition or requirement, may specify the time (being a time either before or after the exportation of the goods to which the permission relates) at or before which the condition or requirement must be complied with by the holder of the permission.

- (9) The Minister, or an authorised person, may revoke a permission if the Minister or authorised person is satisfied that the holder has failed to comply with a condition or requirement of the permission.
- (10) If the Minister or an authorised person decides to revoke a permission, the Minister or authorised person must, as soon as practicable after making the decision, give written notice of the decision to the holder of the permission.
- (11) Application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister or of an authorised person:
- (a) not to grant a permission; or
 - (b) to grant a permission subject to a condition or requirement; or
 - (c) to revoke a permission.
- (12) Notice of a decision mentioned in subregulation (7) or (10) must include a statement to the effect that:
- (a) subject to the *Administrative Appeals Tribunal Act 1975*, a person affected by the decision may make an application to the Administrative Appeals Tribunal for review of the decision; and
 - (b) a person whose interests are affected by the decision may request a statement under section 28 of that Act.
- (13) A failure to comply with subregulation (12) does not affect the validity of the decision.

Schedule 7AA.

Minimum space requirements for rabbits

Type of rabbit	Minimum floor space requirements	Minimum height requirements
Doe and litter to 5 weeks of age	0.56 m ² total area	45 cm high
Doe and litter to 8 weeks of age	0.74 m ² total area	45 cm high
Rabbits 5-12 weeks	0.07 m ² per rabbit	see below
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