

# EADRA GUIDANCE DOCUMENT

## CONSEQUENTIAL LOSS

### SUMMARY OF GUIDANCE AND RECCOMENDATIONS

1. A set of principles and criteria for determining if a response cost is eligible for Cost Sharing is supported and provides an agreed working definition of consequential loss for purposes of the EADRA.
2. Response costs that do not meet the criteria of one or more of the Cost Sharing principles should be considered a consequential loss for the purposes of the EADRA and are therefore not eligible for Cost Sharing.

### PURPOSE OF THIS DOCUMENT

3. This guidance document is provided to signatories of the Emergency Animal Disease Response Agreement<sup>1</sup> (EADRA) to facilitate a common understanding and provide greater clarity on what response costs should be Cost Shared and what costs should be considered consequential losses for purposes of the EADRA and not Cost Shared.
4. This guidance document should be read in conjunction with the EADRA. If there is any conflict between the EADRA and this guidance document then the provisions of the EADRA will take precedence over the guidance document.

### BACKGROUND

5. Under the EADRA, Cost Sharing<sup>2</sup> applies in the Emergency Response Phase and the Proof of Freedom Phase of an Incident (**EADRA Schedule 1 (b)**). In those phases, the Relevant Parties can share eligible costs, over and above their normal commitments.
6. The EADRA and most, if not all jurisdictional legislation, excludes consequential loss from being compensated<sup>3</sup>. However the term “consequential loss” is not defined in the jurisdictional legislation nor the EADRA.
7. Consequential loss is a complicated legal concept. It is poorly defined and subject to ongoing redefinition through new case law which results in confusion and lack of clarity of its meaning and interpretation in legislation, contracts and agreements.
8. In 2016/2017, a working group developed an *EADRA Guidance Documents: Cost sharing of a National Livestock Standstill*. During its development there were in depth discussions on criteria for Cost Sharing response costs of a NLSS which have wider implications for Cost

<sup>1</sup> The legal title is “Government and Livestock Industry Cost Sharing Deed in Respect of Emergency animal Disease Responses”  
<https://www.animalhealthaustralia.com.au/what-we-do/emergency-animal-disease/ead-response-agreement/>

<sup>2</sup> “Cost Sharing” is the process of Government and Industry Parties’ proportional funding of an EADRP as described in this Deed. EADRA clause 2.1.

<sup>3</sup> EADRA recitals B(c) and Schedule 6 Part 3.4

Sharing of response costs in general and could also assist in providing an agreed working definition of “consequential loss” for purposes of the EADRA.

## DISCUSSION

9. Rather than attempting to define consequential loss, a principles approach is supported, and outlined below.

### **COST SHARING PRINCIPLES**

10. The principles under which Cost Sharing of response costs include:

- a. “No Surprises” principle

To be eligible for Cost Sharing, the costs must be specifically identified and flagged for Cost Sharing in the emergency animal disease response plan (EADRP) and approved by NMG.

- b. Cost categories principle<sup>4</sup>

To be eligible for Cost Sharing, the costs must fall into one of the following categories (**EADRA clause 10.2 (b)**). Please also note the examples of costs that are considered eligible and ineligible for cost sharing:

- i. Salaries and wages (Section 3.1)

- Salaries or consultancy fees for staff/consultants engaged by the party to assist directly with eradication and for staff/consultants engaged to backfill positions of existing permanent staff assisting directly with eradication are eligible for Cost Sharing.
- In contrast, salary or consultancy fees of staff/consultants who are, or would be, engaged by a government or industry party, irrespective of the disease emergency, are not eligible for Cost Sharing.

- ii. Operating expenses (Section 3.2)

- Operating expenses directly incurred by a party in the eradication program are eligible for Cost Sharing.
- For laboratory services provided internally by a state/territory government agency, eligible costs are the cost of additional staff, operating costs and consumables incurred as a result of the emergency disease response.

- iii. Capital costs (Section 3.3)

- Capital expenditure on major items such as motor vehicles or buildings are not eligible for Cost Sharing. The working life of such capital items would normally be expected to extend far beyond any eradication effort funded under the EAD Response Plan, and there is every possibility they could be utilised in other ongoing programs.

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<sup>4</sup> A more detailed description of the determination of cost can be found in the EADRA **Schedule 6 Part 3** (see [Attachment B](#))

- Essential equipment required for the immediate servicing needs of the EAD Response Plan are eligible for Cost Sharing
- iv. Compensation (Section 3.4)
- Compensation for destruction of animals or property is determined by jurisdictional legislation. Cost Sharing of response costs, including compensation, is determined by EADRA processes.
  - Response costs, including compensation, must be included in an approved EADRP and identified for Cost Sharing. **(Clause 10.2(b)(iv))**
  - Consistent with the relevant legislation applying in the jurisdiction in question, compensation is to be paid to the owner of any livestock or property that is destroyed for the purpose of eradication or prevention of the spread of the EAD, any livestock that has died of the EAD (this needs to be certified) as well as approved destruction of animals on animal welfare grounds. **(Schedule 6, Part 3, 3.4)**
  - In the case of livestock, a second payment may become due on the date the property where the livestock were located becomes eligible to be restocked, provided the total value of livestock is greater on that date. **(Schedule 6, Part 3, 3.4)**
- c. Normal commitments principle  
To be eligible for Cost Sharing, the costs must be clearly identifiable as additional to normal commitments.
- Costs eligible for Cost Sharing are over and above a government or industry Party's normal commitments. Cost sharing does not apply to activities that are considered "normal" and that exist for, or are required to be carried out under a government or industry Party's normal biosecurity commitments. These are considered as a baseline above which other costs are to be shared. **(Clause 15(b))** and the *EADRA Guidance Document on Normal commitments for Parties to the Emergency Animal Disease Response Agreement*<sup>5</sup>).
- d. Business risk principle  
To be eligible for Cost Sharing, the cost must be clearly identifiable as additional to those generated by normal/acceptable business risk.
- e. Recovery costs principle  
Costs associated with recovery from the outbreak are ineligible for Cost Sharing. Costs of recovery in an EAD, just as with other emergency incident management processes, are managed by processes outside of the disease control legislation and procedures. Recovery services during and after emergencies and business continuity are provided by recovery agencies from all levels of government and non-government organisations.

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<sup>5</sup> <https://www.animalhealthaustralia.com.au/training/emergency-animal-disease-training/guidance-documents/>

f. EADRP principle

To be eligible for Cost Sharing a response cost must be clearly identifiable as contributing to the achievement of response objectives and/or improving disease control and biosecurity outcomes included in the EAD Response Plan.

g. Animal Welfare principle

The primary responsibility for the maintenance of animal welfare standards during a response lies with the owner or the person in charge of the animal(s). However everybody involved in a responses holds some responsibility for the maintenance of animal welfare standards.

Response activities may result in risks to animal welfare. If these risks cannot be adequately managed, jurisdictional welfare legislation may require affected animals to be humanely destroyed. Compensation or financial assistance may then be available for the animal owner and such payments may be eligible for Cost Sharing if they meet the conditions outlined below:

- eligibility for compensation and Cost Sharing must be at the discretion of and agreed by the relevant CVO
- must be clearly identifiable as directly contributing to the disease management outcomes of the response or have arisen as a direct result of disease management measures in an approved EADRP
- must be included in the approved EADRP
- all non-destruction options must have been considered.

It is recognised that compensation, financial assistance or other forms of payment (e.g. *ex gratia* or *ad hoc* payments) may be payable for actions taken to reduce the risk of animal welfare issues that are not considered eligible for Cost Sharing.

11. To be eligible for Cost Sharing, a response cost must have been incurred as a direct result of the response activity or regulatory process, or be a direct result of achieving a response objective. It would also need to have been “reasonably foreseeable” and if it was not, then it would be considered a consequential loss, which is excluded from Cost Sharing under the EADRA (**EADRA recitals B(c)** and **Schedule 6 Part 3.4**).

If the costs were generated by anything not directly related to the disease, the response or the implementation of disease control measures, or caused by some unrelated factor or circumstances, then it would also be considered a consequential loss.

**Response costs that do not meet the criteria of one or more of the Cost Sharing principles should be considered a consequential loss for the purposes of the EADRA and are therefore not eligible for Cost Sharing (EADRA recitals B(c) and Schedule 6 Part 3.4).**

**Animal Health Australia**

**March 2018**

## **ATTACHMENTS**

*Attachment A: Relevant EADRA definitions, clauses and schedules*

## Attachment A: Relevant EADRA definitions, clauses and schedules

### Clause 2.1 Definitions

“**Compensation**” has the meaning given by applicable legislation in any particular the Lead Agency(s) from time to time.

“**Cost Sharing**” is the process of Government and Industry Parties’ proportional funding of an EADRP as described in this Deed.

“**Emergency Animal Disease Response Plan**” or “**EADRP**” means a response to an EAD that is, in accordance with **Part A of Schedule 4**, developed by the Lead Agency(s) CVO and endorsed by the CCEAD and the NMG and which is subject to Government and Industry Parties’ Cost Sharing in accordance with this Deed.

“**Incident**” means the occurrence of a confirmed or reasonably held suspicion of an EAD.

[...]

“**Lead Agency(s)**” means the department or agency within the Commonwealth and/or each State(s) or Territory(s) which is responsible for leading the conduct of an EADRP within the Commonwealth and/or a State(s) or Territory(s) in accordance with the procedures set out in **Part A of Schedule 4**.

“**National Emergency Animal Disease Management Group**” or “**NMG**” means a group which will approve/not approve the invoking of Cost Sharing following advice from the CCEAD of an appropriate Emergency Animal Disease Response Plan and manage, on behalf of the Affected Parties, the national policy and resourcing needs of an EADRP, as described in **Part 1 of Schedule 8**.

“**Normal Commitments**” means a Party’s business as usual costs that underpin a Party’s capability and capacity to detect and respond to a suspect or confirmed EAD in a manner and extent consistent with this Deed and AUSVETPLAN. Normal Commitments are a Party’s activities and resource commitments to EAD management that are not eligible for Cost Sharing.

“**Party**” means a party to this Deed and “**Parties**” means two or more of the Parties to this Deed.

“**Relevant Parties**” means, in respect of the taking of a decision or action, the Parties who are affected by the decision or action.

### Clause 6.1 Incident Definition Phase

This is the investigation period following Formal Notification to the CCEAD, as defined in **clause 5.1**, of an Incident. It continues until:

an EADRP is agreed by the NMG following a determination by CCEAD that the incident relates to an EAD that is capable of being eradicated or contained; or

the NMG, acting on a recommendation of the CCEAD, determines that:

the Incident does not relate to an EAD; or

the Incident does relate to an EAD but the EAD is not capable of being eradicated or contained.

**Clause 6.2 Emergency Response Phase**

This is the period from agreement by the NMG (on advice from the CCEAD) on an EADRP, which may include a national livestock standstill, until the NMG determines (on advice from the CCEAD) that the EAD has been contained or eradicated or cannot be eradicated or contained. This is the period during which the EADRP is performed.

**Clause 6.3 Proof of Freedom Phase**

This is the period following determination by the NMG that the EAD has been contained or eradicated. This period may include research and/or surveillance activities and will end when the NMG determines (on advice from the CCEAD or OIE) that the EADRP has been successful.

**Clause 10.1 Cost Sharing - Incident Definition Phase**

The Lead Agency(s) in which the Incident has occurred will meet the cost of the Incident Definition Phase except that:

- (a) once an EADRP has been agreed, Cost Sharing principles will apply in respect of Compensation costs from:
  - i. the date of first notification of the Incident to the relevant Lead Agency(s), or
  - ii. such earlier date as may be agreed by the NMG on the advice of the CCEAD; and
- (b) where the NMG determines that the cost of Compensation to Owners or diagnostic costs will be shared, they will be shared in accordance with this Deed should an EADRP proceed.

**Clause 10.2 Cost Sharing - Incident Definition, Emergency Response and Proof of Freedom Phases**

- (a) Parties will apply principles of Cost Sharing for the conduct of an EADRP in accordance with the following table:

Category of Disease	Government Funding	Industry Funding
Category 1	100%	0%
Category 2	80%	20%
Category 3	50%	50%
Category 4	20%	80%

Cost Sharing will apply in respect of:

salaries and wages;

operating expenses;

capital costs; and

Compensation determined in accordance with **Part 3 of Schedule 6**.

[...]

#### **Clause 10.6 Additional costs which are subject to Cost Sharing**

The principles for Cost Sharing will also apply to:

- (a) costs of feral and/or wild animal control measures forming part of an EADRP where CCEAD has advised that such measures are integral to the EADRP;

costs incurred by NMG pursuant to **clause 13.3**;

costs of a Financial Auditor incurred pursuant to **clause 13.4**; and

other costs as agreed by the Relevant Parties.

#### **Schedule 6 Part 3**

##### **3. DETERMINATION OF COSTS**

All claims for Cost Sharing of costs under the Agreement must be certified by the Senior Accounting Officer and Chief Veterinary Officer of the State, Territory or Commonwealth organisation involved or the senior accounting officer of an Industry body.

##### **3.1 Salaries and Wages**

- (a) Salary or consultancy fees of staff/consultants who are, or would be, engaged by a government or Industry Party, irrespective of the Implementation of the EADRP, are not eligible for Cost Sharing.
- (b) Salaries or consultancy fees for staff/consultants engaged by the Party to assist directly with Implementation of the EADRP and for staff/consultants engaged to backfill positions of existing permanent staff assisting directly with Implementation of the EADRP will be eligible for Cost Sharing.
- (c) Salaries or wages of staff seconded across State or Territory borders will not be eligible for Cost Sharing, but salaries or wages of staff/consultants engaged to backfill positions of seconded staff will be eligible.
- (d) Allowances for staff/consultants engaged in the Implementation of the EADRP will be eligible for Cost Sharing. These will include meal allowances, district allowances, penalty rates and accommodation assistance.
- (e) Payroll tax, workers' compensation, superannuation and leave for staff especially recruited as a result of the Implementation of the EADRP will be eligible for Cost Sharing.
- (f) Where normal employment conditions provide for payment of overtime, overtime incurred directly as a result of the Implementation of the EADRP will be eligible for Cost Sharing.
- (g) Fees and allowances to private veterinarians employed or contracted by the government Parties to assist with Implementation of the EADRP will be eligible for Cost Sharing up to the level of fees and allowances structure approved by AHC, or such other relevant fees and allowances structure.
- (h) Reimbursements to volunteer emergency service and defence personnel will be by negotiation with the service provider, but should provide primarily for out-of-pocket or incidental expenses.



If the basis of engagement of volunteer emergency service or defence personnel is other than primarily for out of pocket expense then with express approval of NMG, arrangements as for 3.1 (b) will apply.

### 3.2 Operating Expenses

- (a) Operating expenses directly incurred by a Party undertaking activities in the EADRP will be eligible for Cost Sharing.
- (b) For laboratory services provided internally by a Commonwealth, State/Territory government agency, the cost of additional staff and operating costs incurred as a result of activities required by the EADRP will be eligible for Cost Sharing.
- (c) For laboratory services provided to a State/Territory government by an external source to assist in the implementation of the EADRP:
  - when the specified contracted level of service is exceeded, an amount equivalent to the marginal cost incurred in (b) by a comparable government laboratory for that additional service is eligible for Cost Sharing; or
  - where there is no specified contracted service level, an amount not exceeding the full price that would be charged by a comparable government laboratory for those services.
- (d) All stores and equipment purchased with funds which have been subsequently reimbursed from the arrangements shall be valued at the time the Proof of Freedom Phase ends and sold within 60 days. The proceeds of any sale, or equivalent valuation, will be distributed to the Parties in the same proportion as contributions actually made by them.
- (e) Any variation from this procedure can only be made with the approval of the Parties.

### 3.3 Capital Costs

- (a) Capital expenditure on major items such as motor vehicles or buildings will not be eligible for Cost Sharing. The working life of such capital items would normally be expected to extend far beyond any eradication effort funded under the EADRP and there is every possibility they could be utilised in other ongoing programs.
- (b) Essential equipment required for the immediate servicing needs of the EADRP will be eligible for Cost Sharing.
- (c) At the time the Proof of Freedom Phase ends any equipment purchased with funds which have subsequently been subject to Cost Sharing will be dealt with as in Operating Expenses (d) above.

### 3.4 Compensation

Consistent with the relevant legislation applying in the jurisdiction in question payments for Compensation are eligible for Cost Sharing providing that the Compensation is to be paid to the owner of:

- (a) any livestock or property which is destroyed for the purpose of eradication or prevention of the spread of an emergency animal disease;
- (b) any livestock which an inspector accredited under the applicable legislation in that jurisdiction, who is a veterinary surgeon or who is approved by a CVO, is satisfied has died of the EAD and who has certified to that effect, and who (after due enquiry) is satisfied that there has been no unreasonable delay in reporting the death of the livestock and where the CVO certifies that the livestock would have been compulsorily slaughtered had they not died.

#### 3.4.1 Additional principals re Compensation payments that are eligible for Cost Sharing

### *Second valuation or 'Top-up Payment'*

In the case of livestock, a second payment may become due on the date the property where the livestock were located becomes eligible to be restocked provided the total value of livestock is greater on that date. The Compensation payable at this second payment is the difference between the total value of livestock on that date and the amount paid for livestock in (a) and (b) above.

### *To whom payable*

Compensation to be payable to the 'owner', which includes every person (in case of a body corporate, the manager/secretary), other than a mortgagee not in possession, having or claiming any right title or interest in any stock or land.

### *Time limit for applications*

A claim for Compensation in respect of livestock or other property must be made by, or on behalf of, the owner within ninety (90) days after the date of destruction or death of the livestock or other property.

A request for a second valuation must be made by or on behalf of the owner within thirty (30) days of receipt of notification that the property is eligible to be restocked. A claim for a second payment for Compensation must be made within twenty-one (21) days of receipt of the second valuation determination.

### *Exclusions*

No Compensation or any such part of the Compensation otherwise payable as the responsible authority thinks reasonable shall be payable under these guidelines to any owner if they have been convicted of an offence under any Act or regulations which is directly related to the containment and eradication of the EAD.

### *Method of valuation*

In the case of livestock the value is based on:

- (a) the date the owner or owner's representative reports the disease or suspicion of disease to an inspector accredited under applicable legislation or a veterinary surgeon; or
- (b) the date of detection of the disease by an inspector accredited under applicable legislation; or
- (c) the date of imposition of a quarantine order relating to the disease, whichever is the earlier.

In the case of livestock, the date on which the second valuation is based is the date of release of all restrictions pertaining to the property's eligibility to be restocked.

In the case of property (including buildings), the value is that applicable immediately before destruction.

In determining the Compensation to be paid no allowance shall be made for loss of profit, loss occasioned by breach of contract, loss of production or any other consequential loss whatsoever (in the context of the Deed).

For the purpose of calculating the value of the stock or property, that value shall be calculated upon the basis of a sale at the place where the stock or property was when it was destroyed or where the stock was when it died of the disease, that is, farm gate value.

The value of any stock or property in respect of which Compensation is payable shall be the amount determined by the relevant legislation in the jurisdiction in which the death or destruction occurred.

*False statements*

Any person who is suspected of having acted with intent to mislead or defraud the Crown for the purpose of obtaining Compensation for himself or any other person under this Agreement, or who is suspected of having knowingly made a statement which is in any respect false or misleading or who is suspected of practices or of being concerned in any fraudulent act shall be reported to the relevant authorities for appropriate action. That person, if proven to have so behaved forfeits all rights to Compensation and any Compensation paid, under the Deed for the EAD.