

To: **The Director of Veterinary Public Health on behalf of the Department of Agriculture, Land Reform and Rural Development**
Att: Dr Mphane Molefe
And: The Department of Agriculture, Land Reform and Development
Email: VPH@Dalrrd.gov.za

30 April 2021

Dear Dr Molefe,

Re: DRAFT GUIDELINES FOR THE TRANSPORTATION OF LIVE ANIMALS BY SEA

We refer to the Invitation for the Public to Comment on the Draft Guidelines for the transportation of Live Animals by Sea¹ (the “**Draft Guidelines**”).

We, Animal Law Reform South Africa (“**ALRSA**”) and the Centre for Applied Legal Studies (“**CALS**”), welcome the opportunity to provide our comments and hereby do so.

We note that the time period for providing comments is extremely short. Both organisations have separately requested an extension and note that this was denied.

We hereby formally request to be included on the list of relevant stakeholders for all external communications and publications by the Department, Dr. Molefe and/or or equivalent representative.

We hope that you will see the value in our comments and recognize the potentially far-reaching consequences live export will have on our environment, our animals, the human rights of workers on the ships, our guaranteed constitutional rights and South Africa.

Kindly confirm receipt of this Submission and address further correspondence to the email address of Amy P. Wilson: amywilson@animallawreform.org and Sheena Swemmer: Sheena.Swemmer@wits.ac.za

We look forward to receiving a response and are available to engage on any queries, comments, concerns which you might have in respect of the Submission.

Yours sincerely,



Amy P. Wilson
Director
Animal Law Reform South Africa
amywilson@animallawreform.org

Sheena Swemmer
Head of Programme: Gender Justice
Centre for Applied Legal Studies
Sheena.Swemmer@wits.ac.za

¹ <https://www.nda.agric.za/docs/media/Request%20for%20public%20comments%20-%20Draft%20guidelines%20on%20the%20transport%20of%20live%20animals%20by%20sea.pdf>



ORGANISATIONAL BACKGROUND AND DECLARATION OF INTEREST

Animal Law Reform South Africa

Animal Law Reform South Africa (“**ALRSA**”)² is a registered South African non-profit company and non-profit organisation, which has a substantial interest in animal welfare, as is directly relevant to the Draft Guidelines referenced above. Additionally, we closely followed the matter between the NSPCA and Al Mawashi (Pty) Ltd last year regarding the live exportation of sheep, and hence our interest in the efficacy of these Draft Guidelines.

ALRSA is composed of compassionate legal professionals and envisages a society and legal system that adequately protects both humans and nonhuman animals. ALRSA’s three main pillars are: (1) Animal Well-being; (2) Law and (3) Social Justice. We work through three core focus areas being (i) Legislative and Policy Reform; (ii) Litigation and Legal Services and (iii) Education and Research, and we appreciate the need for intersectionality in our approach.

Centre for Applied Legal Studies

The Centre for Applied Legal Studies (“**CALS**”)³ is a civil society organisation based at the School of Law at the University of the Witwatersrand. CALS is also a law clinic, registered with the Law Society of the Northern Provinces. As such, CALS connects the worlds of both academia and social justice. CALS’ vision is of a socially, economically and politically just society where repositories of power, including the state and the private sector uphold human rights. CALS operates across a range of programs including the rule of law, business and human rights, environmental justice, basic services, and gender.

Historically, CALS has contributed comments on similar animal welfare focused bills, namely the Animal Protection Amendment Bill of 2017 and the Performing Animals Protection Amendment Bill 2016. Due to this historical interest in the interests and welfare of animals we submit we are well placed to make comments on these proposed guidelines.

This submission has been drafted by Jaime Uranovsky, Anna Obek, and Prof David Bilchitz with the assistance of Amy P. Wilson, Basetsana Koitsioe and Sheena Swemmer. We thank them all for their research and assistance.

² Animal Law Reform South Africa Website: <https://www.animallawreform.org/>.

³ Centre for Applied Legal Studies Website: <https://www.wits.ac.za/cals/>.

EXECUTIVE SUMMARY

In this submission, we outline the case for why allowing the live export of animals from South Africa is in fact unconstitutional. That unconstitutionality flows from the terrible cruelty involved in the practice. We document some facets of this cruelty and suggest it could be subject to legal challenge.

Given the government seems intent on allowing the live export of animals, we comment on the regulations with a view to mitigating the negative welfare impacts on animals and improving oversight and enforcement.

This Submission is divided into two Parts: the main part of the submission is on the ban and comments on the Draft Guidelines in Part I. Part II provides a brief overview of the position in two other jurisdictions to illustrate how regulation in those jurisdictions has largely failed to protect animals.

Part I:

We provide a specification of the cruelty of live animal export. We note that live animal export is inherently cruel and regardless of the regulations or guidelines in place, as a practice, it is incapable of achieving a suitable standard of animal welfare. That has been recognised recently by New Zealand which has banned live export of animals. We also, as mentioned above, provide the case for the unconstitutionality if live export.

In the event the government persists with these guidelines, we make specific comments, much of which centre on questions around how to ensure transparency around the treatment of animals on these ships and how to enforce these provisions.

Our specific comments include the following:

- We address the lack of legal force in ‘guidelines’ and question the legislative authority that purportedly mandated these guidelines. We propose that they should be turned into regulations so that they are legally binding on all parties and so that compliance can be enforced.
- We argue that the ‘human factor’ of live animal exportation must be recognised as this kind of trade does not only negatively affect animals but humans as well. More specifically, we consider the impact on the workers on the ships and how badly they are treated in this industry. Human rights and animal welfare go hand in hand. A framework must be developed for labour protection. The impact of live export can also affect human health negatively through the spread of possible zoonotic diseases. That also needs to be factored into any regulation.
- We call attention to the Guidelines’ omission of the NSPCA – indeed, the organisation is not mentioned once. Given the NSPCA’s statutory – and indeed constitutional role - we call for the NSPCA to be included as a ‘main party’ and to be involved in strengthening the processes within the Guidelines. The NSPCA should be entitled to nominate a veterinarian to join any ship (at the exporter’s expense) and an independent monitor who can be drawn from the organisation.

- Since there is no oversight once animals reach their ‘final destination’, exporters must be bound by the same standards provided for in South African law to ensure that animals are slaughtered in terms of the welfare standards applicable in South African law (namely, the Meat Safety Act 40 of 2000 and corresponding regulations). We indicate how a recent EU case lays the ground for such extra-territorial application of South African provisions.
- We address various concerns regarding the ‘vessel’ including the need to extend how long the secondary power supply must be able to provide power. We argue that three days is insufficient and that the period must be extended to seven days at a minimum.
- We also call for the Guidelines to make air-conditioning mandatory (it is not mentioned) and to provide precise temperature restrictions.
- We also call on the guidelines to extend the ban on live animal export during the hot summer months. Instead of the prohibition lasting simply from May to September, we call for it to last from April to October to account for the high temperatures during these months as well.
- We indicate that the South African competent authority must stipulate the requirements for a training programme for animal handlers rather than have a vague discretion in this regard. Training requirements and standards must be outlined. We further argue that the NSPCA must be involved in devising these training stipulations.
- We note that while ‘sheep, goats, cows, and buffalos’ are the animals in these Guidelines, specifications regarding buffalos are not always provided when specifications for the other three species are. All animals covered must be equally regulated and according to their separate or differing needs.
- We address issues regarding animal deaths and require that humane euthanasia must be more clearly defined in line with existing legislation. We also argue for the need to document and record animal deaths while on board.
- We call for intervention in all circumstances to ensure all animals have consistent access to food and water and are acclimatised to their new diet.
- We call for the space afforded to each animal on board to be increased and thus the number of animals on board significantly reduced.
- Any ship transporting animals must be specifically designated for this purpose and animals must not be kept on board ships that transport other cargo.
- We show that the contingency situations are not comprehensive and list a number of disasters that have occurred in recent years and that have resulted in both human and animal deaths during live animal exportation. We again emphasise the need for a link between human rights, animal welfare and fair labour practices. We also highlight the need for liability in the face of contingencies and penalties for failure by the companies to address the plight of animals and humans in these circumstances.
- We outline several requirements pertaining to veterinarians and independent monitors. We argue that, since ships contain tens of thousands of animals at once, a team of veterinarians, but no less than two, must be present. The NSPCA should be entitled to choose half the team at the company’s expense. We also argue that there must be at least two independent

monitors so that discrepancies and inconsistencies can be picked up. The NSPCA should appoint one of the monitors. All these parties must have unlimited access to the ship and must be able to record and document without restriction. This information must be capable of being obtained via a successful PAIA application and the safety of these parties must be prioritised.

- We acknowledge the lack of specificity regarding who will enforce these standards on board the ship and recognise the difficulty of veterinarians and independent monitors to voice concerns about conditions on the ship. Apart from the need for a clear line of accountability, we provide for obligations and liability on the part of the company to ensure the safety of veterinarians, independent monitors and animal handlers.
- We outline the need for an enforcement and penalties clause. This is one of the most important clauses in the Guidelines and yet, at present, it does not exist. This clause would need to outline civil and criminal liability of companies and individual persons for failures to fulfil their obligations in terms of the guidelines. It would also need to provide all legal consequences that would arise from non-compliance including removal of permission to operate.
- We advocate for segments to acknowledge and mitigate the diverse effect that live animal exportation has on the environment. We call for the Guidelines to put into place measures to reduce its impact on the environment and we argue that this must be done while taking existing environmental legislation into account.

Part II:

In this section, we briefly survey two existing jurisdictions that have been involved with live export. We look into Australia's regulatory framework regarding live animal exportation and the various pieces of legislation that govern the practice. Despite the comprehensive pieces of legislation, we then list the RSPCA's chief concerns regarding Australia's live exportation regulation which has been unable to stop widespread abuses and ill-treatment on these voyages.

The same is done for both New Zealand – given the recognition that it has not succeeded in preventing abuses, New Zealand has banned all live animal export with a phase-out period of two years.

PART I: OUR GENERAL APPROACH AND SPECIFIC COMMENTS

1. Live Animal Exportation: Why a Ban is Necessary in South Africa

The live export of animals is a barbaric and cruel industry that creates needless suffering and death for both animals and the human workers on board these vessels. Even if the animal survives the grueling sea journey, they are then subjected to cruel and painful slaughter practices that often depart from the standards mandated in the animals' country of origin.

Many countries are recognising that this inhumane and disturbing trade is inconsistent with a concern for animal welfare and have implemented various measures, from stricter humane enforcement mechanisms to an outright ban of the practice. In April 2021, New Zealand's Minister of Agriculture, Damien O'Connor, announced the ban of live animal export by sea over the next two years.⁴ This recent ban has been publicly lauded by the New Zealand Veterinary Association (NZVA).

The UK's Secretary of State for Environment, Food, and Rural Affairs, George Eustice, announced in 2020 that the sending of live animals abroad for slaughter and fattening will be banned in England and Wales by the end of 2021 in a post-Brexit break from European Union Trade rules.⁵ In 2018, India banned all live exports from its ports following public protests.⁶

The NSPCA has urged the South African government to follow suit—to recognize the intrinsic value of animals, as the Constitutional Court in South Africa has done, requires the ban of this practice.⁷ Additionally, the NSPCA has the support of various organisations⁸ in banning live export, including the South African Veterinary Association.

ALRSA, CALS and its allies advocate for the outright ban of the live export of animals from South Africa. The trade is fundamentally inconsistent with animal welfare and thus unconstitutional. Attempting to regulate it can only mitigate the terrible harm it causes.

As it stands, the only applicable non-binding standards that govern live export are those issued by the World Organisation for Animal Health ("OIE").⁹ That organisation itself recognize in Chapter 7.2 "Transport of Animals by Sea" that:

⁴ <https://safe.org.nz/our-work/animals-in-need/live-export-trade/>

⁵ <https://www.bbc.com/news/uk-politics-55167473>

⁶ <https://www.livekindly.co/india-bans-all-live-animal-exports-from-all-ports/>

⁷ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46 78 (NSPCA) at para 57.

⁸ For example (non-exhaustive): United Ulama Council of South Africa; Livestock Welfare Coordinating Committee; Veterinarians Against Live Export (VALE); Compassion in World Farming International; Animals Australia; World Animal Protection; South African Veterinary Council appointed Veterinarian; Ban Animal Trading South Africa; South African Mohair Growers Association; South African Feedlot Association; Director of Muslim Judicial Council Halaal Trust (MJCHT) against the live animal export to the Middle East.

⁹ https://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/2016/en_chapitre_aw_sea_transpt.htm

animal welfare means “the physical and mental state of an animal in relation to the conditions in which it lives and dies. The guiding principles include the ‘Five Freedoms’ which includes: freedom from hunger, malnutrition and thirst; freedom from fear and distress; freedom from heat stress or physical discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behavior.

The very practice of shipping live terrestrial animals on long and dangerous voyages by sea only to meet a violent death violates these principles. Most of the conditions aboard the ships violate most, if not all, of the five freedoms as has been documented by veterinarians who have been on these ships and could no longer accept the suffering engendered. These include the following:

- It is extremely distressing for terrestrial animals used to grazing in the open suddenly to be confined in a small space for an extended period and on the ocean which they are simply not accustomed to;
- Many of these animals were unable to access food and water given the internal arrangements on the ship and some died of hunger and thirst;
- There is an inevitable heat build-up where the animals are kept causing stress and physical discomfort – this is exacerbated as the animals are taken to the Persian Gulf which is very hot during most of the year, contributing to heat stress and, sometimes, animals being ‘cooked alive’;
- The animals often have no room to lie down without being trampled on and are forced to sit in each other’s excrement when they do;
- There is a build-up of ammonia arising as a result of the excretions of the animals and it is extremely difficult to keep the pens clean and with healthy air;
- It is very difficult with high stocking densities to be able to recognise which animals are in distress or ill;
- The animals are unable to express their normal patterns of behaviour due to the conditions on board being unsuitable for terrestrial animals.

It is evident that from an animal welfare point of view, live export of animals is simply unacceptable. Despite the numerous and complex live export regulatory systems that are put in place around the world to “protect” live animal exports, as seen in Australia, New Zealand, and the European Union, the only way to ensure the health, safety, and welfare of both animals and people is to ban live export. It has been shown to be simply impossible to create an effective and enforceable framework at sea and once the animals reach their destination, their slaughter. Thanks to the courageous workers and veterinarians on board these ships, we have video evidence of the cruel and disturbing crimes that take place against animals on board these vessels: these are also readily available online. Moreover, companies often cut corners for financial gains (i.e., “secret compartments” to carry more animals on board and avoid weight limitations).

Simply creating requirements for pen size or protocols for animal handlers will not address the overall moral and legal issues at stake in this industry: the wellbeing and life of the animals and the people accompanying them. The very act of shipping thousands of animals on long journeys is cruel as we have documented above. Additionally, the unpredictability of sea voyages is simply too risky – factors like harsh weather conditions or the possibility of the ship getting stuck or sinking can and often do result in a crisis for the animals onboard. Even if they reach their destination, they are often subject to cruel treatment in their destination countries which lack adequate animal welfare oversight measures.

A ban in our view is **constitutionally required** and these guidelines, allowing a blatant breach of animal welfare, are unconstitutional. Our reason for making this claim flows from the Constitutional Court's recognition in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* ([2016] ZACC 46) that animals have intrinsic value as individuals (at para 57). That recognition requires them not to be subject to cruel treatment. The live export of animals is simply inconsistent with these statements and the caring and compassionate constitutional ethos the Constitutional Court and Supreme Court of Appeal have outlined in their developing case law. The live export of animals also causes serious environmental harms including serious pollution and so is inconsistent with section 24 of the Constitution.

The government thus is not permitted constitutionally to issue these guidelines. To do so is also irrational in administrative law. The regulation of the trade is justified on grounds of profitability – yet, a similar argument could be made for trading in harmful drugs or human organs. Given the unethical nature of these practices and their serious harms they cause to human beings, that would clearly be unacceptable. Live export causes horrific cruelty to animals and, in a similar vein, no amount of profit can justify such a practice.

Assuming it persists with regulating the trade — which we believe to be unconstitutional and unlawful - we propose some changes to the guidelines to mitigate the harms as much as is possible: at minimum, there is a need for stricter enforcement mechanisms, penalties, as well as increased independent monitoring, and transparency relating to the health, safety, and welfare of the animals on board.

2. Specific Comments

In our view, the Draft Guidelines are too weak legally, allow for too much discretion and abuse, and will not ensure the welfare of live animals being exported. They also importantly lack sufficient oversight protocols and enforcement mechanisms. We elaborate on these points below.

We wish to reiterate that our comments on the Guidelines are non-exhaustive. Unfortunately, we have only been able to make limited comments due to the very short time-line for comments as well as capacity and other resource constraints. We reserve the right to provide any further or additional information on aspects raised herein and take any other actions in respect thereof that we deem necessary and appropriate. Our submission does not constitute a waiver of any rights we jointly or individually may have and we reserve any and all rights, remedies and actions available to us.

2.1 The legislative force and origin of these 'Guidelines'

- a. Guidelines are not a binding form of delegated legislation in the way that regulations are. Whilst they guide government policy, the failure to comply with Guidelines will not result in sanctions for the private companies involved. These Guidelines also fail to stipulate legal consequences or sanctions for non-compliance. Ultimately, the Guidelines are weak and lack clear binding legal force against private parties.

- b. The purposes of the Guidelines cannot be achieved if there is inadequate enforcement. Indeed, ‘appropriate animal welfare standards’¹⁰ cannot be maintained without sufficient legal consequences.
- c. Moreover, it is suggested that these Guidelines receive their mandate from section 2 of the Animal Protection Act 71 of 1962 (‘The APA’) read along with the World Organisation for Animal Health (OIE) Terrestrial Animal Health Code (Chapter 7.2). It is not clear what ‘derive their mandate’ means - section 2 of the APA does not mandate delegated legislation. The same is true of the OIE.
- d. While section 10 of the APA allows certain regulations to be put in place pursuant to the APA, the Guidelines do not purport to be issued in terms of this section.
- e. The question then is what legal effect do these guidelines have? It is clear that such an effect is confined to governing the exercise of the government’s powers in relation to live export. Failure to comply with them may render any actions that require reference to them unlawful.
- f. **We propose these ‘Guidelines for the Transportation of Live Animals by Sea’ must be replaced by ‘Regulations for the Transportation of Live Animals by Sea’ so that all provisions within the legislation are legally binding on all parties.**
- g. Additionally, various provisions in the Guidelines are directive as opposed to peremptory. It must be clear that the guidelines issue requirements: thus, all 49 instances of the word ‘should’ in the Guidelines must be replaced by ‘must’ to ensure compliance can be enforced.

2.2 The ‘human factor’ of live animal export

- a. As stated under clause 2.1 of the Draft Guidelines, it is important to acknowledge that ‘...animal welfare has direct and indirect animal wellbeing, public health, food safety, and economic implications’. What is lacking however from this statement is the acknowledgment that the export of live animals for slaughter may also result in the violation of human rights – why is there so little concern for the humans involved?
- b. Lynn Simpson, a livestock veterinarian, states that throughout her experience of live export over the years ‘[w]hat shocked me the most was the disregard for humanity and the poor conditions seafarers are forced to endure. Some companies seem to see seafarers as expendable’.¹¹ Examples of some of the inhumane conditions experienced by seafarers on many live export vessels include exposure to dangerous levels of ammonia, carbon dioxide, and highly flammable methane.¹² Many vessels do not have doctors on board for the seafarers and instead, these individuals have to rely on veterinarians, who are charged with assisting animals, for their health needs. Simpson, a veterinarian, described that ‘I [have] sewed

¹⁰ Section 3 of the Draft Guidelines for the Transportation of Live Animals by Sea.

¹¹ <https://www.animalsaustralia.org/features/more-reasons-to-ban-live-export.php>

¹² <https://www.peta.org.au/issues/food/human-rights-live-export-industry/>

people up, replaced dislocated shoulders, reattached a nearly ripped off thumb. I likely saved an officer from losing his leg to gangrene'.¹³

- c. In a study by Hansen et al, it was found that occupational accidents on vessels are extremely common and sometimes fatal. Furthermore, concerning seafarers from Denmark, it has been found that they have a risk of early death due to 'lifestyle related diseases, suicide, and accidents'.¹⁴
- d. When considering live animal export, the consequences of the practice on employees in such industries must be recognized even outside South African jurisdiction where it is known the harms originate in South Africa's waters. In line with its constitutional and labour law obligations, the government has a duty to address these violations and develop labour guidelines alongside this regulatory framework for the rights of those human individuals in this industry to be upheld.
- e. The human rights impact goes beyond the labour questions - COVID-19 has highlighted the threat of zoonotic disease (a disease passed from animals to humans) by the Food and Agriculture Organisation of the United Nations.¹⁵ The packed unhygienic conditions of animals on these ships poses a grave risk that pathogens will develop and be passed onto human beings who either come into contact with them on ship or at their destination. That, in turn, could be the breeding ground for a new pandemic.

2.3 The exclusion of the National Society for the Prevention of Cruelty to Animals ('NSPCA') in section 2.3

- a. Section 2.3 details the 'main parties' involved in the exportation of animals by sea but omits the NSPCA as one of these parties. Indeed, the NSPCA is not mentioned once in the Draft Guidelines.
- b. It makes little sense why the NSPCA has been excluded from this list, especially since it has been mandated in both the APA and in the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.¹⁶ Additionally, the Constitutional Court has recognised the NSPCA as 'the special guardians' of animal welfare.¹⁷ The organisation has also been described in case law as an 'authoritative voice in the protection against injury or cruelty to animals from whatever source and under whatever circumstances.'¹⁸ As such, '[i]t would be an anomalous situation if the law required that the SPCA had to stand idly by where animal cruelty was likely to occur.'¹⁹ Thus, it is pivotal that the NSPCA is involved as a 'main party' in ensuring that other parties comply with animal welfare regulations in this area.

¹³ *Id.*

¹⁴ H Hansen et al, 'Hospitalizations among seafarers on merchant ships' *Occ Environ Med*, (2005), 145 – 150.

¹⁵ https://cites.org/sites/default/files/eng/CPW_COVID-19_statement_final_launch_16_Oct.pdf

¹⁶ See s 2 and s 8 in the APA and *inter alia* s 6 of the SPCA Act.

¹⁷ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* (CCT1/16) [2016] ZACC 46 at para 59.

¹⁸ *Society for the Prevention of Cruelty to Animals, Standerton v Nel* 1988 (4) SA 42 (W) at 47C (*Nel*)

¹⁹ *Id.* at 47D.

- c. The NSPCA should be involved in monitoring welfare at all stages of live export and should have the right to have a veterinarian on board with full rights to document the treatment of animals and compliance with these regulations.

2.4 Scope

- a. Section 5.2 covers an animal's 'final destination' but there is no oversight regarding how the animal is treated once it arrives there. **It is unacceptable for animals raised in South Africa to be sent to a fate that may involve severe cruel treatment.** Therefore, to ensure decent animal welfare, the exporter must agree to be bound by South African law in terms of the Meat Safety Act up to and including when each animal is killed. This means that animals will be subjected to the same slaughtering laws as they would be if they were slaughtered in South Africa.
- b. This approach was followed in a 2015 EU judgment in which it was held that when there is an export from the territory of the exporter, the exportation 'continues outside that territory to be authorised by the competent authority of the place of departure'.²⁰ In terms of this judgment, the exporting company must accept responsibility for ensuring that these welfare standards are met throughout the journey. In our view, that includes the destination. The regulations should require the company to liaise with the destination country and to allow South African veterinary officials – including those appointed by the NSPCA – to inspect the facilities and ensure compliance with South African animal welfare law in this regard.

2.5 Inadequate specifications regarding 'the vessel to be used' in s 6.2

- a. Section 6.2 (a) indicates that the 'vessel chosen...should be designed, constructed and fitted in a manner that is appropriate for the species'. We would add that it must be clear that any ship that carries live animals must be specifically designated for this purpose and should not carry other cargo. On the one hand, this would prevent inadequate design of ships to carry animals. On the other hand, it would prevent poisoning and other harms coming to these animals.
- b. S 6.2(l) of the Draft Guidelines calls for a secondary power supply that can provide power for at least three days during breakdowns. However, three days is insufficient. The secondary power supply must be able to provide power for seven days minimum. While at sea, conditions are precarious, and ships can break down or get stuck in various ways for various reasons. Three days is not a reasonable amount of time for a secondary power source to be active. See, for example, the recent 2021 Suez Canal obstruction crisis. At least 20 of the ships that were stuck as a result of the *Ever Given* jam contained live animals and were stuck for six

²⁰ See *Zuchttrieb-Export GmbH v Stadt Kempten*, case C-424/13
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=163872&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=609653>

days.²¹ This amounted to about 200 000 live animals.²² This again demonstrates the difficulty of ensuring adequate welfare given the unpredictability of ocean voyages.

- c. Moreover, while section 6.2(*o*) states that ‘automatic ambient temperature readers / thermo-loggers’ must be installed, there is no mention in the Guidelines as to what constitutes a suitable or unsuitable temperature. Temperature restrictions must be prescribed, otherwise a suitable temperature cannot be enforced. Such a provision should read, for example, ‘the temperature must remain below x degrees Celsius.’ While the OIE does not provide temperature restrictions for live exportation by sea, it states that when the temperature outside of an aircraft that has landed (for live export by air) exceeds 25 degrees Celsius, air-conditioning should be provided.²³ Caulfield et al conducted a study regarding heat stress and its adverse effect on animal welfare during long voyages. It discusses different temperatures for different species; see footnote.²⁴
- d. Furthermore, section 6.2 does not **provide for air-conditioning**. This must be included in order to regulate and to decrease the temperature if the temperature restrictions, as discussed in the point above, are exceeded. Without the requirement of an air-conditioner, temperature cannot be regulated.

2.6 Pre-journey planning and operations issues

- a. Section 7.1 (*a*) prohibits travel from May to September through regions that experience high summer temperatures. This interval must be extended based on travel routes as some regions (particularly those near the equator) regularly experience ‘very high’ temperatures outside of these months, especially in the months immediately before and after the stipulated period. Therefore, the ban should be extended at least to prohibit exportation between April and October. Indeed, the attempt to specify exact time periods rather than consider actual climactic conditions suggests arbitrariness in the guidelines.
- b. Additionally, section 7.1(*d*) provides the South African competent authority with the discretion to stipulate the requirements for a training programme ‘if deemed necessary’. This leaves it open to what such training shall involve which may be minimal and the government may fail to exercise this discretion - thus far, it has shown very limited desire to regulate live export. Thus, this provision must be changed so that the competent authority ‘must’ stipulate these details as opposed to ‘may’. These directives should be sourced from the NSPCA. As detailed above, this organisation is tasked by law as being an expert regarding animal welfare and should be consulted regarding the establishment of training requirements.

2.7 Inconsistency regarding specifications for species

²¹ <https://www.businessinsider.com/animal-welfare-concerns-20-livestock-ships-caught-suez-canal-jam-2021-3>

²² <https://www.peta.org/blog/suez-canal-ship-stuck-animals-live-export/>

²³ Article 7.4.4 (2) of the OIE.

²⁴ <https://www.sciencedirect.com/science/article/pii/S1090023313004462>

Section 1 defines animals as ‘sheep, goats, cattle and buffalos’; however, S 7.4(e) provides standard respiratory rates for sheep, goats, and cattle, but not for buffalos. Likewise, s 14 fails to set out the ‘requirements for the minimum space area according to species’ for buffalos. All four of these species must be provided for whenever details requiring the specifics regarding their species are detailed if the guideline is to cover these animals. Such guidelines naturally must be appropriate for the specific species’ size and weight.

2.8 Issues regarding animal deaths

- a. Section 8.4 provides that if an animal needs immediate euthanasia, it must be ‘destroyed immediately and humanely’. The manner of death must be more comprehensively described: animals must be euthanised by a veterinarian. Chapter 7.6 of the OIE stipulates guidelines for this. Furthermore, Australia’s ASEL defines euthanasia as ‘the act of inducing death of an animal in a humane manner that causes immediate loss of consciousness and then rapid death’.²⁵
- b. If the animal is thrown overboard, it may only be done so once the animal has been humanely euthanised. The environmental impact of doing so must also be considered before doing so particularly if the animal is seriously diseased.
- c. The standards need to include a provision that if a certain percentage of animal deaths occur on board, the ship must be grounded. Additionally, every animal that dies or is killed on board must be documented and accounted for. The cause of death for each animal must be documented and recorded and reported to the relevant veterinarians. Disciplinary consequences should follow from any worker failing to disclose a death. The following comparators may be of assistance but are themselves, in some respects, not adequate:
 - New Zealand’s MPI (before the total ban) required records of all illnesses and deaths to be recorded and delivered to the MPI within 20 days after the voyage’s arrival in the destination country.²⁶
 - Australia’s ASEL is woefully inadequate but requires calculation of the average daily mortality rate: ‘the rate (percentage) that is calculated by dividing the mortality rate for each species of the consignment, by the number of voyage days. It is worked out after the voyage’.²⁷ ASEL also calculates the mortality rate: ‘the rate (percentage) that is calculated by dividing the number of deaths of a species occurring during the voyage... for each export consignment in the case of a shared vessel... by the total number of that species loaded and multiplying the resultant figure by 100’.²⁸
 - Additionally, in section 5.6.5 of ASEL, If a ‘notifiable incident occurs at any time, the exporter must notify the department as soon as possible and within 12 hours.’ At sea, a notifiable incident includes: ‘an average daily mortality rate that is equal to, or greater than, the notifiable mortality level. In relation to a

²⁵ ASEL, Definitions.

²⁶ <https://www.mpi.govt.nz/dmsdocument/38036/direct>, p 19.

²⁷ ASEL 3.1 – Definitions

²⁸ *Id.*

notifiable incident involving a mortality rate equal to or greater than the notifiable mortality level listed’ a written report must be submitted. This report must detail:

- Particulars of the deaths (‘the number, species, pen location, suspected cause, the animal’s identification, any treatments administered prior to death’);
- Possible factors that resulted in these deaths;
- The current location of the ship, where it is going and when it expects to get there;
- Efforts being made to reduce the probability of more deaths occurring during the voyage.²⁹

2.9 Bullying

Section 8.11 regarding ‘bullying’ requires clearer drafting and is clearly inadequate. Food and water must be consistently accessible to all animals and it must not be possible for some animals to prevent others from accessing food and water. Thus, this must go beyond ‘monitoring’. Animal handlers must ensure that all animals regularly have this access – they must both monitor and intervene.

2.10 Stocking Densities

Section 8.13 talks of stocking densities being ‘checked and adjusted as required’. Section 14 outlines minimum space requirements. It is important to recognise that the current practices in this regard are woefully inadequate and too many animals are transported in too small spaces. For any attempt at decent welfare, it will be necessary to reduce significantly the number of animals transported. These guidelines should be developed on the basis of animal welfare rather than profitability.

2.11 Uncomprehensive contingency possibilities

Section 10.2 provides that contingency plans should provide for certain situations: however, the list is not comprehensive enough and does not cover, for example, capsizing and subsequent drowning; being kept at sea to contain disease; natural disasters at sea; and death caused by overheating. This section needs to place a duty on the exporting company to ensure the welfare of animals and humans in the event of a contingency. These should include rescue vessels and returning to the original port. Prescribed damages should have to be paid for any animal that is lost in this way to a designated animal welfare organization to discourage breach of the standards. Significant financial penalties must be imposed on the exporting company by South Africa in such an eventuality.

A list of some live export casualties in recent years is included below and highlights the importance of planning for these situations:

²⁹ *Id.* at s 5.6.5.

Live Export Casualties

- **March 2021:** Over 200 000 animals were trapped on twenty live export ships for a week due to a container ship that became stuck on the Suez Canal.³⁰ The fate of those animals is unknown; it was unclear whether they were given food or water, or if they were even alive.
- **December 2020:** Two vessels carrying over 2800 cattle from Spain became stranded at sea for over two months due to a supposed blue tongue disease outbreak, which was later found to be untrue. Regardless, the cattle were “destroyed.”³¹
- **2020:** 5867 cows and 41 people presumably perished due to a typhoon near Japan that hit the *MV Gulf Livestock 1* ship.³²
- **November 2019:** A ship carrying sheep from Romania to Saudi Arabia capsized, killing an estimated 14 420 sheep, with 180 surviving. In 2020, reports surfaced that the ship sank because it was carrying more sheep than allowed in secret decks.³³
- **2018:** 2400 sheep died due to overheating (being cooked from inside out) while on route to Qatar, Kuwait, and the UAE.³⁴
- **2016:** 1700 Australian sheep being shipped to Doha died as a result of heat-related stress. 1,286 sheep were “unaccounted for.”³⁵
- **2015:** In Brazil, the *MV Haidar* capsized, killing around 5,000 cows.³⁶
- **2015:** 3000 animals were killed when a cargo ship from Somalia to UAE sank.³⁷
- **2013:** Over 4000 sheep from Australia were “cooked alive” on board a ship to the Middle East.³⁸
- **2012:** Following the 2003 *Cormo* disaster mentioned below, trade between the Middle East and Australia resumed after a MoU was established ensuring that such incidents would not occur again. However, it was discovered that 22 000 sheep from Australia were “clubbed, stabbed and buried alive” in Pakistan.³⁹
- **2009:** The *MV Danny FII* capsized, killing 17 932 cattle, 10 224 sheep, and 44 people near Lebanon.⁴⁰
- **2003:** Around 6000 Australian sheep died in disturbing conditions on a ship called the *Cormo Express* because it floated for two months, unable to find a port that would accept the ship.⁴¹

2.12 Responsibilities and competencies

³⁰ <https://www.peta.org/blog/suez-canal-ship-stuck-animals-live-export/>

³¹ <https://www.theguardian.com/environment/2021/mar/01/cattle-stranded-on-ship-to-be-destroyed-in-port-as-second-vessel-returns-to-spain>

³² <https://www.animalsaustralia.org/features/two-live-export-ships-past-year-capsized-sea-destroying-animal-human-lives.php>

³³ <https://www.peta.org/blog/sheep-drown-death-live-export/>

³⁴ <https://www.animalsaustralia.org/facts/history-of-disasters.php>

³⁵ *Id.*

³⁶ <https://www.animalsaustralia.org/features/two-live-export-ships-past-year-capsized-sea-destroying-animal-human-lives.php>

³⁷ *Id.*

³⁸ <https://www.animalsaustralia.org/facts/history-of-disasters.php>

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

- a. Section 11.1 engages with the responsibilities of the exporter but fails to include any provision that the exporter should comply with the animal welfare laws of South Africa as well as these draft regulations. That omission should be remedied. It is clear that vital to proper animal welfare will be strong obligations on the part of the companies and employees thereof.
- b. Section 11.6(a) prescribes one veterinarian to be included per voyage. This is inadequate, especially considering that the number of animals on board is often between 60 000 and 80 000. To have one veterinarian responsible for such a large number of animals is unreasonable. A team of veterinarians is required based on the number of animals but no less than two should be included. ASEL prescribes minimum 'veterinary medicines and equipment' throughout the Act as opposed to a fixed number of veterinarians themselves. At least one veterinarian should be included who is chosen by the NSPCA to avoid the company paying for veterinarians who will simply sanction abuses. The company should have to pay all veterinarians regardless if external and they shall not be employees of the company and independent. The veterinarians are vital as the animal's welfare will essentially be in their hands.
- c. Additionally, section 11(6)(e) and section 12 must introduce requirements for the veterinarians and independent monitors respectively to photograph and document any abuses or deaths (or any other relevant facet of the treatment of animals) during the exportation process, especially photographs and reports regarding animal illness and death. They must have the opportunity to do so freely and this record must be capable of being applied for in terms of the Promotion to Access of Information Act (PAIA).
- d. Moreover, there must be at least two independent monitors appointed in terms of section 12. At least one individual from the NSPCA must be one of the independent monitors and must have unrestricted access to the vessel. Furthermore, their safety must be prioritised and the exporting company must guarantee their safety – any breach of this provision should lead to criminal and civil liability of the company and its directors in South Africa. Each independent monitor must keep their own records in order to account for discrepancies and inconsistencies.
- e. Furthermore, section 11.7 must require that animal handler training is completed in terms of requirements set by the NSPCA. Like veterinarians and independent monitors, animal handlers must have unrestricted access and their safety must be prioritised with criminal and civil penalties flowing if there are any breaches thereof.

2.13 Lack of specificity regarding who will enforce welfare standards on ships

While veterinarians, independent monitors, animal handlers and the Master of the ship are all addressed in the Guidelines (section 11), it is difficult to discern who, in practice, will enforce such regulations. Often, veterinarians are ostracised for condemning conditions during a voyage.⁴² Additionally, the use of independent monitors or observers is not uniformly implemented: for example, in Australia, such observers are ‘only placed on some ships’. Additionally, since the advent of COVID-19, independent monitors in Australia stopped being used.⁴³ There should be a clear indication of who has the right to make orders regarding animals and no shipping should take place without such veterinarians and monitors.

2.14 **Provision of enforcement and penalties**

- a. There is no section focusing on penalties, civil liability and criminal liability for non-compliance. As it stands, there are no consequences for failing to comply with the Draft Guidelines.
- b. Thus, once these Guidelines are reclassified as regulations, a penalties and liabilities clause must be included. This clause must make the company liable in terms of civil law for the breaching of animal welfare standards. There must also be criminal liability for animal abuses as derived from s 2 of the APA; this can be evidenced through reporting and documentation by the independent monitors and veterinarians.
- c. Additionally, this clause must outline the consequences for the granting of permits in relation to non-compliance – permits must be refused or taken away from the company if any abuses are detected.
- d. Additionally, when criminal liability ensues via the APA, who must be charged? This needs to be laid out: are individual crew members charged or is the company charged? We believe liability should be on both.

2.15 **Environmental impact**

The impact that live exportation of animals has on the environment must be acknowledged by the delegated legislation and efforts must be made to minimise these adverse effects. The following must be taken into account – this list is not exhaustive:

- High levels of ammonia – which are often unregulated.⁴⁴

⁴² <https://kb.rspca.org.au/knowledge-base/what-are-the-standards-of-animal-welfare-onboard-live-export-ships/>

⁴³ https://www.zenger.news/2021/04/27/tech-could-end-live-export-monitors-australian-animals-body/?utm_source=rss&utm_medium=rss&utm_campaign=tech-could-end-live-export-monitors-australian-animals-body

⁴⁴ <https://www.animalsaustralia.org/features/more-reasons-to-ban-live-export.php#:~:text=This%20cruel%20trade%20is%20also,putting%20people%20at%20risk%20...&text=Hundreds%20of%20tonnes%20of%20sewage,sewage%20directly%20into%20the%20ocean.>

- Pollution: hundreds of tonnes of sewage can be produced daily by exporting vessels.⁴⁵
- Animal carcasses – when animals die on board and are thrown overboard, they might have an impact on the ecosystems and, particularly, on shark movements.⁴⁶ If diseased, they may affect aquatic animals.
- Exporters’ environmental obligations must be derived from existing environmental legislation in both South Africa and in international and foreign jurisdictions.

⁴⁵ *Id.*

⁴⁶ *Id.*

PART II: OTHER KEY JURISDICTIONS AS EXAMPLES WHY REGULATION DOES NOT WORK

1. Australia's Live Export Regulatory Framework

Australia is considered to have some of the most expansive live export regulatory schemes: however, even such laws have been unable to prevent the extreme cruelty and death that occurs within the live export industry. The RSPCA has highlighted the negative consequences of Australia's complex live export regulatory framework, from oversight and enforcement. Therefore, the Australian government is working on streamlining the live export regulation process.

Australia's live export trade is regulated by an intricate mix of Commonwealth legislative mechanisms under the Australian Meat and Livestock Industry Act 1997⁴⁷ (AMLI) and the Export Control Act 1982 (repealed March 2021 and replaced with the Export Control (Consequential Amendments and Transitional Provisions) Act 2020),⁴⁸ promulgated by the Australian Government Department of Agriculture, Water and the Environment (DAWE). The Commonwealth Navigation Act 1912 and state-based animal welfare legislation also affects the trade.⁴⁹ The Commonwealth Navigation Act, through Marine Orders, Part 43: Cargo and Cargo Handling – Livestock mandates sizes for animal enclosures, ways to inspect the animals, the possession of humane euthanasia tools, and reporting mortality rates to the ship's captain.⁵⁰

Further, the Export Control (Animals) Order 2004 (EC) (amended 2020) sets forth export conditions and requires the issuance of a livestock export license.⁵¹ Livestock that are exported must meet importing country requirements, such as pre-export quarantine or issuance of a health certificate.⁵² The EC was amended in 2018 to give the Secretary of DAWE power to put its departmental officers on-board live export ships to monitor conditions, which is now required on all live export ships by the government.⁵³

Companies wishing to purchase Australian live exports must adhere to the Australian Standards for the Export of Livestock (ASEL)(updated 2020) and have an approved Export Supply Chain Assurance System (ESCAS), which was put in place after the Australian government banned live exports in 2011.⁵⁴ The ESCAS requires the exporter to trace all of the animals' whereabouts through an independently-audited supply chain all the way until slaughter. Compliance is tracked through independent audits.⁵⁵ For example, the ASEL requires exporters report back to the DAWE if the "mortality rate exceeds 1% for cattle or 2% for sheep."⁵⁶

⁴⁷ <https://www.legislation.gov.au/Details/C2017C00013>

⁴⁸ <https://www.legislation.gov.au/Details/C2016C01063>

⁴⁹ <https://kb.rspca.org.au/knowledge-base/how-is-the-live-export-trade-regulated-in-australia/>

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

The RSPCA in Australia recently applauded New Zealand's decision to ban the export of live animals via sea due to animal welfare concerns, and implores Australia to do the same. However, the Australian government has said that it would not ban the trade, citing the profitability and economic gains of live export. We include below an extract of concerns by the RSPCA relating to the Australian framework:

2. **Australian Royal Society for the Prevention of Cruelty to Animals' (RSPCA) Concerns with Australia's Live Export Regulatory Framework**⁵⁷

- *It is not possible to 'regulate out' risks that are inherent to the trade. No amount of government regulation can overcome the inevitable welfare issues associated with the stress of prolonged transportation, changes in climatic conditions, and uncontrollable handling and slaughter practices in foreign jurisdictions.*
- *Stocking densities on-board vessels are too high and do not allow animals to lie down at the same time nor easily access food and water.*
- *There is no requirement for animals in foreign jurisdictions to be stunned before slaughter.*
- *The regulatory framework is fundamentally reactive in nature. While the ESCAS is a welcomed improvement, it operates primarily to monitor and detect breaches, not to prevent them. Detecting cruelty after it has occurred is of little benefit to the animals affected.*
- *The ASEL and ESCAS take the form of licence conditions rather than legislative provisions. This renders any requirement for compliance with the ASEL and ESCAS vulnerable to the discretion of relevant DAWE officers. A breach of the ASEL or ESCAS is not an offence in itself but a breach of a licence condition, which is ultimately left to DAWE to decide whether any action should be taken in response. If the ASEL or ESCAS were legislated any breach would constitute an offence of itself.*
- *There are fundamental limitations to any effort by the Australian Government to control the conditions of animal handling and slaughter in foreign jurisdictions.*
- *Accountability mechanisms, effected through the various reporting obligations under the ASEL and ESCAS, lack independence. Veterinarians operating under the ASEL and the independent auditors under the ESCAS are engaged and compensated directly by the exporter. The Farmer Review itself acknowledged incidents of undue influence being exerted by exporters over accredited vets but failed to recommend a change to the way their services are engaged.*
- *Sanctions for breaches of the ASEL and ESCAS have to-date been manifestly inadequate and have failed to act as a sufficient deterrent to neglecting animal welfare responsibilities.*

3. **New Zealand's Live Export Regulatory Framework**

As noted above, in April 2021, **New Zealand announced that it would phase out the export of live animals by sea over the next two years.** This landmark decision has been praised by animal welfare organisations and veterinary associations alike. New Zealand based its decision solely on animal welfare concerns. Despite the economic loss that will result from this decision, New Zealand has instead chosen to focus on doing what is right for animals and wants to maintain

⁵⁷ <https://kb.rspca.org.au/knowledge-base/how-is-the-live-export-trade-regulated-in-australia/>

its trade reputation around the world since it cannot properly regulate the animal welfare risks and catastrophic deaths that inevitably results from the live export trade.

New Zealand prohibits the export of livestock, which includes sheep, cattle, deer, and goat, for slaughter (exporters can apply for exception).⁵⁸ The Animal Welfare (Export of Livestock for Slaughter) Regulations 2016 mandates that no live animals may be exported for slaughter without the Director-General of the Ministry for Primary Industries' (MPI) approval. Approvals are granted only when there is risk management. The Animal Welfare Regulations mandate states:⁵⁹

Before departure:

MPI is regularly in touch with exporters to determine the health status of the animals and assess an application for the issue of an Animal Welfare Export Certificate.

Animals are preconditioned to the diet (dry pellet food) they will be fed on the voyage. Animals who are unlikely to successfully transition to the pellets are not selected for export.

MPI vets inspect all animals to ensure they are in good condition. The animals are only cleared to travel when the vet is satisfied they are fit to travel.

During the journey

MPI requires a range of measures to ensure the welfare of animals while they are being transported, including:

Animals must be given the right amounts of water, food, space and facilities. Medicines and equipment for treating any animals that become unwell during the journey must also be on hand.

People experienced in handling animals must be on board. For sea voyages, the minimum requirement is at least one experienced stockman per 1500 cattle and at least 2 experienced stockmen for a shipment of up to 60 000 sheep in addition to the crew of the vessel.

On arrival

- *MPI does not have jurisdiction and cannot require verification of animal welfare after the animals arrive. It is in the importer's best interests that the prime breeding stock remain in excellent condition so they can make a return on their investment.*
- *The exporter should provide a report to MPI on how the animals travelled within 20 working days of completion of the voyage.*
- *If MPI ever became aware of any information that contradicted information provided by the exporter – either in a voyage report or the stated purpose of the animals – this would be taken into account when applications for future exports are made.*

The above regulations were totally inadequate. In 2008, New Zealand banned the export of livestock for slaughter but allows exporting for breeding or dairy production.⁶⁰ As mentioned

⁵⁸ <https://www.mpi.govt.nz/export/animals/live-animals-including-livestock/requirement-documents-for-exporting-live-animals/animal-welfare-export-certificates/restrictions-on-exporting-livestock>

⁵⁹ <https://www.mpi.govt.nz/export/animals/live-animals-including-livestock/requirement-documents-for-exporting-live-animals/animal-welfare-export-certificates/live-sheep-and-cattle-exports/>

⁶⁰ <https://www.beefcentral.com/live-export/nz-announces-ban-on-live-cattle-exports-with-two-year-phase-out/>

above, in 2021, the country announced it would ban all live export of cattle by sea, with a two-year phase out period.⁶¹

Implementations of additional live export welfare standards in 2020 include:

focused maritime inspection of livestock carrier ships entering New Zealand;

restricting stocking density on vessels to 90 percent of former limits;

increased requirements for voyage reporting, including daily veterinary reports during voyages;

increased minimum fodder requirements that ensure at least 20 per cent of feed is available for unplanned delays during the voyage.

New Zealand conceded that even with its welfare protocols in place, it had no control of the welfare of the animal in its future destination. See footnote for an overview of New Zealand animal welfare laws and standards.⁶²

-----**END**-----

⁶¹ *Id.*

⁶² <https://www.mpi.govt.nz/legal/legal-overviews-legislation-standards/animal-welfare-legislation/>