

Policy and law reform advice to
Humane Society International Australia

Prepared by



**HUMANE SOCIETY
INTERNATIONAL**

and



Environmental
Defenders Office

NEXT GENERATION

Best Practice Wildlife Trade
Provisions in National Law

Bearded dragon

Wildlife trafficking is valued at up to \$213 billion USD annually, being the fourth most lucrative global crime

About Humane Society International:

Humane Society International (HSI) is a national and international conservation and animal protection NGO that specialises in the application of domestic and international environment law. Established in Australia in 1994, HSI works to change government conservation and animal protection policies and law for the better, while striving to enforce the effective implementation of those laws.

About the Environmental Defenders Office:

The Environmental Defenders Office (EDO) is the largest environmental legal centre in the Australia-Pacific, dedicated to protecting our climate, communities and shared environment by providing access to justice, running groundbreaking litigation and leading law reform advocacy.

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Best practice wildlife trade provisions in national law

Foreword	2
<hr/>	
1. Introduction	
1.1 Problem: Scale and impacts of wildlife trade	3
1.2 Solution: A strengthened legal regime	3
1.3 Summary of Recommendations	5
<hr/>	
2. A comprehensive legal framework	
2.1 Dedicated Part in the Legislation	7
2.2 National plans, standards and targets	7
2.3 Institutions	8
<hr/>	
3. Operational provisions	
3.1 Objects	9
3.2 Wildlife trade	
Prohibitions	9
The permit system	10
Conservation benefit test for non-commercial wildlife trade	12
Fit and proper person test	13
The non-detriment test	13
3.3 Export of wild-caught and wild-harvested specimens: Wildlife Trade Management Plans and Wildlife Trade Operations	15
3.4 Welfare	16
3.5 Import controls	
Origin and welfare of imported CITES Appendix I and II species	18
Trophy hunting ban	19
3.6 Domestic trade	
Establish a domestic trade ban on ivory and rhinoceros horn	21
3.7 Fisheries	
Accreditation and compliance	23
Shark fin trade	24
3.8 Compliance and enforcement	
Compliance and enforcement review	27
Internet trading	29
Sentencing guidelines for wildlife trade offences	29
3.9 Accountability, transparency and public consultation	
Public consultation	33
Advisory bodies	33
Public registers	33
Third party merits appeals and civil enforcement	33
Open standing to seek review of legal errors and enforce breaches	34
<hr/>	
Appendix: Current structure of Part 13A of the EPBC Act	36

Foreword

The commercial trade in wild animals is a multibillion dollar industry that threatens the survival of many species and results in the inhumane treatment of countless animals every year. Humane Society International is opposed to the commercialisation of wildlife because it is a key driver of species endangerment and animal cruelty.

This report proposes stronger measures for wildlife trade in Australia's legal regime to minimise these risks.

Critical recommendations of this report include the application of more rigorous non-detriment tests for commercial trade, a robust conservation benefit test for trade to be eligible to be treated as non-commercial and for the welfare of individual animals to be given primary consideration as part of any wildlife trade approvals.

This report is intended to be read as a companion to the EDO NSW and Humane Society International Australia 2018 report *Next Generation Biodiversity Laws—Best practice elements for a new Commonwealth Environment Act*.

Wildlife trafficking is valued at up to \$213 billion USD annually, being the fourth most lucrative global crime



1. Introduction

1.1 The problem: Scale and impacts of wildlife trade

Wildlife trade—both regulated and illegal—is a lucrative global business that generates billions of dollars putting at risk the conservation and welfare of the wildlife being exploited. Australia’s unique and spectacular biodiversity is a highly sought after commodity.

With a value of between \$70 billion and \$213 billion USD each year¹ illegal wildlife trafficking is the fourth most lucrative global crime after drugs, human and arms trafficking. As well as being devastating for wildlife conservation and the animals involved, the trafficking of wildlife has been recognised as a specialised area of organised crime with links drawn between illegal wildlife trade and professional criminal groups involved in drug trafficking, human trafficking, terrorism, or other transnational offences.²

For more than 40 years—from the original Customs Regulation, the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*, the *Environment Protection and*

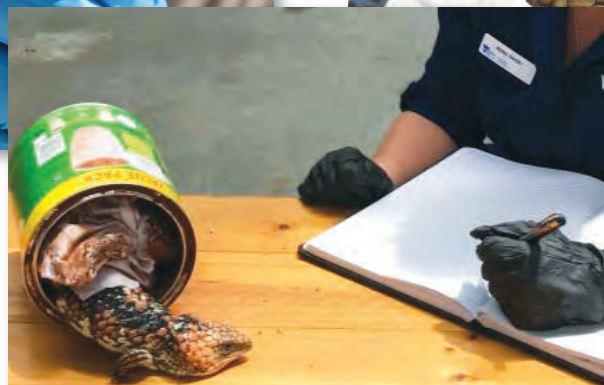
Biodiversity Conservation Act 1999 (EPBC Act), the 2001 EPBC Act wildlife trade amendments, to the Hawke Review of the EPBC Act—the legal and illegal international wildlife trade has become an intractable conservation problem, on a scale that is now almost incomprehensible. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) identified the direct exploitation of wildlife as the second of five key drivers of global changes in nature and in the marine ecosystem it is the number one driver.³

Both illegal and unsustainable, poorly regulated legal trade are driving the problem. All too often, the legal, international wildlife trade provides cover for the illegal trade in wildlife. In addition to the devastating impacts of illegal trade on certain targeted species, the legal wildlife trade is actually undermining, rather than assisting, wildlife conservation. Trading in live animals or their body parts is also a serious animal welfare concern.

1.2 The solution: A strengthened legal regime

As a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (CBD), Australia has obligations to conserve biodiversity and implement an effective scheme for regulating the export and import of wildlife as a core objective. It is also in Australia’s own interest to ensure we are protecting our biodiversity assets for now and for future generations.

These obligations are currently implemented by the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, which regulates wildlife trade and related issues (see **Box 1** and the **Appendix**). Issues related to wildlife trade are also regulated under fisheries, forestry and biosecurity legislation.



Wildlife is often found (usually in poor health) inside toys, food containers and appliances.

- 1: Western Australia Police
- 2: Parks and Wildlife (top right)
- 3: Victorian Government (bottom)

¹ Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds). 2014. The Environmental Crime Crisis—Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources. A UNEP Rapid Response Assessment. United Nations Environment Programme and GRID-Arendal, Nairobi and Arendal, www.grida.no

² UNODC, World Wildlife Crime Report: Trafficking in protected species, 2016. Available at: https://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf

³ Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the work of its seventh session, Paris 29 April–4 May 2019. Available at: https://www.ipbes.net/system/tdf/ipbes_7_10_add.1_en_1.pdf?file=1&type=node&id=35329 (Pg 5).

Box 1: Snapshot of the current approach to wildlife trade regulation under Part 13A EPBC Act

The basic approach currently taken to regulating wildlife trade under Part 13A of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* is:

- Species listed in **CITES Appendices I, II and III** are regulated under one set of provisions, and ‘**regulated native specimens**’ (which includes all other native wildlife, other than wildlife on the list of exempt native specimens) is regulated under another;
- Trade in certain native wildlife is **not regulated** if the species is included on the list of exempt native specimens;
- The export of **live mammals, reptiles, birds and amphibians** is prohibited for commercial purposes for both CITES species and regulated native specimens—export of such live animals is, however, permissible for specified non-commercial exports;
- Commercial exports of **wild-caught or harvested** specimens is only permissible for CITES II and III species and regulated native specimens that are not threatened species (except conservation dependent). However, in both cases such exports are only permissible for specimens taken under an approved or accredited Wildlife Trade Management Plan or approved Wildlife Trade Operation;
- **Commercial exports** of all species can be permissible if the specimen is derived from an approved breeding/propagation program. In the case of CITES II and III species and regulated native specimens, commercial exports may also be sourced from approved cultivation programs. Regulated native specimens (including threatened species) may also be sourced from approved aquaculture programs; and
- There are discrete **exceptions** to this general approach, for example, in relation to an exchange of scientific specimens of non-CITES species between scientific organisations and in relation to the powers to grant permits in ‘exceptional circumstances’ or to the Secretary of the Department in relation to either education/training or enforcement under CITES.

While Australia has had laws in place to regulate wildlife trade for decades, the laws have been gradually weakened, and their effectiveness called into question. At the same time, illegal wildlife traders are innovating and exploiting new technologies. The need for environmental law reform at the national level is clear so that it remains responsive and keeps up with the pace of both the demand and the technology that facilitates it.

Our *Next Generation Biodiversity Laws* report⁴ outlines that Australia needs a new Environment Act given the limitations of the EPBC Act to adequately protect and conserve biodiversity. This paper specifically addresses the regulation of wildlife trade and identifies core provisions that should be retained, those that should be strengthened and new provisions for a revised Act. The recommendations in this report are for best-practice critical provisions that should be in a new Act, or at the very least incorporated into the EPBC Act while a new Act is being developed.

Enforcement of the wildlife trade provisions of the EPBC Act is the joint responsibility of the Commonwealth Department of Environment and Energy and Australian Border Force (formerly Australian Customs and Border Protection Services). The Australian National Audit Office conducted an audit⁵ in 2015 to assess the effectiveness of the enforcement of these provisions. The recommendations of this report also incorporate outstanding recommendations from that audit.

Given the scale of the problem and our national obligations, national legislation must more effectively protect Australia’s wildlife from illegal trade and unsustainable commercial exploitation and the animal welfare risks involved.

This paper proposes changes to the current system to create better protection for biodiversity threatened by wildlife trade both in Australia and elsewhere, and to enhance animal welfare protections.

The current lack of a strategic approach to wildlife trade should be remedied with a new national environment Act (or amendments to the EPBC Act) to create clear objectives for the regulation of wildlife trade, to create strategic planning for the trade within the context of broader planning for biodiversity conservation and recovery, and to reform institutions to ensure that they can function consistently with the intent of CITES and CBD.

The current permit system should be refined, including through a more consistent and rigorous application of the **non-detriment test**.

We also propose amendments to close loopholes which have enabled the more permissive category of **non-commercial exports** (which allows the export of live animals) to be misused to facilitate exports which are wholly or partially commercial in nature. In addition, we propose a strict **conservation benefit test** to be applied to all non-commercial wildlife trade.

Measures to enhance protection for animal welfare throughout the wildlife trade chain are also proposed.

Measures are proposed to help reduce the critical threats being faced by wildlife in other countries including total import bans for certain species and certain hunting trophies. For some specimens—notably ivory and rhino horn—this should also be supported by domestic trade restrictions.

⁴ EDO NSW and Humane Society International Australia, *Next Generation Biodiversity Laws—Best practice elements for a new Commonwealth Environment Act (2018)*, Humane Society International Australia Ltd, Sydney https://hsi.org.au/uploads/publication_documents/HSI_EDO_Next_Generation_Report_WEB.pdf

⁵ Auditor-General ANAO Report No. 7 of 2015-16, *Performance Audit, Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*, available at: https://www.anao.gov.au/sites/default/files/ANAO_Report_2015-2016_07.pdf

We identify measures and regulatory amendments that are needed in relation to wildlife trade involving fisheries. Finally, we propose a modern and effective suite of compliance and enforcement powers to ensure that these laws can be meaningfully enforced and a new approach to sentencing to ensure that criminal sanctions are an effective deterrent, given the lucrative nature of the illegal wildlife trade. We propose transparency measures to incentivise

better decision making through oversight, expert advice, public reporting and appropriate avenues for legal challenge. This report focuses on the role of next generation biodiversity legislation, and builds on recommendations made in the HSI/EDO *Next Generation Biodiversity Laws Report: Best practice elements for a new Commonwealth Environment Act*.⁴

1.3 Summary of Recommendations

The key recommendations for best practice wildlife trade provisions in national environmental legislation are:

National environmental legislation has an explicit dedicated Part for regulating wildlife trade.

Establish a requirement in the legislation to develop a **National Environment Plan** that includes a goal relating to regulation of wildlife trade consistent with the implementation of international obligations.

Ensure legislation provides for the making and/or accreditation/approval of a range of subordinate plans—**environment plans**—including for wildlife trade and fisheries management. The process for making these plans must include public consultation.

Establish a process in the legislation to set **national standards and targets**.

Include provisions in the legislation to ensure the independence of the Scientific Authority with wildlife trade specific review and advice functions.

Strengthen legislation to include specific objects relating to wildlife trade.

Establish clear rules on what species and specimens cannot be imported or exported. This would include:

- Retaining the existing prohibition on commercial trade in live native mammals, reptiles, birds and amphibians;
- An express prohibition on the import and export of certain live threatened species, including elephants.

Classify exhibition and travelling exhibition as a commercial purpose and more strictly define what qualifies as a non-commercial purpose.

Establish a clear conservation benefit test for non-commercial wildlife trade activities.

Establish a fit and proper person test for applicants.

Continue to implement stronger domestic measures to require non-detriment findings for both export and import permits for Appendix I, II and III species.

Establish a stronger non-detriment test which considers impacts on the conservation status and recovery of species.

Require that a statutory guideline be approved to establish a consistent, rigorous approach to how non-detriment and conservation benefit assessments are to be undertaken.

Strengthen assessment requirements prior to approval of Wildlife Trade Management Plans (WTMPs) to make it a more objective process, rather than subject to Ministerial discretion. Specify what plans must contain and objective criteria that need to be met.

The approval and accreditation of WTMPs and approval of Wildlife Trade Operations (WTOs) (and any renewal or extension) should be a function exercised only with the concurrence of the Scientific Authority (as the scientific experts on the impacts of wildlife trade).

Maintain and publish a register of all plans, variations and conditions. Expand the register to include data in a consistent format about the location and numbers of specimens taken.

Allow third party review of decisions to approve/accredit both WTMPs and WTOs.

Build welfare considerations into the non-detriment test for permits, WTOs and WTMPs for all animal species, including fish.

Build animal welfare criteria into the process for approving captive breeding and aquaculture programs, including third party expert welfare risk assessments, consistent with any Constitutional limitations.

Base the welfare criteria applying to live exports and imports on the five freedoms, to ensure that the needs for the animals are fully met and ensure that suffering is prevented or minimised to the greatest extent possible.

Ensure that the welfare and suffering of animals is more clearly integrated into considerations relevant to sentencing for offences involving illegal wildlife trade.

Establish more rigorous checks on the origins of CITES Appendix I species subject to import applications (including information such as the legal acquisition in the country of origin and status of captive breeding claims).

Retain and broaden 'Stricter domestic measures' provisions. These provisions should be used to create a trophy hunting import ban that is extended to species listed on Appendix I or II of CITES and other critically endangered, endangered and vulnerable species as listed by IUCN including rhinos, leopards, giraffes and elephants.

Amend the provisions regulating exports of both CITES species and regulated native specimens to prohibit the export of trophies from native animals.

The States, Territories and Commonwealth work together to effect a consistent national ban on domestic ivory trade with strictly limited exemptions.

The Minister should be required to act consistently with all relevant recovery plans, threat abatement plans and conservation advice in deciding whether to approve a WTO.

All fisheries currently included on the List of Exempt Native Specimens (LENS) in the absence of an approved WTO must be required to secure approval of a WTO within the life of their current LENS listing.

The right to seek review by the Administrative Appeals Tribunal (AAT) of decisions to approve WTOs for commercial fisheries must apply to all decisions, including decisions made personally by the Minister.

Approval of WTOs should be limited by the requirement that all conditions of any previous WTO for the same fishery have been complied with, or if not, that there is a plan in place to achieve compliance with any outstanding conditions.

All WTOs must include a condition requiring annual reporting, based on an independent audit, against consistent criteria which demonstrate that conditions are being complied with and that the fishery is being conducted in a sustainable way.

The legislation should prohibit the import of shark fins (unless naturally attached to a shark), prohibit the granting of export permits for shark fins (unless naturally attached to a shark) and provide that the LENS must not include an entry allowing the export of shark fins unless they are naturally attached to the shark.

Establish a national traceability system, which requires shark fins to be accompanied by information demonstrating its lawful provenance from the time of landing to the point of final sale or export.

All WTOs should be subject to the condition requiring that the fisheries rules must:

- prohibit the removal of shark fins on a vessel;
- prohibit the possession of shark fins not naturally attached to a shark on a vessel;
- require logbooks of shark catch with identification down to the species level;
- require quarterly reporting of catches from logbook data; and
- require participation in the national traceability scheme.

Legislate the full range of best practice investigation and enforcement powers for officers under national environmental legislation.

Strengthen requirements for vendors and online sales platforms to provide proof of an item's legality when offering it for sale on the internet. Update offence provisions to more comprehensively cover potentially unlawful internet trading.

No live animals should be traded on the internet due to welfare implications for all native wildlife and species listed on Appendices I or II or IUCN listed species.

High maximum penalties should be retained (at least equivalent to the EPBC Act) while penalties under the associated Regulation should be increased to provide appropriate incentives and deterrence for mid-tier compliance.

Establish a new provision to the effect that a sentencing court should consider a number of additional factors, in addition to the factors in section 16A(2) of the *Crimes Act 1914*.

Provide for public consultation on permit applications and applications for approval/accreditation of WTOs and WTMPs. This includes public consultation on permit applications by Australian zoos.

Establish a Wildlife Trade Advisory Group, with expert membership and a remit to review and advise on wildlife trade issues.

Maintain public registers of approved wildlife trade permits, Wildlife Trade Operations and Wildlife Trade Management Plans.

Restore merits review rights for third parties for wildlife trade decisions made by the Minister and by delegates.

Ensure legislation provides for open standing for third party civil enforcement by community members, including orders for injunctions, declarations and compensation.

2. A comprehensive legal framework

This section addresses the need for a comprehensive legal framework in terms of:

- A dedicated Part in the Legislation
- National plans, standards and targets
- Institutions

2.1 Dedicated Part in the Legislation

International wildlife trade is clearly an issue of national responsibility, given Australia's international obligations. Wildlife trade is currently regulated by a separate Part of the EPBC Act, namely **Part 13A – International movement of wildlife specimens** (see **Box 1** and **Appendix 1**).

All international wildlife trade (regardless of its scale) is covered by these provisions. This is in contrast to many other international obligations implemented by the EPBC Act, which are delivered through environmental assessments of actions likely to have a *significant impact* on matters of national environmental significance—a test which typically excludes smaller or incremental impacts.

All international wildlife trade activities should continue to be subject to an explicit and comprehensive part of relevant national environmental legislation—whether a strengthened Part 13A, or a new part in a new Environment Act. We note there may be some constitutional limits on federal involvement in interstate (domestic) wildlife trade and suggest mechanisms to address this, but strong national leadership is critical.

The dedicated part should include best practice provisions for the following:

- Clear objects
- Strengthened provisions for prohibiting certain trade

- Rigorous and transparent electronic permit system for exports and imports
- A strengthened non-detriment test for all permits and other trade-related authorisations
- A conservation benefit test for non-commercial trade
- A fit and proper person test
- An extended trophy hunting ban
- A domestic ban on ivory trading and rhino horn
- Accreditation of fisheries
- Clear offence provisions and sentencing guidelines
- Comprehensive public consultation requirements, including for zoos
- Enhanced animal welfare provisions
- Third party review powers, with open standing

We note that related amendments may need to be made to other parts, divisions and regulations as needed.

Recommendation

National environmental legislation has an explicit dedicated Part for regulating wildlife trade.

2.2 National plans, standards and targets

Our *Next Generation Biodiversity Laws* report proposes that a new Environment Act for Australia would establish new requirements for an overarching national environment plan including specific targets, and national standards.⁶

These new legislative mechanisms should be applied to the issue of wildlife trade, to create clear targets and strategies to ensure that Australia complies with its international obligations to protect our biodiversity (and that of other countries) from the threat of wildlife trade and to create clear guidance for decisions made in the operational provisions (e.g. import and export permits).

To provide effective national leadership, legislation should require development of a **National Environment Plan** that includes a goal relating to regulation of wildlife trade; reducing or ending trade of certain species and/or products; and improving data, compliance and enforcement (as identified by the Australian National Audit Office⁷). Accreditation of subordinate **environment plans**—for example for wildlife trade and fisheries management—would set national standards and targets and ensure that they are effectively implemented and achieved.

Examples of **national targets** could include to:

- end the domestic trade in, and unlawful import of, ivory products and rhino horn by 2021;

- end the importation of hunting trophies of CITES Appendix I and II listed species and IUCN listed species by 2020; and,
- Achieve an 80% reduction in unlawful internet-based wildlife trade involving Australian buyers or sellers by 2025, with a view to ultimately ending internet-based unlawful wildlife trade.

Recommendations

Establish a requirement in the legislation to develop a **National Environment Plan** that includes a goal relating to regulation of wildlife trade consistent with the implementation of international obligations

Ensure legislation provides for the making and/or accreditation/approval of a range of subordinate plans—**environment plans**—including for wildlife trade and fisheries management. The process for making these plans must include public consultation.

Establish a process in the legislation to set **national standards and targets**.

⁶ Humane Society International & EDO NSW, *Next Generation Biodiversity Laws: Best Practice Elements for a Commonwealth Environment Act*, p 28.

⁷ Auditor-General ANAO Report No. 7 of 2015-16, *Performance Audit, Managing Compliance with the Wildlife Trade Provisions of the Environment Protection and Biodiversity Conservation Act 1999*, available at: https://www.anao.gov.au/sites/default/files/ANAO_Report_2015-2016_07.pdf

2.3 Institutions

CITES requires parties to nominate a Management Authority and a Scientific Authority.⁸

In broad terms the Management Authority is responsible for the administration of the licensing system (i.e. the grant of import and export permits or similar authorisations) while the role of the Scientific Authority is to advise the Management Authority on the effects of trade and the status of species. The Scientific Authority has a key role in advising the Management Authority in relation to the preparation of non-detriment findings (discussed further below) and in monitoring the grants of export permits and their effects across the range of relevant species.⁹

There are a number of advantages, in terms of oversight, independence, expertise, transparency and science-based decision-making, of a system which separates the day-to-day administration of a permit system from the agency tasked with providing scientific advice to inform decision-making and scientific oversight of the outcomes of the permit system. These may be among the reasons for the Conference of the Parties to CITES resolving to recommend that the Scientific Authority and the Management Authority be independent.¹⁰ Despite this resolution, Australia has designated the federal Department of the Environment and Energy to be both the Scientific Authority and the Management Authority.¹¹

It is essential that the governance of the Management Authority and Scientific Authority is independent to better perform the role envisaged under CITES. This may require institutional reform.

The powers of the Scientific Authority should be set out in legislation and should be commensurate with CITES including:

- Requiring the Management Authority to seek the advice of the Scientific Authority in applying the non-detriment test in permit applications and decisions in relation to Wildlife Trade Operation and Wildlife Trade Management Plans, and to act consistently with that advice;
- Requiring the Scientific Authority to conduct and make publicly available regular reviews of the permits, Wildlife Trade Management Plans and Wildlife Trade Operations (see discussion below) and their implications for the conservation status of the relevant species as well as their ecosystems;
- Requiring the Scientific Authority to review the conditions imposed on permits against outcomes achieved (including in relation to animal welfare) and, if necessary, recommend to the Management Authority that permits be amended; and
- Requiring the Minister to consult with the Scientific Authority before deciding to place a species on the list of exempt species.

Recommendation

Include provisions in the legislation to ensure the independence of the Scientific Authority with wildlife trade specific review and advice functions.



⁸ Article IX Convention on International Trade in Endangered Species of Wild Fauna and Flora

⁹ Ibid, Article IV.

¹⁰ CITES Resolution Conf. 10.3 (Designation and the role of Scientific Authorities): <https://www.cites.org/sites/default/files/document/E-Res-10-03.pdf>

¹¹ See EPBC Act section 303CL, which designates the Minister as the Management Authority and the Secretary of the Department as the Scientific Authority.

3. Operational provisions

This part of the report identifies the core operational provisions that must be in national environmental legislation to effectively regulate wildlife trade. We note that further requirements will need to be set out in regulations and subordinate instruments.¹² Best practice operational provisions are proposed in relation to:

- **Objects**
- **Wildlife trade**
- **Export of wild-caught and wild-harvested specimens: Wildlife Trade Management Plans and Wildlife Trade Operations**
- **Welfare**
- **Import controls**
- **Domestic trade**
- **Fisheries**
- **Compliance and enforcement**
- **Accountability, transparency and public consultation**

3.1 Objects

The current Part 13A of the EPBC Act contains objects specific to the Part (see s303BA). These are useful for indicating the intent of the Part, but need to be clarified, strengthened and actively operationalised by decision-makers applying the legislation.

Legislation should include requirements for relevant decision-makers under the Part to exercise their powers and make decisions *consistent* with the objects. (Requiring consistency with the objects is a higher standard than requiring decision-makers to simply “have regard to” objects).

Consistent with our proposal for strengthened primary objects of the Act,¹³ legislation should be strengthened to include specific objects relating to wildlife trade including:

- To ensure that Australia complies with obligations under the Convention on International Trade in Endangered Species (CITES) and the Convention on Biological Diversity (CBD), and wildlife provisions of any relevant international trade agreements and conservation treaties;
- To protect wildlife that may be adversely affected by trade, and to prohibit certain trade;
- To ensure the conservation of biodiversity in Australia, and support international efforts to conserve and protect biodiversity;

- To ensure the humane treatment of wildlife;
- To ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed to ensure no detriment to the species’ conservation status and its ecosystem;
- To ensure non-commercial trade has a demonstrated conservation benefit for that species;
- To ensure any person or entity engaging in wildlife trade is a fit and proper person/entity;
- To ensure Australian fisheries are managed in an ecologically sustainable way through accreditation; and
- To ensure that the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.

Recommendation

Strengthen legislation to include specific objects relating to wildlife trade

3.2 Wildlife trade

This section focuses on strengthening:

- **Prohibitions**
- **The permit system**
- **Conservation benefit test for non-commercial trade**
- **The fit and proper person test**
- **The non-detriment test**

Prohibitions

The EPBC Act does currently contain prohibitions, for example, commercial trade in live native mammals, reptiles, birds and amphibians is prohibited. However, the legislation does not always provide outright prohibitions, but rather a prohibition applies in the absence of a permit or approved wildlife plan.

Specifically, the commercial export of live native wild mammals, reptiles, birds and amphibians is currently

prohibited¹⁴, however, non-commercial exports are permissible for specified purposes (and subject to other limitations). The import of live animals (and plants) is currently regulated by the list of specimens suitable for live import under s303EB which identifies species which may be imported without a permit and species which may be imported with a permit (the import of other live species is not permissible).¹⁵

¹² This part focuses on CITES obligations. Discussion of obligations under other trade agreements and treaties has not been undertaken for this part.

¹³ As recommended in the HSI/EDO *Next Generation Biodiversity Laws Report*.

¹⁴ EPBC Act s303CH (in relation to CITES species) and s303DG(3) (in relation to regulated native specimens); see also the *List of Exempt Native Specimens Instrument 2001* (which does not exclude any live mammals, birds, amphibians or reptiles from export controls).

¹⁵ EPBC Act ss303EA (definition of ‘regulated live specimen’), 303EB(2), 303EK (offence) and 303EN(3)(c).

As noted in the introduction, trade will often undermine conservation efforts. There are a number of current approaches that are established to ensure that trade is not detrimental to a species or taxon, however—as discussed later in this report—the current non-detriment tests are insufficient to adequately address cumulative impacts of trade. There are some species such as elephants^{16,17} that simply should not be traded due to the animal welfare and conservation risks involved, other than under exceptional circumstances, and only when a very clear conservation benefit test has been satisfied. (This is discussed further below).

To provide certainty on this issue, there should be clearer prohibitions in legislation, and a tightening of permit requirements.

Recommendation

Establish clear rules on what species and specimens cannot be imported or exported. This would include:

- Retaining the existing prohibition on commercial trade in live native mammals, reptiles, birds and amphibians;
- An express prohibition on the import and export of certain live threatened species, including elephants.

The permit system

Part 13A of the EPBC Act sets out a system for import and export permits, with offence provisions relating to carrying out wildlife trade activities without a permit or other exception.¹⁸

There are a number of different avenues to qualify for export and import permits, depending for example upon which

CITES Appendix the species appears in, whether the species is a threatened species, whether the proposed import/export is commercial or non-commercial, whether the specimen was wild-caught (animals) or wild-harvested (plants) and whether the export or import is of a live specimen.

One common requirement for all permits is a non-detriment finding—i.e. that the trading activity will not be detrimental to the survival of that species—the strengths and weaknesses of which are discussed below.

Commercial exports

The commercial export of CITES species must be authorised by a permit¹⁹, which can only be issued in the case of CITES Appendix I species for specimens resulting from a CITES registered captive breeding program or an approved artificial propagation program. For CITES Appendix II and III species, permits may be issued for specimens derived from an **approved** wildlife trade management plan, **approved** wildlife trade operation or an approved captive breeding, artificial propagation or cultivation program.²⁰

In the case of regulated native specimens, a commercial export must be authorised by an **accredited** wildlife trade management plan²¹ or a permit. However, permits may only be granted for specimens from an approved captive breeding, artificial propagation, aquaculture or cultivation program or, in the case of specimens that are not listed threatened species (excluding conservation dependent species), from an approved wildlife trade operation or approved wildlife trade management plan.²²

Permissible categories of commercial exports are set out in **Table 1** below.

Table 1: Currently permissible categories of commercial exports

CITES I	CITES II and III	Regulated native species (not threatened)	Regulated native species (threatened)
CITES-Registered captive breeding program	Approved captive breeding program	Approved captive breeding program	Approved captive breeding program
Approved artificial propagation program	Approved artificial propagation program	Approved artificial propagation program	Approved artificial propagation program
	Approved cultivation program	Approved cultivation program	Approved cultivation program
	Approved Wildlife Trade Operation	Approved aquaculture program	Approved aquaculture program
	Approved Wildlife Trade Management Plan	Approved Wildlife Trade Operation	
		Approved Wildlife Trade Management Plan	

¹⁶ See, for example, Clubb R, Rowcliffe M, Lee P, Mar K, Moss C and Mason G, 2008, Compromised Survivorship in Zoo Elephants, Science, Vol 322, Issue 5908, pp 1649, which found that elephants in zoos have half the median life span of conspecifics in protected populations in range states. See also CITES information document SC69 Inf. 36 (found here: <https://cites.org/sites/default/files/eng/com/sc/69/inf/E-SC69-Inf-36.pdf>) which found that zoos were not suitably equipped to house and care for live, wild-sourced African elephants

¹⁷ This would be consistent with CITES Resolution Conf. 11.20 (rev. COP 18). “AGREES that where the term 'appropriate and acceptable destinations' appears in an annotation to the listing of *Loxodonta africana* in Appendix II of the Convention with reference to the trade in live elephants taken from the wild, this term shall be defined to mean in-situ conservation programmes or secure areas in the wild, within the species' natural and historical range in Africa, except in exceptional circumstances where, in consultation with the Animals Committee, through its Chair with the support of the Secretariat, and in consultation with the IUCN elephant specialist group, it is considered that a transfer to ex-situ locations will provide demonstrable in-situ conservation benefits for African elephants, or in the case of temporary transfers in emergency situations”

¹⁸ For example, the offences of exporting and importing CITES specimens (which include CITES Appendix I, II and III species) are contained in sections 303CC and 303CD (respectively) of the EPBC Act. The exceptions to these include a permit under section 303CG, and also include permits issued under s303GB and 303GC, however, as those provisions apply only in the limited circumstances of permits granted in exceptional circumstances and to the Secretary of the Department. Similarly, the offence of exporting a regulated native specimen (which includes any native species not on the list of exempt native specimens) is contained in s303DD of the EPBC Act. The exceptions to this offence include a permit under one of ss303CG, 303DG, 303GB or 303GC or an accredited wildlife trade management plan under s303FP.

Non-commercial exports and imports: eligible non-commercial purposes

The non-commercial export of both CITES and non-CITES species is limited to a number of purposes.

Permits for the export of both CITES species and other regulated native species (other than threatened species) may be issued for an “eligible non-commercial purpose”²³ which is defined by section 303FA of the EPBC Act as including the following purposes:²⁴ research,²⁵ education,²⁶ exhibition,²⁷ conservation breeding or propagation,²⁸ household pet,²⁹ personal item,³⁰ or travelling exhibition.³¹

Permits for the non-commercial import of CITES species are limited to ‘eligible non-commercial imports’, which includes the same list of purposes.³²

Permits for the export of non-CITES native species which are threatened species (other than conservation dependent species) are available for a more limited list of purposes, being research, education, exhibition or conservation breeding or propagation.³³

The current ‘exhibition’ purpose is providing a serious loophole as discussed in **Box 2** and **Case Study 1**.

Box 2: Non-commercial purpose: exhibition and travelling exhibition

Eligible non-commercial purpose export is defined under the EPBC Act as an export for the purposes of research under 303FC, education under 303FD, exhibition in accordance with 303FE, conservation breeding or propagation under 303FF, household pet under 303FG, personal item under 303FH or travelling exhibition under 303FI. Eligible non-commercial purpose imports have a corresponding definition. While the majority of these purposes are defined in a relatively strict way, ‘exhibition’ and ‘travelling exhibition’ are not.

The scope of what will constitute ‘exhibition’ is defined by s303FE, which provides that ‘exhibition’ includes a zoo or menagerie and that an import/export will be for the purposes of exhibition if the specimen will be used for the purposes of exhibition, the import is not primarily for commercial purposes and any conditions set in the regulations are complied with. The additional conditions are set in s9A.11 of the EPBC Regulations, which includes

requirements that the exhibition presents information with a cultural, scientific or conservation content and that the specimen is not used primarily for commercial purposes after it is no longer needed for exhibition by the institution.

While the requirement that animals not be used for commercial purposes when no longer needed for exhibition is necessary, it is difficult to enforce in practice. There is no conservation benefit requirement.

The scope of what will constitute a ‘travelling exhibition’ is defined in s303FI of the Act and s9A.15 of the Regulations which require that the export/import not be primarily for commercial purposes, that the travelling exhibition presents information in a cultural, scientific or conservation context and that the specimen (and any progeny) are subsequently exported/imported.

Case Study 1: Parrot Exports to Germany

In 2015, a permit issued to export 232 parrots to a German organisation, the Association for the Conservation of Threatened Parrots (ACTP), was approved. This constituted more than 80% of all the live native birds legally exported from Australia during that same period. Species exported include the Baudin’s black cockatoo, which is nationally listed as vulnerable, endangered Carnaby’s black cockatoos, sulphur-crested cockatoos, and purple-crowned lorikeets.

The permit was granted on exhibition grounds; however the organisation has no premises open for public viewing, nor is ACTP registered with any major international zoological association. The ACTP premises are located 30km out of Berlin, and the owner does not advertise its location or display any kind of signage or indication that it is open to the public for visitation.

The owner, Martin Guth, is reported in the press to have been convicted of kidnapping, fraud and extortion offences. An ACTP facility in Denmark is run by a bird collector reported in the press to have been convicted of involvement in a trading ring illegally selling protected birds.

Many of the exported birds have been put up for sale by ACTP—which is in direct contravention of the export permit. In October 2017, a co-director of ACTP claimed he was the first person to breed purple-crowned lorikeets in Denmark, despite the fact that the permit granted to ACTP prohibited the transfer of the birds to any other facility that wasn’t registered as a zoo.

At the time of writing, the exporter’s permit has not been revoked and native parrots have continued to be exported to Germany as recently as November 2018. Senate estimates in February 2019 revealed that the federal environment department had not investigated the facility in person, and does not know whether the exported birds remain at the German ACTP facility.

This case study provides an example of where a ‘conservation benefit’ test and the application of a ‘fit and proper person’ test would have applied more rigour to the export approval process.

¹⁹ Subject to exceptions, including for personal or household effects and specimens certified as having been acquired prior to the provisions of CITES applying to the specimen (s303CC(4) – (6)) and for registered non-commercial exchanges of scientific specimen (s303CC(3)).

²⁰ In relation to the export of CITES specimens, see EPBC Act ss303CH and 303CG(3)(e).

²¹ Section 303DD(3) of the EPBC Act has the effect that an accredited wildlife trade management plan is an exception to the offence of exporting a regulated native specimen.

To address these loopholes, display and exhibition should be more accurately classified as commercial purposes in legislation (and therefore subject to the rules applying to commercial exports, including certain prohibitions on live exports).

If exhibition is to remain a commercial purpose, there are a number of not necessarily mutually exclusive options, that should be considered for inclusion either in new national environmental legislation or amendments to the EPBC Act to limit the concept of 'exhibition' and 'travelling exhibition' in order to exclude less reputable operations and operations which may launder specimens or subsequently bred specimens for commercial trade, through an exhibit in order to later sell them. These include requiring that:

1. The specimen, subsequently bred specimens and their progeny, must be retained in a public exhibition, or transferred to another public exhibition or accredited sanctuary,³⁴ for the balance of their life;
2. The organisation which owns, operates or manages the exhibition (or which will own or have custody of the specimen): (a) does not engage (or have a related entity that engages) in the commercial sale of any wildlife and (b) has not been prosecuted or fined for a wildlife trade offence in its home jurisdiction or in Australia;
3. The definition of exhibition be strictly limited to organisations which have education or research to directly assist conservation of the species in the wild as their primary goal (with those terms defined to exclude general public awareness raising from the concept), and can demonstrate that the management of the exhibition is consistent with those goals; and
4. An additional criteria should be added to the concept of exhibition, as it applies to live specimens, to provide that the exhibition must produce a conservation benefit to the particular species. Conservation benefit should be defined to include tangible benefits such as scientific research directed to the survival of the species in the wild or to produce specimens for use in internationally recognised programs to (re-)introduce to the wild, without negative impact to the welfare of the exported individual(s).

Recommendation

Classify exhibition and travelling exhibition as a commercial purpose and more strictly define what qualifies as a non-commercial purpose.

Conservation benefit test for non-commercial wildlife trade

Measures should be put in place to ensure that exports and imports for non-commercial purposes are limited to purposes which provide a clear benefit to the species being traded. In that regard it is proposed that, in addition to the non-detriment test discussed below, non-commercial wildlife trade should be subject to the additional requirement that a demonstrated conservation benefit will be derived from the proposed non-commercial trading activity. Such a **conservation benefit test** would better encompass the aims of Part 13A of the EPBC Act and would be used when conservation or non-commercial reasons are cited as a reason for the trade. There are legal precedents for this type of test—for example that an activity must “maintain or improve” native vegetation, or that an activity has a “neutral or beneficial impact” on water quality³⁵.

The onus would be on the applicant to demonstrate their proposed activity meets the non-detriment test (discussed below) and conservation benefit test—i.e. this would require applicants seeking to import or export wildlife to demonstrate an actual conservation benefit when non-commercial or conservation reasons are cited as the purpose for the trade. There should be criteria to address to meet the test that not only show no detriment (including for welfare), but an actual benefit. The legislation should require the relevant Government agency to determine (and be satisfied) not only that the activity will not be detrimental to, or contribute to trade which is detrimental to, the survival of the species, but will actually contribute to conservation and recovery of the species in the wild.

Considerations relevant to a conservation benefit test include:

- improved welfare³⁶ including for the individual and as a result of the trade in both the short and longer term;
- contribution to recovery of the species in its natural habitat; and
- application of the precautionary principle.

Recommendation

Establish a clear conservation benefit test for non-commercial wildlife trade activities.

²² Section 303DD(2) has the effect that a permit under s303DG is an exception to the offence of exporting a regulated native specimen. Section 303DG(4)(d) and (7) contain the rules which apply to commercial exports of eligible listed threatened species, while s303DG(4)(e)(i) and 303FJ (eligible commercial purposes) contain the rules which apply to other regulated native specimens.

²³ See EPBC Act s303CG(3)(e)(i) in relation to permits for the export of CITES species and s303DG(4)(e) for permits for the export of regulated native specimens which are not eligible threatened species.

²⁴ EPBC Act s 303DG(3).

²⁵ EPBC Act ss 303FA(a), 303FC.

²⁶ EPBC Act ss 303FA(b), 303FD.

²⁷ EPBC Act ss 303FA(c), 303FE.

²⁸ EPBC Act ss 303FA(d), 303FF.

²⁹ EPBC Act ss 303FA(e), 303FG.

³⁰ EPBC Act ss 303FA(f), 303FH.

³¹ EPBC Act ss 303FA(g), 303FI.

³² EPBC Act ss303CG(f)(i) and 303FB.

³³ EPBC Act ss303DG(4)(e) and (8) and 303FC - 303FF.

³⁴ Such as a sanctuary accredited by the Global Federation of Animal Sanctuaries <https://www.sanctuaryfederation.org/>

³⁵ See Native Vegetation Act 2003 (NSW), State Environmental Planning Policy (Sydney Drinking Water Catchment) 2011.

³⁶ In addition to being mentioned in the objects of Part 13A of the EPBC Act, welfare of exported species is provided for in section 303GO - Regulations relating to welfare, and in section 303GP Cruelty - export or import of animals. Welfare issues are discussed below in relation to wildlife management plans and imports.

Fit and proper person test

Recent case studies highlight concerns about those involved in wildlife trade more broadly. To address these concerns we recommend a 'fit and proper person' test be applied by legislation to ensure there is assessment of those applying for permits. For example, the legislation should require consideration of previous compliance history of applicants.

Recommendation

Establish a fit and proper person test for applicants.

The non-detriment test

The non-detriment test: Current approach

Permits for both the commercial and non-commercial export of regulated specimens that are not CITES species is limited by the requirement that the Minister must not issue such a permit unless the Minister is satisfied that:

- (a) The export of the specimen will not be detrimental to, or contribute to trade which is detrimental to:
- (i) the survival of any taxon to which the specimen belongs; or
 - (ii) any relevant ecosystem (for example, detriment to habitat or biodiversity).³⁷

This is the core **non-detriment test** that must be satisfied, in conjunction with additional requirements for threatened species or species subject to additional regulations.³⁸ This test allows trade providing that exporting the specimen in question will not be detrimental to, or contribute to trade which is detrimental to either the relevant taxon's survival, or relevant ecosystems such as habitat or biodiversity. This test (which is also applied to threatened species) is less onerous than the non-detriment test which applies to CITES species and the non-detriment tests applying to Wildlife Trade Management Plans and Wildlife Trade Operations (see **Table 2** below).

For CITES species, the non-detriment test is slightly stricter. The conditions upon which permits may be granted for the import or export of CITES species under the EPBC Act are set out in section 303CG of the Act. The first pre-condition to the grant of a permit is that the Minister must be satisfied that the actions specified in the permit will not be detrimental to, or contribute to trade which is detrimental to:

- i. the survival of the taxon to which the specimen belongs; or
- ii. the recovery in nature of any taxon to which the specimen belongs; or
- iii. the relevant ecosystem (for example, detriment to habitat or biodiversity).

The inclusion of a non-detriment test for CITES species reflects the following of Australia's obligations under CITES, namely:

- For Appendix I species an **export** permit shall only be granted when the Scientific Authority of the exporting country has advised that such export will not be detrimental to the survival of that species and an **import** permit shall only be granted where the Scientific Authority of the state of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved (Art III, para 2(a) and 3(a)).
- For Appendix II species, an export permit shall only be granted when the Scientific Authority of the exporting country has advised that such export will not be detrimental to the survival of that species (Art IV, para 2(a)). The importing country, however, is entitled to rely on export permit (Art IV, para 4).
- For Appendix III species, a non-detriment finding is not required for the grant of an export permit (Art V, para 2) and for an import only a certificate of origin is required.

Australia has elected to implement stronger domestic measures to the extent that a non-detriment finding is a necessary prerequisite to both export and import permits for Appendix I, II and III species. This requirement should continue.

Table 2: Current non-detriment tests

CITES species permit 303CG(3)(a)	Regulated Native Species permit 303DG(4)(a)	Approved Wildlife Trade Management Plan 303FO(3)(d)	Wildlife trade operation 303FN(3)(b) and (ba)
The action or actions specified in the permit must not be detrimental to, or contribute to trade that is detrimental to: (i) the survival of any taxon to which the species belongs; or (ii) the recovery in nature of any taxon to which the species belongs; or (iii) any relevant ecosystem (e.g. detriment to habitat or biodiversity)	The action or actions specified in the permit must not be detrimental to, or contribute to trade that is detrimental to: (i) the survival of any taxon to which the species belongs; or (ii) any relevant ecosystem (eg. detriment to habitat or biodiversity)	The activities covered by the plan will not be detrimental to: (i) the survival of a taxon to which the plan relates; (ii) the conservation status of a taxon to which the plan relates; and (iii) any relevant ecosystem (eg. detriment to habitat or biodiversity) (note that the Minister must also be satisfied that accredited Wildlife Trade Management Plans meet this requirement (s303FP(3)(b))	(b) The operation will not be detrimental to: (i) the survival of a taxon to which the operation relates; (ii) the conservation status of a taxon to which the operation relates (ba) the operation will not be likely to threaten any relevant ecosystem including (but not limited to) any habitat or biodiversity. (note that 'threaten' is not defined in this context, however, likely to be interpreted consistently with the definition of 'threatening process' in s188(3) of the Act as a process that threatens the survival abundance or evolutionary development of a native species or ecological community)

³⁷ EPBC Act s303DG(4)(a).

³⁸ EPBC Act s 303DG(4).

A signatory to CITES, Australia is obliged to implement effective regulation of wildlife exporting and importing



The scope of what will be 'detrimental' is not further defined in the EPBC Act. However, some guidance exists under CITES:

- Resolution Conf. 16.7 (Rev. CoP17) includes, as an objective, that the best available scientific information is the basis for non-detriment findings;
- Resolution Conf. 16.7 (Rev. CoP17) contains some more detailed guidance about the approach Scientific Authorities should take to non-detriment findings; and
- There is some, more specific, guidance available for certain species and for introductions from the sea.³⁹

TRAFFIC has also produced guidance on non-detriment findings for certain plants⁴⁰ and for sharks.⁴¹ However, it is not clear whether non-detriment findings made under the EPBC Act are relying on any or all of this guidance.

The approval or accreditation of Wildlife Trade Management Plans and Wildlife Trade Operations (which authorise the take of specimens for export from the wild, as discussed below) are also subject to a non-detriment test. That test includes detriment to the conservation status of the species, as well as 'detriment to survival' of the species and is therefore somewhat stricter than the test applying to regulated native specimens but less strict than the test applying to CITES species (which includes non-detriment to 'recovery in nature').

The effectiveness of the non-detriment test has been called into question. Concerns have been cited regarding the lack of data available to assist in determining the potential for detrimental impacts to be suffered by the species being considered for export.⁴² Various decisions of state parties to CITES have identified components of non-detriment findings for Appendix I and II species.

A non-detriment finding is an assessment upon which reasonable minds may differ. We acknowledge that different levels of assessment may be appropriate depending upon the particular characteristics of the species in question, the

scale of the activity, the extent of the risk to the species and the extent to which the species is data-deficient. However, we believe that a relatively standardised approach, from which any departures based on these types of factors is disclosed and justified, would provide a more robust approach to non-detriment findings. The conservation benefit test proposed above would similarly benefit from guidance to ensure that it is applied in a consistent way.

The Australian Government does not have a policy which outlines how assessments for non-detriment findings are to be undertaken and to ensure that they are undertaken in a consistent way, based on the best available scientific information and in accordance with the relevant guidance. Such a policy should be required to ensure that, in line with the obligation to implement the precautionary principle in this decision-making, permits are either not granted, or granted only on strict conditions in the event of inadequate data. Guidelines are needed to ensure consideration of non-detriment findings is consistent with the intent of the CITES treaty and the stronger domestic measures implemented in the EPBC Act taking into account the conservation status of species and the recovery of threatened species.

Recommendations

Continue to implement stronger domestic measures to require non-detriment findings for both export and import permits for Appendix I, II and III species.

Establish a stronger non-detriment test which considers the impacts on the conservation status and recovery of species.

Require that a statutory guideline be approved to establish a consistent, rigorous approach to how non-detriment and conservation benefit assessments are to be undertaken.

3.3 Export of wild-caught and wild-harvested specimens: Wildlife Trade Management Plans and Wildlife Trade Operations

As outlined above, the commercial export of native species may be authorised by a permit or, in the case of specimens which are not CITES species or threatened species, an Accredited Wildlife Trade Management Plan.⁴³

Whether a permit will be available depends upon the source of the specimen, with most permits being restricted to specimens which have not been wild-caught or harvested. The exception to that is species listed on Appendices II and III of CITES and other species which are not listed threatened species (excluding conservation dependent species) which may be exported under an approved or accredited Wildlife Trade Management Plan or Wildlife Trade Operation (see comparison **Table 1**).

Wildlife Trade Management Plans (WTMPs) are a key tool under the Act because they authorise the export of animals or plants 'taken'⁴⁴ from the wild (for example, cut flowers, crocodile eggs to supply the ranching and export of skins and the harvest of tree ferns from Tasmania for landscaping and similar use⁴⁵).

WTMPs can be approved under the EPBC Act or, in the alternative, WTMPs under state law can be accredited to also be in effect under the EPBC Act. In order to accredit a WTMP the Minister must be satisfied that the criteria for approving a WTMP are met⁴⁶ with the consequence that the same non-detriment test and other requirements apply to both accredited and approved WTMPs. The key

³⁹ See: https://www.cites.org/eng/prog/ndf/Guidance_NDF

⁴⁰ See: <https://www.traffic.org/site/assets/files/8302/guidelines-cites-non-detriment-findings-guidance-for-perennial-plants.pdf>

⁴¹ See: <https://www.traffic.org/site/assets/files/8302/cites-non-detriment-findings-guidance-for-sharks.pdf>

⁴² James B Murphy, 'Alternative Approaches to the CITES "Non-Detriment" Finding for Appendix II Species' (2006) 36 *Environmental Law* 531.

⁴³ The export of CITES species and threatened species must be authorised by a Permit.

⁴⁴ Note: 'take' is defined in s303BC of the EPBC Act to include include: (a) in relation to an animal—harvest, catch, capture, trap and kill; and (b) in relation to a plant specimen—harvest, pick, gather and cut.

⁴⁵ See examples here: <https://www.environment.gov.au/biodiversity/wildlife-trade/commercial/management-plans>

⁴⁶ EPBC Act s303FP(3)(b).

difference in the effect of approved and accredited WTMPs is that specimens taken or derived from *approved* WTMPs still require an export permit under the EPBC Act, while it is not an offence to export (without a permit) specimens taken or derived under an *accredited* WTMP.

Approved Wildlife Trade Operations (WTOs) under s303FN are an alternative to WTMPs for operations that are small-scale, for market-testing purposes, developmental, provisional operations or existing stocks.⁴⁷ Such plans are subject to a lower level of environmental assessment, including a non-detriment test which allows a higher threshold of harm to the relevant ecosystem (i.e. 'not likely to threaten' instead of 'not detrimental to') (see discussion and comparison **Table 1** above). However, WTOs remain in effect for a maximum of three years (while WTMPs are approved for a period of five years). WTOs are also used for commercial fisheries, which are subject to separate assessments under Part 10 (i.e. fisheries strategic assessments). This is discussed in the fisheries section below.

While the consultation requirements under s303FR of the EPBC Act provide the public with the opportunity to make submissions to be considered by the Minister in deciding whether to approve or accredit a plan, in each case WTMPs and WTOs are approved or accredited by a gazette notice and there is no opportunity for third parties to challenge the merits of the decisions. Furthermore, the criteria for approving each type of plan is a list of matters of which the Minister must be 'satisfied'. This creates an unnecessarily broad subjective discretion and potential for inconsistent

decision-making.

There are currently registers of approved and accredited plans, however, in order to enable the public and the scientific community to scrutinise whether the operations are limiting their effects to those permissible under the relevant plan, the registers should be expanded to include data in a consistent format about the numbers of specimens taken and the location of take.

Recommendations

Strengthen assessment requirements prior to approval of Wildlife Trade Management Plans (WTMPs) to make it a more objective process, rather than subject to Ministerial discretion. Specify what plans must contain and objective criteria that need to be met.

The approval and accreditation of WTMPs and approval of Wildlife Trade Operations (WTOs) (and any renewal or extension) should be a function exercised only with the concurrence of the Scientific Authority (as the scientific experts on the impacts of wildlife trade).

Maintain and publish a register of all plans, variations and conditions. Expand the register to include data in a consistent format about the location and numbers of specimens taken.

Allow third party review of decisions to approve/accredit both WTMPs and WTOs.

3.4 Welfare

As Part 13A of the EPBC Act currently stands, there is limited integration of animal welfare protections into the regulation of wildlife trading.

In deciding to grant export and import permits⁴⁸ and in deciding to approve/accredit WTMPs and WTOs⁴⁹ the Minister must be satisfied that, if the trade or take (respectively) is of a live specimen specified in the regulations, then the conditions listed in the regulations have been complied with.

The welfare provisions prescribed in the regulations for these purposes apply only to mammals, reptiles, amphibians and birds (and do not apply to fish or invertebrates).

Those conditions are as follows in relation to permits:

- (a) the animal is prepared and transported in a way that is known to result in minimal stress, risk of injury and adverse effect on the health of the animal;
- (b) the person receiving the animal is suitably equipped to manage, confine and care for the animal, including meeting the behavioural and biological needs of the animal.⁵⁰

The conditions relating to the take of live animals under a WTMP or WTO are as follows:

- (a) the animal is taken, transported and held in a way that

is known to result in minimal stress and risk of injury to the animal;

- (b) if the animal is killed, it is done in a way that is generally accepted to minimise pain and suffering.⁵¹

The offence of knowingly or recklessly subjecting an animal to cruel treatment while exporting or importing a live animal is available as an additional control for animal welfare in the wildlife trade.⁵²

However, presumably on the basis that these issues are addressed under state laws and possibly due also to constitutional limitations:

- The offence of cruel treatment does not apply to the domestic operations carried out under WTMPs or WTOs or to activities in approved captive breeding or aquaculture programs; and
- The criteria for approval of captive breeding and aquaculture programs do not include any animal welfare criteria.⁵³

A more rigorous and objective assessment process is needed for Wildlife Trade Management Plans, including stronger animal welfare provisions. This should be based on the five freedoms of animal welfare⁵⁴ which are:

⁴⁷ EPBC Act ss303FN(10) and EPBC Regulations s9A.20. See examples at: <https://www.environment.gov.au/biodiversity/wildlife-trade/commercial/operations>

⁴⁸ EPBC Act s303CG(3)(c) and 303DG(4)(b).

⁴⁹ EPBC Act ss303FN(3)(c) and 303FO(3)(f).

⁵⁰ EPBC Regs s9A.05(3).

⁵¹ EPBC Regs s9A.05(4).

⁵² EPBC Act s303GP.

⁵³ EPBC Act s303FK and s9A.17 (captive breeding) and 303FM and 9A.19 (aquaculture).

⁵⁴ See: <https://kb.rspca.org.au/knowledge-base/what-are-the-five-freedoms-of-animal-welfare/>

- Freedom from hunger and thirst: by ready access to fresh water and a diet to maintain full health and vigour;
 - Freedom from discomfort: by providing an appropriate environment including shelter and a comfortable resting area;
 - Freedom from pain, injury and disease: by prevention through rapid diagnosis and treatment;
 - Freedom to express normal behaviours: by providing sufficient space, proper facilities and company of the animal's own kind; and
- Freedom from fear and distress: by ensuring conditions and treatment which avoid mental suffering.

Illegal trade causes immense animal suffering and it is essential that welfare considerations are taken into account when sentencing for wildlife trade offences (as discussed further in Section 3.8). **Case study 2** highlights the need for welfare considerations in approving legal trade and in sentencing for illegal trade.

Case Study 2: The need for welfare considerations

There are many cases where the welfare of individual animals is not adequately considered during the export of live animals, in both legal and illegal trade.

In 2011, 20 scalloped hammerhead sharks captured on the Great Barrier Reef in the Queensland Marine Aquarium Fish Fishery, an approved wildlife trade operation, were exported to the Nausicaá aquarium in the French port of Boulogne-sur-Mer, with another ten scalloped hammerhead sharks exported in 2018 to the same aquarium. As reported in the media, the last of the 30 sharks died in April 2019, although the timeline and cause of their deaths is unclear. It is suspected that the sharks attacked and killed each other after being weakened by a fungal infection.

The current regulatory regime did not require the exporter to take into account life history traits of the animal, such as for the scalloped hammerhead shark which is a highly migratory species and is widely recognised to have low tolerance to stress as observed when captured in Australia's commercial fisheries. Listed as Endangered by IUCN in 2009, and given these life history traits which would suggest that the export of the species would cause significant stress and suffering, this export should have been refused on welfare grounds.

Other examples relate to the illegal export of native reptiles from Australia. This is a particularly cruel and lucrative trade as illustrated by the following examples.



Blue tongued lizards found in a teddy bear were taped from head to tail.
Source: <https://www.theage.com.au/national/victoria/snatched-taped-up-and-traded-cracking-down-on-australias-illegal-animal-trade-20170720-gxf57d.html>

In May 2017, a man was arrested at Perth International Airport attempting to smuggle seven adult and six baby shingleback lizards to Japan. The lizards were packed inside cotton bags inside a suitcase and were retrieved alive. The lizards were in poor body condition, and were transferred to a rehabilitation facility before being released.

In March 2018, police raided a residence in Pasay City in the Philippines and seized 313 exotic pets, including 106 sulphur-crested cockatoos, 23 palm cockatoos, 16 rainbow lorikeets, three fig parrots, two wallabies, 110 sugar gliders and three emus. Five of the sugar gliders were already

dead, and the rest of the animals were transported to a rehabilitation facility.

In May 2018, a car in the town of Eluca, Western Australia was discovered with 219 animals packed inside a suitcase and other containers. The haul consisted of 198 reptiles, 16 marsupials, three cockroaches and two spiders. Multiple species were packed in bags together, and many of the animals, particularly the marsupials, were discovered dead. Others later had to be euthanised, and the rest were transported to a rehabilitation facility.

In March 2019, an illegal wildlife smuggling ring operating out of Melbourne was discovered smuggling 150 lizards to China. The lizards were wrapped in masking tape and packed into rice cookers, waffle makers and food containers. Twelve of the reptiles seized had died from either suffocation or trauma. Most of the surviving reptiles were sent to zoos or sanctuaries.

In April 2019 a Japanese woman was arrested at Melbourne airport attempting to smuggle 19 native lizards (17 shingleback lizards and two eastern blue tongued lizards) out of the country in two tightly packed mesh packages in her suitcase. The lizards were seized by Australian Border Force officers and referred to the Victorian Department of Environment, Land, Water and Planning who are now looking after them.

In June 2019, two men were arrested at Perth International Airport attempting to smuggle 13 shingleback lizards to Singapore and Kuala Lumpur. The lizards were packed inside netted laundry bags wrapped in towels inside two plastic containers. While all of the lizards were discovered alive, none had access to food or water. Despite being relocated to a rehabilitation facility, several died and several remained in poor health. The two men were each sentenced to five months in prison.

Wildlife smuggling is so pervasive in Australia that in 2019 Australia joined forces with 21 other countries as part of INTERPOL's three week long Operation Blizzard to enhance international efforts in tackling the illegal trade in reptiles, involving surprise raids, compliance inspections and random airport checks, which resulted in the seizure of 69 reptiles. Both live and dead animals were seized, highlighting the terrible conditions in which these animals are often kept in.

Welfare considerations must be taken into account for all legal exports of live specimens, with the five freedoms of animal welfare a key criterion. Welfare considerations for the animals involved in illegal wildlife trade must also be taken into account when compliance and enforcement operations are undertaken and in the setting of penalties (as discussed further below).

 **Recommendations**

Build welfare considerations into the non-detriment test for permits, WTOs and WTMPs for all animal species, including fish.

Build animal welfare criteria into the process for approving captive breeding and aquaculture programs, including third party expert welfare risk assessments, consistent with any Constitutional limitations.

Base the welfare criteria applying to live exports and imports on the five freedoms, to ensure that the needs for the animals are fully met and ensure that suffering is prevented or minimised to the greatest extent possible.

Ensure that the welfare and suffering of animals be more clearly integrated into the considerations relevant to sentencing for offences involving illegal wildlife trade.

3.5 Import Controls

This section of the report looks at:

- [Origin and welfare of imported CITES Appendix I and II species](#)
- [Trophy hunting bans](#)

Origin and welfare of imported CITES Appendix I and II Species

As discussed above, there are certain species that should be subject to a clear legislative prohibition on being imported. For example, as discussed above, CITES has recently made a decision further limiting the export of African elephants to ex-situ captive situations.¹⁷ Where importing does still occur, national legislation should establish more rigorous checks on the origins of CITES listed species subject to import applications, and for welfare assessment. There are concerns that current laws do not adequately address these issues, as demonstrated in **Case Study 3**.

The independent Scientific Authority (discussed above)

could have a role in periodic review of import conditions. Further recommendations about the role of third party review are made below.

 **Recommendation**

Establish more rigorous checks on the origins of CITES Appendix I species subject to import applications (including information such as the legal acquisition in the country of origin and status of captive breeding claims).

Case Study 3: *Asian elephants—The International Fund for Animal Welfare (Australia) Pty Ltd and Ors and Minister for Environment and Heritage and Ors (2006)*

In 2005, EDO NSW filed proceedings in the Administrative Appeals Tribunal on behalf of the International Fund for Animal Welfare (Australia) Pty Ltd, the Humane Society International Inc and the RSPCA Australia seeking review of a decision made by the Commonwealth Environment Minister to allow the import of eight Asian elephants from Thailand to Taronga and Melbourne Zoos. The basis of the appeal was that the Minister's decision did not meet the animal welfare and conservation requirements of the EPBC Act.

The Asian elephant species is listed on Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and so permits to import the species can only be granted for certain specific, non-commercial purposes. The Zoos claimed that their non-commercial purpose is conservation breeding (despite there being no recommendation for ex-situ conservation breeding for IUCN Asian elephant specialist group) and they also applied to the Minister for approval of their breeding program. That approval was granted.

On 6 February 2006, the Administrative Appeals Tribunal handed down its decision. The Tribunal decided that permits to import Asian elephants should be granted to the zoos subject to a far more stringent set of conditions (22 conditions for Taronga Zoo and 18 conditions for Melbourne Zoo) than those originally imposed by the Environment Minister. The conditions imposed on the import, primarily related to the elephant's welfare, include:

- a requirement to install closed circuit television in each

barn and enclosure to be operated 24 hours per day, 7 days a week;

- increased environmental enrichment in the enclosures including loose outdoor earth mounds, a minimum of two mud wallows of sufficient size for the elephants to lie down, and a trial of natural bedding to encourage the elephants to lie down; and
- a requirement for the elephants to be walked regularly as part of their environmental enrichment, including ensuring that the male elephant has appropriate opportunities for physical contact with one or more of the female elephants for at least 9 months in any 12 month period.

HSI considers that these conditions improved the environment for these elephants, who will spend up to 60-70 years in urban zoos. Without the opportunity to file a merits review of the import approval, the conditions that improved the daily lives of these elephants and their progeny would not have been implemented.

The applicants also raised the issue of the parentage of the elephants and questioned the evidence to confirm they were born in captivity of captive parents. Although unsuccessful on this point, the case illustrates the need for clearer evidentiary requirements for CITES species, in addition to improved welfare requirements.

A conservation benefit test that considered the recommendations of IUCN on ex-situ breeding for Asian elephants would have resulted in this import not being approved.

Trophy Hunting Ban

Hunting 'trophies' is the name given to parts of animals imported or exported after they have been killed.

This section recommends extending a hunting trophy import ban to species listed on Appendix I or II of CITES and other critically endangered, endangered and vulnerable species as listed by IUCN that are victims of trophy hunting such as black rhinos, African elephants, giraffes and leopards. This approach is proposed in the UK Government's October 2019 announcement that it will launch a consultation in relation to prohibiting the import and export of hunting trophies from endangered species.⁵⁵

Many threatened species are highly sought after by trophy hunters despite being listed in CITES Appendices. For example, the black rhino (*Diceros bicornis*) is identified as critically endangered on the IUCN Red List and included in Appendix I of CITES but continues to be adversely affected by poaching. Despite that, CITES continues to allow trophy quotas for this species⁵⁶. Similarly, trophy hunting is a primary driver of the decline of leopard populations, with leopards (*Panthera pardus*) being included in Appendix I of CITES. Despite the alarming decline of leopard populations, CITES export quotas for hunting trophies and skins for personal use have grown substantially over time. These quotas have no scientific basis and are not routinely reviewed to ensure that they are not detrimental to the survival of the species. Giraffes (*Giraffa camelopardalis*) were listed on Appendix II in CITES in August 2019.

Available trade data, news reports and advertisements of trophy hunts indicate that giraffes are regularly targeted by trophy hunters. European wolves (*Canis lupus*) are listed on Appendix II in CITES. Hunting trophies of European wolves have been imported into Australia as recently as 2017. In October 2018, Europe's highest court, the European Court of Justice, ruled that wolves cannot be hunted in the European Union, except in the rarest cases where member countries can prove that there is no other option to end human-wolf conflict. African elephants (*Loxodonta africana*), have a split-listing on CITES Appendices I and II. There are export quotas for trophies of African elephants. In 2017, Australia imported hunting trophies of African elephants from Zambia whose elephant population is on Appendix I. Zimbabwe is given an export quota of 1,000 hunting trophies (with 500 animals) of African elephants for the year of 2018.

The EPBC Act requires the Minister to establish a list of CITES species for those species listed in Appendix I, II or III of CITES.⁵⁷ In line with CITES, the EPBC Act subsequently provides stricter controls for Appendix I listed species. For example, the circumstances under which import and export permits may be issued are more restrictive for Appendix I species, and there is an exception to the offences of importing and exporting CITES specimens available for Appendix II listed species that is not available for Appendix I listed species.⁵⁸

Additionally, the EPBC Act also contains a 'stricter domestic measures' provision⁵⁹ that allows the Environment Minister to make declarations including to treat certain specimens as if they are listed under Appendix I, to decrease a quantitative limit in relation to the export or import of a specimen or to treat species not listed under CITES as if they were included in Appendix I or II. The effect of such a declaration is that more stringent provisions of the EPBC Act apply to the specimen subject to the declaration.

In 2015 Australia announced that it would implement a ban on the import and export of lion (*Panthera leo*) hunting trophies using this 'stricter domestic measures' provision of the EPBC Act to declare lions (currently listed as an Appendix II listed species), to be treated as Appendix I species for the purpose of the EPBC Act.⁶⁰ Section 303CB(2)(a) of the EPBC Act allows the Environment Minister to make a declaration modifying the EPBC list of CITES species so as to treat a specified specimen that is included in Appendix II to CITES as if the specimen were included in Appendix I to CITES. The stricter controls were introduced as a direct response to concerns about 'canned hunting'—a growing practice that involves hunting and killing lions in enclosed areas which involves animals that have been bred in captivity for that purpose. This ban reduced legal imports of lion hunting trophies from 36 in 2015 to zero in 2018.

The same provision has been used to establish stricter domestic measures for other species, including for example, African elephants (*Loxodonta africana*)⁶¹, and all species within the order *Cetacea* (which includes all whales, porpoises and dolphins) except those species already listed as Appendix I.⁶²

Extending the ban on the import of hunting trophies to other species

There is potential to use the 'stricter domestic measures' provision of the EPBC Act (or similar provision in a new Environment Act) to replicate a similar hunting trophy import ban for other species, including leopards and giraffes (as discussed above), species listed as on Appendix I or II of CITES and species listed as critically endangered, endangered or vulnerable (under IUCN).

Recommendation

Retain and broaden 'stricter domestic measures' provisions. These provisions should be used to create a trophy hunting import ban that is extended to species listed on Appendix I or II of CITES and other critically endangered, endangered and vulnerable species as listed by IUCN including rhinos, leopards, giraffes and elephants.

⁵⁵ See: <https://www.gov.uk/government/news/new-measures-protect-animal-welfare-and-increase-woodland-cover>

⁵⁶ CITES Resolution Conf. 13.5: <https://www.cites.org/eng/res/13/13-05R14C15.php>

⁵⁷ See section 303CA of the EPBC Act. A list of CITES species made under s303A of the EPBC Act is available at <https://www.legislation.gov.au/Details/F2017C01029>. It is noted that under s 303CA of the EPBC Act the list must include all species from time to time included in any of Appendices I, II and III to CITES and must not include any other species.

⁵⁸ See, for example, s303CD(4) of the EPBC Act.

⁵⁹ EPBC Act s303CB.

⁶⁰ See s303CB declaration for lion (*Panthera leo*) – 5 March 2015, www.legislation.gov.au/Details/F2015L00277

⁶¹ See s303CB declaration for African elephant (*Loxodonta africana*) – 20 March 2017, <https://www.legislation.gov.au/Details/F2017L00351>

⁶² See s303CB declaration for *Cetacea* – 20 March 2017, <https://www.legislation.gov.au/Details/F2017L00349>

Australia must have a strategic, national approach—
closing loopholes in wildlife import and export



Trophy hunting exports

While domestic trophy hunting appears to be largely directed to feral species, there would be value in preventing an industry with impacts on native wildlife from becoming established with a ban on the export of hunting trophies from native species.

Recommendation

Amend the provisions regulating exports of both CITES species and regulated native specimens to prohibit the export of trophies from native animals.

3.6 Domestic trade

Establish a domestic trade ban on ivory and rhinoceros horn

Elephants are victims of illegal wildlife trade due to the demand for ivory from elephant tusks. This, together with habitat loss, has led to a sharp decline in numbers of African elephants. Latest figures suggest that between 2007 and 2014, the elephant population in Africa has declined by 30% or 144,000 individuals (with the total number of elephants remaining estimated to be about 352,271 elephants).⁶³

In 2008, the IUCN reported that the population of Asian elephants had declined by 50 percent over the past 20 to 25 years, and that the estimated global population of Asian elephants in 2003 was between 41,410 and 52,345 individuals.⁶⁴

Rhinoceroses (rhinos) are under threat due to demand for rhino horn, which has been used for traditional medicine and for ornamental purposes and, more recently, for health tonics and also for recreational purposes and as a high-value gift.⁶⁵ While some wild rhino populations are increasing⁶⁶, the northern white rhino has been declared extinct in the wild, with the last male having died in captivity in 2018.

International limitations on trade in elephant ivory have recently seen a displacement of trade from elephant ivory and rhino horn to other sources of ivory, in particular hippopotamus (*Hippopotamus amphibius*)⁶⁷ teeth. Similarly, the trade in woolly mammoth ivory, which is almost impossible to distinguish from elephant ivory without a microscope, may provide opportunities to launder elephant ivory.

Any domestic ban on ivory and tusks should ban trade in non-elephant ivory to include ivory from any species, even woolly mammoths, and also include hippo teeth in order to improve enforcement and discourage a trade which may become an additional threat to this and other species already included in Appendix II of CITES.⁶⁸

The current approach

The international trade in wildlife, including elephant ivory and rhino horn, is regulated by CITES and current Australian laws restrict elephant ivory and rhino horn from being imported into or exported out of Australia, unless certified or deemed pre-CITES. Specifically in relation to elephant ivory and rhino horn, the following provisions are relevant:

- Stricter domestic measures are in effect so that all elephants are treated, under the EPBC Act, as if they were CITES Appendix I species;⁶⁹
- Under section 303CC of the EPBC Act, it is an offence to export a CITES specimen unless a permit is in force or exemptions apply;
- Under 303CD of the EPBC Act, it is an offence to import a CITES specimen unless a permit is in force or exemptions apply; and
- Under s303GN it is an offence to be in possession of a wildlife specimen that has been illegally imported into Australia unless exemptions apply.

Concerns have been raised about the inadequate enforcement of these provisions, including that:

- Enforcement of these provisions is difficult. The main mechanism of identifying offences is through border control operations and customs, yet it is unclear how much focus border control agencies put on screening for elephant and rhino products;
- Data relating to these offences is not readily publicly available, inconsistent and difficult to interpret; and
- Once products are in the country, it is difficult to identify products that were imported illegally particularly due to a lack of legally prescribed provenance documentation.⁷⁰

⁶³ Chase MJ, Schlossberg S, Griffin CR, Bouché PJ, Djene SW, Elkan PW, Ferreira S, Grossman F, Kohi EM, Landen K, Omondi P, Peltier A, Selier SAJ, Sutcliffe R. 2016. Continent-wide survey reveals massive decline in African savannah elephants. PeerJ 4:e2354 <https://doi.org/10.7717/peerj.2354>

⁶⁴ Choudhury, A., Lahiri Choudhury, D.K., Desai, A., Duckworth, J.W., Easa, P.S., Johnsingh, A.J.T., Fernando, P., Hedges, S., Gunawardena, M., Kurt, F., Karanth, U., Lister, A., Menon, V., Riddle, H., Rübél, A. & Wikramanayake, E. (IUCN SSC Asian Elephant Specialist Group). 2008. Elephas maximus. The IUCN Red List of Threatened Species 2008: e.T7140A12828813. <https://www.iucnredlist.org/species/7140/12828813>

⁶⁵ African and Asian Rhinoceroses – Status, Conservation and Trade A report from the IUCN Species Survival Commission (IUCN SSC) African and Asian Rhino Specialist Groups and TRAFFIC to the CITES Secretariat pursuant to Resolution Conf. 9.14 (Rev. CoP15), <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-68-A5.pdf>

⁶⁶ Ibid.

⁶⁷ Which is currently included in Appendix II of CITES.

⁶⁸ We note that current consultation in the UK: <https://consult.defra.gov.uk/communications/non-elephant-ivory-trade/> proposes non-elephant ivory would also cover the following species:

Common hippopotamus (<i>Hippopotamus amphibius</i>)	Sperm whale (<i>Physeter macrocephalus</i>)	Desert warhog (<i>Phacochoerus aethiopicus</i>)
Killer whale, also known as orca (<i>Orcinus orca</i>)	Walrus (<i>Odobenus rosmarus</i>)	Mammoth (<i>Mammuthus primigenius</i>)
Narwhal (<i>Monodon monoceros</i>)	Common warhog (<i>Phacochoerus africanus</i>)	

⁶⁹ Under CITES the Asian elephant (*Elephas maximus*) is an Appendix I species, while the African elephant (*Loxodonta africana*) is divided between Appendices I and II. A declaration is currently in effect under the section 303CB(1) of the EPBC Act which has the effect that all populations of the African elephant are treated as Appendix I (see: <https://www.legislation.gov.au/Details/F2017L00351>).

⁷⁰ Humane Society International, *Submission to the Parliamentary Joint Committee on Law Enforcement Inquiry into the Trade in Elephant Ivory and Rhino Horn*, 6 June 2018, available at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/ElephantIvoryRhinoHorn

A domestic trade ban on ivory in Australia

Despite CITES and efforts by party countries to stop the international trade of elephant ivory and rhino horn, poaching and an illegal market for these commodities continue to operate. For this reason, in 2016 CITES parties agreed to a non-binding resolution that called upon members to implement a domestic trade ban on elephant ivory where those markets are 'contributing to poaching or illegal trade' in an effort to crack down on illegal markets.⁷¹ This was followed in 2017 by a United Nations General Assembly resolution recommending that "*all Governments close legal domestic ivory markets, as a matter of urgency, if these markets contribute to poaching or illegal trade*".⁷² This was followed again in 2019 by a further strengthening of CITES provisions, requiring Parties which had not closed their domestic ivory markets to report to the CITES Standing Committee on what measures they are taking to ensure that their domestic ivory markets are not contributing to poaching or illegal trade.

In 2018 a Parliamentary Joint Committee on Law Enforcement conducted an inquiry into the trade in elephant ivory and rhinoceros horn and recommended that Australia implement a national domestic trade ban on elephant ivory and rhinoceros horn.⁷³

The Parliamentary Inquiry heard that there were several barriers to implementing a domestic trade ban on ivory, including:

- the lack of Constitutional power for the Government to restrict trade within States;⁷⁴ and
- the application of mutual recognition laws in preventing any federal, state or territory parliament unilaterally banning the sale of ivory and rhino horn.⁷⁵

However, the committee did recognise that there was scope for States and Territories to work together to implement a national domestic trade ban on elephant ivory and rhino horn either through the States devolving their powers to the Commonwealth or through a national agreement by State to introduce uniform State and Territory laws. It was noted that a similar approach was taken to restrict the firearms in Australia under the National Firearms Agreement.⁷⁶

The committee did not prescribe the exact method for implementing a domestic trade ban, but recommended more broadly that "*the Commonwealth, states and territories, through the Council of Australian Governments, develop and implement a national domestic trade ban on elephant ivory and rhinoceros horn*" and that "*the domestic trade ban should be consistent with those implemented in like-minded jurisdictions*".⁷⁷

The committee also made recommendations for certain exemptions as part of the trade ban, that would allow for the trade of certain items including, for example, items

with a content of less than 10 per cent and made prior to 1975, certain musical instruments, portrait miniatures produced 100 years or more prior, trade by museums and rare and important items.⁷⁸

On 22 August 2019, Environment Minister Sussan Ley, formally announced⁷⁹ the Government's intention to close the domestic trade of elephant ivory and rhino horn. To address the concerns raised above, national legislation should retain and strengthen existing offences for importing and exporting wildlife specimens into and out of Australia, and being in possession of illegally imported specimens. These need to be accompanied by measures to improve enforcement of existing offences, including by increasing border control efforts to screen for elephant and rhino products.

The Commonwealth Government's domestic trade ban on elephant ivory and rhino horn should be consistent with those implemented in like-minded jurisdictions and expanded to include ivory from any species including woolly mammoth and also include hippo teeth. This could be achieved by a national agreement to ban the sale of ivory and rhino horn within Australia, implemented by:

- States referring their powers to the Commonwealth to legislate a domestic ban on ivory and rhino horn; or
- States introducing uniform legislation implementing a ban on the sale of ivory and rhino horn.

Any exemptions to the domestic trade ban on elephant ivory and rhino horn should be strictly limited—for example to musical instruments—and enforceable.

These limited exemptions should be available for:

- Items which have a content of less than 10% ivory (by weight or value) and were made prior to 1975;
- Musical instruments with an ivory content of less than 20% which were made prior to 1975;
- Portrait miniatures produced 100 years ago or more prior to the domestic trade ban coming into force; and
- CITES-accredited museums and art institutions.

The legislation should also include a schedule for domestic trade restrictions that provides a mechanism for the addition of further species in the future.

Further recommendations relating to internet trade and sentencing are discussed below.

Recommendation

The States, Territories and Commonwealth work together to effect a consistent national ban on domestic ivory trade with strictly limited exemptions.

⁷¹ Parliamentary Joint Committee on Law Enforcement, *Report—Inquiry into the Trade in Elephant Ivory and Rhino Horn*, September 2018, at [2.51] p22, available at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Elephantivoryrhinohorn

⁷² United Nations General Assembly Resolution 71/326. *Tackling illicit trafficking in wildlife*, 11 September 2017 A/RES/71/326 https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/326

⁷³ Parliamentary Joint Committee on Law Enforcement, *Report—Inquiry into the Trade in Elephant Ivory and Rhino Horn*, September 2018, available at www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Elephantivoryrhinohorn

⁷⁴ In contrast, see Animal Law Institute, *Submission to the Parliamentary Joint Committee on Law Enforcement Inquiry into the Trade in Elephant Ivory and Rhino Horn*, 7 June 2018, which argued that federal law could effect such a ban in reliance upon ss51(xx) (corporations power) and 51(v) of the constitution (the communications power).

⁷⁵ *Ibid*, p43-45.

⁷⁶ *National Firearms Agreement* (1996).

⁷⁷ *Ibid*, Recommendation 1.

⁷⁸ *Ibid*, Recommendation 2.

⁷⁹ <https://minister.environment.gov.au/ley/news/2019/australia-pursue-domestic-ivory-ban>

3.7 Fisheries

This section examines:

- Accreditation of Australian fisheries
- Shark fin trade

Accreditation and compliance

The regulation of Australian export fisheries is described in **Box 3**. The use of fisheries strategic assessments and approved WTOs to regulate fisheries through the EPBC Act has been one of the most successful areas of the Act for improving the management of take of native wildlife. It is imperative that the environmental oversight of fisheries provided by the EPBC Act continues, given the significant role of fisheries management in ensuring the health of marine species and ecosystems.

However, while the initial implementation of the EPBC Act led to significant improvements in the environmental management of many fisheries, there are still improvements which should be made to the process to provide better protections for listed threatened species and procedural improvements which should be made to facilitate more effective implementation.

Consideration of recovery plans and threat abatement plans

As outlined in **Box 3**, export fisheries will generally secure an approved WTO before they are included on the LENS

(and become able to export without a permit). However, this is not a mandatory requirement and there are a number of fisheries included on the LENS (on a time-limited basis) in the absence of an approved WTO.

In deciding whether to declare a fishery to be an approved WTO, the Minister is required to conduct an assessment that, amongst other things, “must rely primarily on the outcomes of” any relevant fisheries strategic assessment (or re-assessment).⁸⁰ In deciding to endorse a fisheries plan of management under a strategic assessment, the Minister must⁸¹ not act inconsistently with a recovery plan⁸² or a threat abatement plan⁸³ and must have regard to any approved conservation advice⁸⁴. However, not all fisheries are required to undergo a strategic assessment⁸⁵ and it is possible for a WTO to be approved without a plan of management being endorsed under the strategic assessment. As a consequence, there are only limited links between fisheries controls and tools designed to protect threatened species.

Box 3: Overview of fisheries and wildlife trade

The regulation of fisheries is divided between State, Territory and Commonwealth fisheries legislation and the EPBC Act. In general terms, permission to fish is governed under the relevant fisheries legislation, while environmental assessments for Commonwealth-regulated fisheries and export controls are contained in the EPBC Act.

Commonwealth regulated fisheries have been required to undergo strategic assessments under Part 10, Division 2 of the EPBC Act before a plan of management was made, or a decision not to have a plan of management was made, under the relevant fisheries legislation. Further assessment is required if there is likely to be significantly greater impacts on a matter protected by the EPBC Act (which include listed threatened species, migratory species, Commonwealth marine areas and the Great Barrier Reef Marine Park).

Fisheries that export product are subject to the wildlife trade regime contained in Part 13A of the EPBC Act. However, fisheries generally interact with that regime as follows:

- Native fish will be ‘regulated native specimens’ (and therefore subject to those export controls and permit requirements under Part 13A) unless they are included on the list of exempt native specimens (**LENS**) made under s303DB of the EPBC Act;
- Export fisheries generally apply to become approved wildlife trade operations (**WTOs**), which may be subject to conditions imposed under s303FT(7);

- Declarations approving WTOs for commercial fisheries generally exclude CITES species and threatened species (other than conservation dependent species); and
- The LENS made under s303DB of the EPBC Act is generally then amended to include specimens taken in the fishery (generally excluding CITES species and listed threatened species, other than conservation dependent species) either in accordance with the approved WTO or, for those fisheries without an approved WTO, subject to the requirement that they be taken lawfully and subject to a time limitation.

The overall effect of the above is that fish taken in commercial fisheries included on the LENS are not ‘regulated native specimens’ and may therefore be exported without a permit under Part 13A of the EPBC Act.

The exclusion of CITES species and threatened species (other than conservation dependent species) from the listing in the LENS has the effect that such species remain subject to the need for an export permit under Part 13A.

If a fishery was not listed on the LENS, it could secure export permits for its product (excluding CITES and threatened species in respect of which further restrictions apply) if the export constitutes an ‘eligible commercial purpose’. ‘Eligible commercial purposes’ include approved WTOs and approved aquaculture programs.

⁸⁰ EPBC Act s303FN(10A) and (10B).

⁸¹ EPBC Act ss146(2)(f) and 146K.

⁸² See EPBC Act ss268 - 270 in relation to the content and effect of recovery plans.

⁸³ See EPBC Act ss270A - 271 in relation to the content and effect of threat abatement plans.

⁸⁴ See EPBC Act s266B in relation to the content and effect of conservation advice.

⁸⁵ The obligation applies to Commonwealth regulated fisheries only.

Further, while the decision to approve a WTO is subject to a non-detriment test (as discussed above), a lack of detriment is an inadequate standard for threatened species for which recovery must be the objective. In that regard, the current non-detriment test is not a substitute for a requirement to act consistently with a recovery plan, threat abatement plan or conservation advice. We further propose the non-detriment test relate to finding no detriment to a species' recovery (as discussed in Section 3.2).

Given that both State/Territory and Commonwealth regulated fisheries have the potential to interact with listed threatened species (at least as bycatch and potentially through other impacts on the ecosystem), any relevant recovery plan, threat abatement plan and conservation advice should be a key consideration for the Minister in deciding whether to approve a WTO.

Recommendations

The Minister should be required to act consistently with all relevant recovery plans, threat abatement plans and conservation advice in deciding whether to approve a WTO.

All fisheries currently included on the LENS in the absence of an approved WTO must be required to secure approval of a WTO within the life of their current LENS listing.

Right to seek review of decision to approve WTO

Under the current EPBC Act, there is capacity for third parties to seek review on the merits⁸⁶ by the Administrative Appeals Tribunal (AAT) of decisions to approve a WTO.⁸⁷ However, that right of review is only available where the decision is made by a delegate of the Minister and is not available when the decision is made personally by the Minister.⁸⁸ This inconsistent right of review may provide an avenue for poor decision-making to bypass review by an independent third party.

Recommendation

The right to seek review by the Administrative Appeals Tribunal (AAT) of decisions to approve WTOs for commercial fisheries must apply to all decisions, including decisions made personally by the Minister.

Compliance: WTOs and conditions

WTOs may be approved subject to conditions, compliance with which may be essential or desirable to ensure that the WTO has its intended outcome. However, there have been a number of recent examples of WTOs being renewed without the conditions of the previous WTO having been met.

⁸⁶ *Administrative Appeals Act 1975 (Cth)* s43(1).

⁸⁷ EPBC Act s303GJ(1)(h).

⁸⁸ EPBC Act s303GJ(2).

⁸⁹ See: <http://www.environment.gov.au/system/files/pages/bbf3e30a-2fa3-45d6-b20c-7623b995cbcd/files/assessment-southern-eastern-scalefish-shark-fishery-2019.pdf>

⁹⁰ See: <http://www.environment.gov.au/system/files/pages/bbf3e30a-2fa3-45d6-b20c-7623b995cbcd/files/scalefish-part-13-2016.pdf>

⁹¹ See: <http://www.environment.gov.au/system/files/pages/bbf3e30a-2fa3-45d6-b20c-7623b995cbcd/files/scalefish-part-13-2019.pdf>

⁹² See: <http://www.environment.gov.au/system/files/pages/bbf3e30a-2fa3-45d6-b20c-7623b995cbcd/files/scalefish-part-13-2019.pdf>

⁹³ For the purposes of this section, the term 'shark' is used to refer to all sharks, skates, rays and chimaeras in the class *Chondrichthyes*.

⁹⁴ Worm, B., Davis, B., Kettner, L., Ward-Paige, C., Chapman, D., Heithaus, M., Kessel, S. and Gruber, S. (2013) Global catches, exploitation rates, and rebuilding options for sharks *Marine Policy* 40 (2013) 194–204

For example, the Southern and Eastern Scalefish and Shark Fishery (SESSF) is acknowledged as a substantial source of mortality for protected seal species.⁸⁹ In recognition of this, in 2013 the WTO accreditation of the SESSF required the Australian Fisheries Management Authority (AFMA) to "work with industry and relevant experts to develop and implement management measures to minimise mortality of seals in the Commonwealth Trawl Sector of the fishery".⁹⁰ Two subsequent WTO accreditations in 2016⁹¹ and 2019⁹² have included exactly the same condition despite the February 2019 assessment of the fishery identifying that seal mortality remained a significant impact of the fishery and that measures to date have failed to reduce seal mortality.

In that regard, the power to approve a WTO must be subject to the requirement that all conditions of a WTO are specific, measurable and timely and any approval of a new WTO for the same fishery must be subject to the requirement that conditions on the previous condition have been complied with, or that there is a plan in place that the Minister is satisfied will achieve compliance with the condition under the new WTO.

The conditions imposed on WTOs in relation to reporting on outcomes have been inconsistently applied. In order to ensure that there is public information available about the outcomes being achieved by WTOs, all WTOs should be subject to a deemed condition requiring annual public reporting, based on an independent audit, against consistent criteria to demonstrate that the export fishery is being conducted in a sustainable way.

Recommendations

Approval of WTOs should be limited by the requirement that all conditions of any previous WTO for the same fishery have been complied with, or if not, that there is a plan in place to achieve compliance with any outstanding conditions.

All WTOs must include a condition requiring annual reporting, based on an independent audit, against consistent criteria which demonstrate that conditions are being complied with and that the fishery is being conducted in a sustainable way.

Shark fin trade

Shark⁹³ finning entails cutting off a shark's fin, often while the shark is still alive and often involving the remainder of the shark being discarded at sea. Fins are used for shark fin soup, an East Asian dish associated with wealth and festivity.

Research has shown that at least 63 million sharks are killed every year for their fins alone.⁹⁴ Healthy shark populations are an indicator of the health of the marine environment, with research demonstrating that the depletion of sharks

that has occurred worldwide has had significant and, in some cases, cascading negative effects through marine ecosystems.⁹⁵ Sharks face many threats, with one quarter of all sharks threatened with extinction as a result of overfishing⁹⁶ and one third of shark species targeted in the shark fin trade listed as endangered⁹⁷. Given the high demand for, and value of, shark fin, there is a strong incentive for illegal and unreported fishing to occur.

The take of sharks is currently permissible in a number of approved WTOs. These WTOs rely on State or Territory legislation to manage the issue of shark finning. State and Territory laws currently take different approaches to this issue. Whilst all Australian jurisdictions have controls on shark finning⁹⁸, the management measures in some jurisdictions are insufficient to prevent illegal finning. Some jurisdictions, such as NSW, generally prohibit fishers from removing a fin from any species of shark while on board a boat so that the sharks must be landed whole⁹⁹. However, in some jurisdictions¹⁰⁰ fishers are permitted to land fins separately from shark bodies under certain circumstances. This approach creates a loophole which may facilitate live shark finning, discarding of shark trunks and high grading (i.e. retaining the most lucrative fins and flesh even if they are derived from different animals). These arrangements also complicate the species identification and data collection that is necessary to prevent overfishing and exploitation of protected species.

Amendments to national environmental legislation are required to:

- prohibit the import of shark fins, unless naturally attached to a shark; and
- provide that export permits must not be granted for shark fins (unless naturally attached to a shark) and provide that the LENS must not allow the export of shark fins unless naturally attached to the shark.

Those protections could be complemented by a traceability system, similar to the current National Docketing System for abalone, which requires abalone to be accompanied by a docket demonstrating its lawful provenance at each point from its landing to its final sale.

This could be achieved through a provision inserted into national environmental legislation imposing deemed conditions on all WTOs requiring that the rules applying to the relevant fishery must:

1. Prohibit fishers from removing a fin from any species of shark while on a vessel;
2. Prohibit fishers from being in possession of a shark fin that is not naturally attached to the body of a shark while on a vessel;
3. Require fishers to maintain logbooks on shark catches to the species level (unless the fishery has an exemption, on the basis of scientifically valid research that prevents species level identification, in which case identification to the genus level should be required);
4. Require AFMA to provide quarterly reports on logbooks to the Department of Environment and Energy;
5. Require fishers to participate in a traceability scheme (similar to the current National Docketing system that applies to abalone fisheries).

Recommendations

The legislation should prohibit the import of shark fins (unless naturally attached to a shark), prohibit the granting of export permits for shark fins (unless naturally attached to a shark) and provide that the LENS must not include an entry allowing the export of shark fins unless they are naturally attached to the shark.

Establish a national traceability system, which requires shark fins to be accompanied by information demonstrating its lawful provenance from the time of landing to the point of final sale or export.

All WTOs should be subject to the condition that the fisheries rules must:

- prohibit the removal of shark fins on a vessel;
- prohibit the possession of shark fins not naturally attached to a shark on a vessel;
- require logbooks of shark catch with identification down to the species level;
- require quarterly reporting of catches from logbook data; and
- require participation in the national traceability scheme.

⁹⁵ See for example Heithause, M., Wirsing, A. and Dill, L. (2012) The ecological importance of intact top-predator populations: a synthesis of 15 years of research in a seagrass ecosystem *Marine & Freshwater Research* 63(11) 1039-1050.

⁹⁶ Dulvy, N., Fowler S., Musick, J., Cavanagh, R., Kyne, P., Harrison, L., Carlson, J., Davidson, L., Fordham, S., Francis, M., Pollock, C., Simpfendorfer, C., Burgess, G., Carpenter, K., Compagno, L., Ebert, D., Gibson, C., Heupel, M., Livingstone, S., Sanciangco, J., Stevens, J., Valenti, S. and White, W. (2014) Extinction risk and conservation of the world's sharks and rays. *eLife* 3:e00590. doi: 10.7554/eLife.00590.

⁹⁷ Fields, A., Fischer, G., Shea, S., Zhang, H., Abercrombie, D., Feldheim, K., Babcock, E. and Chapman, D. (2017) Species composition of the international shark fin trade assessed through a retail-market survey in Hong Kong, *Conservation Biology* 32(2): 376-389.

⁹⁸ Commonwealth (*Fisheries Management Regulation 2019 (Cth)*, s67), NSW (*Fisheries Management Act 1994 (NSW)*, s20B), Victoria (*Fisheries Regulations 2009 (Vic)*, ss5 and 93(1)), South Australia (*Fisheries Management (General) Regulation 2017 (SA)*, s18), Western Australia (*Fisheries Resources Management Regulation 1995 (WA)*, s16B), Queensland (*Fisheries Act 1994 (Qld)*, s34 and *Fisheries Declaration 2019 (Qld)*, Chapter 3, Part 2 and Schedule 2), Northern Territory (*Fisheries Regulations 1992 (NT)*, s100F) and Tasmania (*Fisheries (Scalefish) Rules 2015 (Tas)*, s16).

⁹⁹ Fisheries Management Act 1994 (NSW) 20B. Exemptions *Fisheries Management (General) Regulation 2010* Part 5 Division 8 Clause 95A Removal and possession of certain parts of sharks permitted.

¹⁰⁰ See, for example, Queensland (*Fisheries Act 1994 (Qld)* s34 and *Fisheries Declaration 2019* Chapter 3, Part 2 and schedule 2) and Western Australia (*Fisheries Resources Management Regulations 1995 (WA)* s16B(2)).



Trading in wildlife is a speciality of criminal groups
linked to drug and human trafficking, and terrorism

3.8 Compliance and enforcement

This section examines:

- [Compliance and enforcement review](#)
- [Internet trading](#)
- [Sentencing](#)

Compliance and enforcement review

In 2015-6 the Auditor-General conducted a performance audit: *Managing compliance with the wildlife trade provisions of the EPBC Act*.¹⁰¹ Australian National Audit Office (ANAO) conclusions are set out in **Box 4** below.

Box 4: Extract from Australian National Audit Office Report No. 7 2015-16: *Managing compliance with the wildlife trade provisions of the EPBC Act*

Overall conclusion

8. The effectiveness of the Department of the Environment's regulation of wildlife trade under Part 13A of the EPBC Act has been undermined by the absence of appropriate and tailored policy and procedural guidance, functional IT support systems and a risk-based approach to monitoring compliance. While the department considers the risks arising from this area of regulatory activity to be low compared to its other regulatory responsibilities, with settings and resources allocated accordingly, this position has not been informed by structured departmental-wide risk assessment focusing on its regulatory activities. As such, the department has limited assurance as to the adequacy of current settings. Further, the absence of an appropriate set of performance measures and reporting arrangements means that the department is not well positioned to report both internally and externally on the extent to which it is achieving its regulatory objectives...

10. Environment has recognised the need to address shortcomings in its regulatory activities and is establishing a comprehensive regulatory compliance framework through a five year Regulatory Capability Development Program. This is an encouraging development and will assist the department to better understand the risks arising from its regulatory activities and tailor settings and target resources accordingly. Nonetheless, implementation of the program has been slower than expected.

11. The ANAO has made four recommendations designed to assist Environment and DIBP to:

- better assess and manage the risks to compliance with wildlife trade regulations;
- improve voluntary compliance through education and awareness activities;
- improve the data integrity of records; and
- strengthen performance monitoring and reporting.

Supporting findings

Compliance Intelligence and Risk Assessment (Chapter 2)

Environment is yet to establish an effective compliance intelligence capability for wildlife trade regulation, 13 years after Part 13A of the EPBC Act came into effect. Prior to March 2015, Environment had not extracted or analysed its wildlife trade information holdings, had not used intelligence analysis to inform its risk assessment of wildlife trade compliance, and was also yet to develop a risk-based strategy to monitor compliance with wildlife

trade regulations. The department has commenced work to address these deficiencies, with projects underway to extract data for intelligence analysis and improve compliance information gathering and IT systems support.

13. While both Environment and the ACBPS have shared information relating to specific matters, data collected by both entities on the trade in wildlife has not been combined to deliver a holistic view of the risks posed to the legal trade in wildlife.

Monitoring Compliance (Chapter 3)

14. Environment has not developed a risk-based, compliance monitoring strategy to guide the delivery of compliance monitoring activities.

15. Environment's IT systems, which support permit approval and acquittal, rely on manual data entry (with historic delays in the entry of acquittal data) increasing the risk to data integrity. The systems also provide limited reporting functionality, which has hampered the department's ability to use collected data to inform the establishment of an effective risk-based monitoring process.

16. Environment has acknowledged these functionality and data integrity issues and the need to improve its business support systems for wildlife trade. The department is currently undertaking a project to define wildlife trade business systems requirements to deliver greater functionality. There is also scope for Environment to make greater use of alternative information sources, such as DIBP permit compliance data, to provide a more comprehensive perspective of compliance with wildlife trade regulation.

Responding to Non-compliance (Chapter 4)

17. Environment and the ACBPS have used education and awareness activities to encourage voluntary compliance. There is scope to better coordinate these activities.

18. There would also be benefit in DIBP updating its guidance to Australian Border Force staff to help to ensure that they are aware of their obligations. The ANAO identified inconsistent operational practices that created reputation risks through the incorrect release of wildlife specimens.

19. The quality of wildlife seizure data in Environment's and the ACBPS's IT systems is generally poor, with no automated exchange of data between the two entities or reconciliation of seizure records. The poor quality of seizure data limits its use for intelligence analysis and risk assessment.

¹⁰¹ ANAO Report No. 7 2015-16, Commonwealth of Australia 2015.

Responding to Non-compliance (Chapter 5)

20. Frameworks largely aligned with established requirements although there is scope for Environment to improve policy and procedural documentation at the departmental level. Decision-making and documentation relating to the investigations cases of both entities was generally sound.

21. There were, however, deficiencies in Environment’s case selection process, with different case selection models used across areas of the department responsible for conducting investigations. Further, the department has not established a central repository to record allegations, referrals and investigations.

22. There would be merit in clarifying the process of referral between entities of allegations assessed as meeting investigation thresholds, but not able to be undertaken by an entity due to resource constraints. This would also lead to improved intelligence sharing.

Reporting of Wildlife Trade Regulation (Chapter 6)

23. Environment does not have comprehensive key performance indicators against which it can illustrate trends over time and outline the extent to which Australia is meeting its international objectives. Developing more comprehensive key performance indicators would better position Environment and other stakeholders to assess the effectiveness of wildlife trade regulation.

24. The last publicly available data on Australian wildlife seizures was published in 2008. Environment currently provides only limited external reporting on the extent of illegal wildlife trade to and from Australia. As the lead regulator, and the only Commonwealth entity with access to both wildlife trade permit and seizure data, the department is well positioned to make such reporting available to the public.

Recommendations

Recommendation No. 1

To better assess and manage risks to compliance with wildlife trade regulations, the ANAO recommends that the Department of the Environment:

- (a) collect, retain and regularly analyse compliance information from its own and the Department of Immigration and Border Protection’s holdings;
- (b) identify and regularly review relevant risk factors for wildlife trade regulation; and
- (c) develop and implement, as part of its compliance strategy, an annual risk-based program of compliance activities.

Environment’s response: *Agreed*

Recommendation No. 2

To improve voluntary compliance with wildlife trade regulation, the ANAO recommends that the Department of the Environment:

- (a) update its website information for travellers and traders;
- (b) develop a communications plan, taking into account the results of intelligence analysis and risk identification; and
- (c) evaluate, in collaboration with the Department of Immigration and Border Protection, publicly available information with a view to maximising its effect on traveller and trader behaviour.

Environment’s response: *Agreed*

Recommendation No. 3

To improve the integrity of wildlife trade data for compliance and regulatory purposes, the ANAO recommends that the Department of the Environment and the Department of Immigration and Border Protection:

- (a) agree on minimum data standards for seizures that incorporate standardised quantity recording and develop strategies for enforcing those data standards; and
- (b) develop strategies for improved data exchange between the two entities, including options for electronic transfer and real-time access.

Environment’s response: *Agreed*

DIBP’s response: *Agreed*

Recommendation No. 4

To improve the monitoring and reporting of wildlife trade regulation, the ANAO recommends that the Department of the Environment develop appropriate key performance indicators and targets, and publicly report the extent to which the objectives for wildlife trade regulation are being achieved.

Environment’s response: *Agreed*

It is clear that in addition to having offence provisions, including for engaging in a wildlife trade activity without a permit or approved plan, trading a prohibited species, providing false or misleading information in a permit

application in legislation, there needs to be a well-resourced enforcement agency to actively undertake compliance. There also needs to be interagency cooperation on data analysis.

As set out in our *Next Generation Biodiversity Laws* report, best practice compliance and enforcement under the national legislation would include:¹⁰²

- A **consolidated part** on compliance and enforcement, penalties and tools;
- Explicit powers for a new **National EPA** as the chief environmental regulator;
- **Open standing** for third party civil enforcement by community members including Court orders for injunctions, declarations and compensation;
- Community members can **seek performance of enforceable duties** under the Act, such as requirements to act within a statutory timeframe or comply with particular decision criteria;
- A comprehensive suite of **investigative powers** for authorised officers (for entry, seizure, information-gathering etc);
- New powers to issue **warning notices** and **environmental protection notices** to direct certain action (such as to cease an activity), including in response to minor breaches or where more evidence is needed for the suspected breach;
- A full suite of **criminal, civil and administrative sanctions** to respond to breaches, to apply across the spectrum of non-compliance in the Act;
- Provisions to enable **detention of non-citizens** suspected of breaching the Act and to enable the seizure of wildlife specimens (with enforceable conditions);
- **Harmonised federal-state regulation** based on the most stringent standards and clearly assigned responsibilities;
- A **proactive compliance monitoring and auditing system**, including discretion for the National EPA to conduct audits, and strategic oversight by a National Sustainability Commission;
- Investigation and prosecution **costs would be recoverable** from offenders; and
- Other fees and penalties would be hypothecated to a **Capital Stewardship Fund**, rather than consolidated revenue, for increased investment in biodiversity conservation.

Recommendation

Legislate the full range of best practice investigation and enforcement powers for officers under national environmental legislation.

Internet trading

The issue of internet wildlife trade is of growing concern for imports into Australia, and also for exports. A survey undertaken by IFAW in 2013 documented Australian websites selling endangered wildlife. An alarming number of CITES Appendix I specimens were available for sale on websites hosted in Australia, with ivory listings making up 59% of the trade. A 2016 report found a 266% increase in the number of endangered wildlife products offered for sale on Australian websites since the previous survey in 2008. The report findings are set out in **Box 5**.¹⁰³

¹⁰² The framework proposed here includes (but is not limited to) many of the recommendations from the Independent review of the EPBC Act (Hawke Review) to improve EPBC Act enforcement (see Hawke 2009, Chapter 16). Detailed provisions are beyond the scope of this report.

¹⁰³ Click to delete: *Australian websites selling Endangered wildlife*, IFAW (2016)

https://d1jyxxz9imt9yb.cloudfront.net/resource/127/attachment/regular/IFAW_Internet_Trade_Report_AUS_final.pdf

¹⁰⁴ Crimes Act 1914 (Cth) s4AA.

Internet trade is poorly regulated with significant risks to animal welfare including through handling and transport. This trade stimulates demand resulting in illegal take from the wild. Online purchases are often the result of impulse buying and can lead to pet abandonment, with owners ill equipped to meet the specialist needs of the wild animals they are caring for.

To address these issues we recommend that:

- A provider of an online sales platform must not allow their platform to be used for the trade of live regulated native specimens.
- A provider of an online sales platform must ensure that all advertisements placed on their platform for the sale of CITES specimens, regulated native specimens or other native wildlife include a notice warning potential purchasers of the risks of purchasing and owning illegally traded specimens.
- A provider of an online sales platform must take all reasonable and practicable measures to prevent their sites being used for the sale of CITES specimens or regulated native specimens without documents demonstrating the lawful provenance of the specimen.
- A person must not offer for sale on an online platform a CITES specimen or a regulated native specimen unless they have documentary evidence of the lawful provenance of the specimen.
- A person must not purchase, through an online platform, a CITES specimen or a regulated native specimen unless they have first been provided with documentary evidence of the lawful provenance of the specimen.

Recommendations

Strengthen requirements for vendors and online sales platforms to provide proof of an item's legality when offering it for sale on the internet. Update offence provisions to more comprehensively cover potentially unlawful internet trading.

No live animals should be traded on the internet due to welfare implications for all native wildlife and species listed on Appendices I or II of CITES or IUCN listed species.

Sentencing guidelines for wildlife trade offences

The wildlife trading offences contained in the EPBC Act and their associated maximum penalties are set out in **Table 3**. Maximum penalties are high, but the penalties actually ordered tend to be low. This needs to be addressed.

It is important to note that the current value of a penalty unit at the Commonwealth level is \$210¹⁰⁴. As a consequence, the maximum penalty for the above offences (with the exception of s303GP and 303GQ) is \$210,000 for an individual and, under s4B(3) of the *Crimes Act 1914 (Cth)*, \$1,050,000 for a body corporate. Furthermore, the offences in s303GP and 303GQ (which have a specified maximum penalty of imprisonment only) can result, under s4B(2) of the *Crimes Act 1914* in a pecuniary penalty being imposed instead of, or in addition to, the penalty of imprisonment.

Box 5: Extract from IFAW report 'Click to Delete: Australian websites selling endangered wildlife' (2016)

Legislation Governing Wildlife Trade on the Internet

Australia's legislation governing trade in endangered species is relatively strong in comparison to other countries such as New Zealand and its enforcement agencies seek to take a robust approach to ensuring compliance with the rules. However, the rise of online trading opportunities represents a significant challenge for effective law enforcement as it creates a large pool of online shoppers with access to wildlife products who may be unaware of the laws governing this trade. It also creates a pathway for those with criminal intent to utilise online trading platforms and the international postal systems to evade detection and prosecution.

The Australian wildlife trade legislation pre-dates the massive expansion of the online trading world and this, together with the international nature of the trade, can allow traders to evade or abuse legislation in various

jurisdictions. There are no requirements for sellers to provide proof of an item's legality when offering it for sale, making it difficult for the customer to know whether a wildlife product or live animal is a legal or illegal specimen.

While the legislation currently makes it an offence to import, export or have possession of an illegally imported CITES listed specimen, it has no specific prohibitions for commercial activities that reflect the reality of the internet trade in which illegal items are offered for sale, bought and sold before the specimens are actually exported, imported or delivered. In this way the existing measures fall short in capturing the sort of illegal wildlife trade activities taking place. This may impede successful prosecutions and fails to create a legal requirement for trading platforms to adopt more effective control measures for potentially illegal trade.

Table 3: Wildlife trading offences

Section	Offence	Penalty	Defence/Exemptions
303CC	Export of CITES specimen	10 years or 1,000 penalty units	Exemptions: § Registered, non-commercial scientific exchange § Specimen acquired before CITES § Personal/household effects
303CD	Import of CITES specimen	10 years or 1,000 penalty units	Exemptions: § Personal/household effects § CITES II, non-living, not prescribed, not limited by 303CA, in personal baggage, non-commercial and CITES authority from exporting country § Registered, non-commercial exchange of scientific specimens § CITES certificate under paragraph 2 of Art VII from exporting country
303DD	Export of regulated native specimen	10 years or 1,000 penalty units	Exemptions: § Accredited wildlife trade management plan § Non-living mammal, live reptile/amphibian or live bird, either not prescribed or approved aquaculture program, not CITES and not eligible listed threatened species; § Registered non-commercial exchange of scientific specimens
303EK	Import of regulated native specimen	10 years or 1,000 penalty units	Exemptions: § Included in Part 2 of list under s303EB and imported under a permit; § Imported under testing permit under s303GD
303GP	(1) Export/Import of live animal in manner subjecting animal to cruel treatment and person knows or is reckless as to whether export/import involves cruel treatment and animal is CITES specimen and person contravenes s303CC or 303CD (2) Export in a manner subjecting animal to cruel treatment, knowingly or recklessly and animal is regulated native specimen and in contravention of s303DD (3) Import subjecting animal to cruel treatment, knowingly or recklessly, animal is regulated live specimen and in contravention of s303EK	2 years imprisonment	N/A
303GQ	Intentional import of specimen if a person knows that specimen was exported from a foreign country and the export was prohibited by a law of the foreign country	5 years imprisonment	(offence only available if investigation or assistance requested by CITES authority of the foreign country)

That pecuniary penalty is calculated by multiplying the maximum term of imprisonment in months by five to result in the maximum number of penalty units—as a consequence, the offence under s303GP has an associated maximum pecuniary penalty of 120 penalty units (being \$25,200 for an individual and \$126,000 for a corporation).

Despite the seriousness of the maximum penalties available, actual penalties imposed are low as set out in **Table 4**.

Table 4: Sentences for wildlife trafficking under the EPBC Act awarded since July 2015

	Sentences	Maximum	Minimum
Mandatory	5	4 years	3 months
Released on Condition	9	23 months	4 months
Fine	31	\$10,000	\$200
Good Behaviour	19	2 years	3 months
Community Service	1	50 hours	50 hours

Current sentencing approach and principles

Sentencing has a number of purposes,¹⁰⁵ however, sentencing for environmental offences will often be a balance between proportionality (i.e. ensuring that the overall punishment is proportionate to the gravity of the offending behaviour), deterrence (i.e. penalties significant enough to discourage others from offending) and protection of the community.¹⁰⁶ While restoration and reparation will be of key relevance to some offences involving environmental harm, particularly where orders for rehabilitation or similar are available, they are likely to be of less relevance for wildlife trading offences than to, for example, pollution or unlawful clearing offences.

Deterring others from committing similar offences is of particular relevance to illegal wildlife trade offences, particularly given that it is notoriously difficult to detect and the significant prices that illegally trafficked wildlife can fetch. The difference between the amount of a fine versus the

value of the trade is illustrated in **Box 6**. In that regard, for a sentence to deter the commission of illegal wildlife trade offences, it should have regard to the profit that could potentially have been realised through the commission of the offence.

The approach to sentencing for federal crimes in Australia involves all relevant matters being weighed up to arrive at an “instinctive synthesis” of the appropriate sentence.¹⁰⁷ This is in contrast to the approach taken in some other jurisdictions (such as the United States) where prescriptive sentencing guidelines are used. While instinctive synthesis involves a large degree of discretion, the Courts do strive to achieve reasonable consistency in sentencing in the interests of justice¹⁰⁸ and will have regard to sentencing decisions in comparable cases.¹⁰⁹

The current statutory sentencing principles are found in Part 1B of the *Crimes Act 1914*, however, common law principles also remain relevant.¹¹⁰

The general principle set out in s16A(1) is that the court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence. Section 16A(2) lists (non-exhaustively) a number of factors that will be relevant to sentencing including the nature and circumstances of the offence, personal circumstances of the offender, the circumstances and degree of harm to the victim, the deterrent effect of the sentence, cooperation with law enforcement and pleading guilty and any course of conduct consisting of criminal acts of the same or similar character. To the extent that these factors relate to the ‘victim’, they are difficult to apply to wildlife trading offences where the harm is to individual animals, the environment more generally and the broader public.

The primary indication of the seriousness of the offence is drawn from the maximum penalty,¹¹¹ which is suitable for imposition on the worst category of offences. Increases to maximum penalties tend to result in the imposition of tougher penalties.¹¹² Recently, the Court of Criminal Appeal in *R v Kennedy*¹¹³ held that the maximum penalties for the illegal wildlife trade offences under the EPBC Act demonstrated the seriousness of these offences.

Box 6: Fines v Value

Fines are usually much less than the value of the wildlife goods on the international black market.

In 1998 one of the largest fines to date was awarded for the attempted export of 19 parrot eggs. The **black market value of the eggs was \$60,000** however the fine was **only half of that, at \$30,000**.

In August 2005 a perpetrator was charged and **fined**

\$24,600 for the attempted export of 24 long necked turtles (*Chelodina oblonga*) and a shingleback lizard (*Tiliqua rugosa*) to Japan. 13 turtles died during the attempt. Despite the hefty fine, it was considerably less than the wildlife’s estimated market value—the turtle typically selling for \$1400 and a shingleback for \$4000 making the total **seizure worth \$37,600**.

¹⁰⁵ Chief Judge Preston identifies the purposes of sentencing as retribution, denunciation, deterrence, protection of the community, rehabilitation, restoration and reparation in Preston BJ, 2006, *Principled Sentencing for Environmental Offences*, paper presented to 4th International IUCN Academy of Environmental Law Colloquium, White Plains, New York.

¹⁰⁶ *R v Kennedy* [2019] NSWCCA 242, per Payne JA and Fullerton J at paragraph [85], see also Adamson J at [101] in relation to the importance of deterrence.

¹⁰⁷ *R v Willisroft & Ors* [1975] VR 292; *Markarian v R* (2005) 228 CLR 357.

¹⁰⁸ *Wong v R* (2001) 207 CLR 584.

¹⁰⁹ See *R v Pham* (2015) 256 CLR 550. Note, however, that the statutory recognition given to ‘guideline judgments’ by some state legislation does not exist at the Commonwealth level.

¹¹⁰ *Judiciary Act 1903* s80.

¹¹¹ *Elias v R; Issa v R* (2013) 248 CLR 483, [27].

¹¹² Pepper R, 2012, *Recent Developments in Sentencing for Environmental Offences*, Paper delivered to the Australasian Conference of Planning and Environment Courts and Tribunals, Perth.

¹¹³ [2019] NSWCCA 242 at [86].

Case Study 4: Martin Kennedy

In 2017, former rugby league player Martin Kennedy was charged with illegal wildlife trafficking offences. The trafficked species included shingleback lizards, soft shell turtles, alligator snapping turtles, snakehead fish, sugar gliders, veiled chameleons and freshwater stingrays. At his property at the time of his arrest \$43,500 cash was seized as proceeds of crime.

On 7 June 2019, Martin Kennedy pled guilty and was sentenced to three years imprisonment to be served by way of an intensive corrections order (which are served in the community), including 700 hours of community

service—a low sentence for such a serious breach of the EPBC Act.

However, the federal Department of the Environment and Energy appealed this sentence on the basis that it was manifestly inadequate. On 18th October 2019 the NSW Court of Criminal Appeals found that the original sentence was manifestly inadequate, with the Court considering the need to deter similar offending as a significant factor in its decision. Martin Kennedy was sentenced to four years imprisonment, with a non-parole period of 2 years and 6 months.

While sentencing decisions are often made by lower courts and remain unreported, the decision of the NSW Court of Criminal Appeal in *Morgan v R*¹¹⁴ provides an indication of the factors Courts have considered in sentencing wildlife trading offences. Those included:

- a) the nature and extent of the offender's role (i.e. their role in the criminal enterprise);
- b) the offender's motivation for committing the offence;
- c) the level of sophistication of the enterprise in which the offender was involved;
- d) whether the offender's conduct revealed any particular aggravating features such as undue cruelty;
- e) the number, value and/or rarity of the specimens involved;
- f) actual harm and/or potential harm occasioned to the particular specimens; and
- g) actual and/or potential harm or damage occasioned to the environment, including, for example, the spread of disease.

In *R v Kennedy* the New South Wales Court of Criminal Appeal (while limited to an appeal on the basis of the manifest inadequacy of the offence) discussed the following issues as relevant to its finding that the sentence imposed by a lower Court was manifestly inadequate:

- a) The seriousness of the offences, as indicated by the maximum penalties for each offence;
- b) The "potentially catastrophic consequences for the Australian ecosystem" flowing from the potential for imported species to carry pathogens, prey on native species or become invasive;
- c) The fact that some of the trafficked species, while not endangered, were listed in Appendices II and III of CITES;
- d) The six separate offences committed in discrete episodes of repeat offending; and
- e) The need to deter offending of this kind, particularly given that it is notoriously difficult to detect.¹¹⁵

The Court at first instance did not include undue cruelty as an aggravating factor in its sentencing, despite one third of the 100 specimens involved suffering death, on the basis that "*undue cruelty must be something more than the risk of death upon transportation.*" The issue was not reconsidered on appeal.

¹¹⁴ [2007] NSWCCA 8.

¹¹⁵ *R v Kennedy* [2019] NSW CCA 242 at para [86]

¹¹⁶ In general federal legislation does not provide for mandatory penalties, the exception being for certain people smuggling offences under the *Migration Act 1958*: Commonwealth Director of Public Prosecution, 2018, *Sentencing of federal offenders in Australia: a guide for practitioners*, Commonwealth of Australia, found at: https://www.cdpp.gov.au/sites/default/files/Sentencing%20of%20Federal%20Offenders%20in%20Australia%20-%20a%20Guide%20for%20Practitioners_300718.pdf

¹¹⁷ Note there is no intention to overlap with requirements under the Biosecurity Act.

Prescriptive guidelines or mandatory minimum sentences would be out of keeping with the overall approach to sentencing for commonwealth crimes.¹¹⁶ In that regard, the recommended approach is to include a list of factors which, in addition to the factors listed in s16A(2), should be considered in arriving at a sentence, including to reflect the nature of the 'victim' involved in such offending.

A new provision should be established to the effect that a sentencing court should consider the following factors, to the extent that they are relevant, in addition to the factors in section 16A(2) of the *Crimes Act 1914*:

- a) the conservation status of the species under the EPBC Act, under state law and, for species which are imported or which have not been subject to a recent assessment under state or commonwealth laws, as assessed in relevant international agreements and the IUCN red list or in relevant legislation in the country of origin;
- b) the biosecurity risk, including risks associated with the spread of disease or pathogens and risk of invasiveness, presented by the species:¹¹⁷
 - i. to Australian ecosystems, for import offences; and
 - ii. to ecosystems in the intended destination, for export offences
- c) the harm to biodiversity caused by the illegal wildlife trade in Australia;
- d) the need to deter commission of wildlife trade offences, having regard to the specimen's value in legal and illegal markets;
- e) the number of specimens;
- f) the level of sophistication of any criminal enterprise the offender was involved in and its capacity to harm biodiversity;
- g) for lookalike species—the conservation status, biosecurity risk and potential harm to biodiversity under (a), (b) and (c) above, for the species the offender may have intended to import/export;
- h) risks to the health and wellbeing of the specimens being imported/exported, including any likely suffering of a living animal;
- i) actual harm to the specimens being imported/exported, including any need to euthanise the specimens for biosecurity reasons.

Recommendations

High maximum penalties should be retained (at least equivalent to the EPBC Act) while penalties under the associated Regulation should be **increased** to provide appropriate incentives and deterrence for mid-tier compliance.

Establish a new provision to the effect that a sentencing court should consider a number of additional factors, in addition to the factors in section 16A(2) of the *Crimes Act 1914*.

3.9 Accountability, transparency and public consultation

This section examines:

- Public consultation
- Advisory bodies
- Public registers
- Third party review rights

Public consultation

There is significant public interest in the conservation of Australia's biodiversity, and this should override commercial-in-confidence considerations in relation to the trade of wildlife. Current legislation has requirements for public consultation and provision of information on public registers, however these could be improved.

One area for reform is to have more comprehensive public consultation requirements for all permit applications, including import and export applications from Australian zoos.

Public consultation for all management plans should be mandatory with adequate time for the public to provide comment. This includes on the making of plans, but also on any significant variations.

Recommendation

Provide for public consultation on permit applications and applications for approval/accreditation of WTOs and WTMPs. This includes public consultation on permit applications by Australian zoos.

Advisory bodies

In addition to public consultation, best practice biodiversity legislation also provides effective avenues for expert consultation. Previously under Australian law there have been specific expert advisory bodies in relation to wildlife trade issues—for example the Exotic Birds Advisory Group.

National environmental legislation should include a requirement for a Wildlife Trade Advisory Group to be established, with expert membership and a remit to review and advise on wildlife trade issues including, but not limited to: prohibitions; permits and plans; conservation benefit assessments; stricter domestic measures; and cooperative measures for domestic trade. The Advisory body would report to the Minister, with all reports and Ministerial responses being made public. This should include at least one industry representative, one conservation representative, one animal welfare representative, one zoo representative, plus Government representatives, with the ability to co-opt members with technical expertise as appropriate.

Recommendation

Establish a Wildlife Trade Advisory Group, with expert membership and a remit to review and advise on wildlife trade issues.

Public registers

National legislation must provide for a comprehensive and accessible public register of permit application and accredited/approved plans and publically accessible lists of species imported and exported. A useful model is the United States Law Enforcement Management Information System (LEMIS) database.

Recommendation

Maintain public registers of approved wildlife trade permits, Wildlife Trade Operations and Wildlife Trade Management Plans.

Third party merits appeals and civil enforcement

National legislation must provide standing for interested parties to seek *merits review* by an independent court or tribunal, of a limited set of key decisions that impact biodiversity. This anti-corruption and accountability measure is in keeping with various expert reviews and recommendations.¹¹⁸

Currently, section 303GJ of Part 13A states (emphasis added):

Review of decisions

- (1) Subject to subsection (2), an application may be made to the Administrative Appeals Tribunal for review of a decision:
 - (a) to issue or refuse a permit; or
 - (b) to specify, vary or revoke a condition of a permit; or
 - (c) to impose a further condition of a permit; or
 - (d) to transfer or refuse to transfer a permit; or
 - (e) to suspend or cancel a permit; or
 - (f) to issue or refuse a certificate under subsection 303CC(5); or
 - (g) of the Secretary under a determination in force under section 303EU; or
 - (h) to make or refuse a declaration under section 303FN, 303FO or 303FP; or
 - (i) to vary or revoke a declaration under section 303FN, 303FO or 303FP.
- (2) Subsection (1) does not apply to a decision made personally by the Minister (but the subsection does apply to a decision made by a delegate of the Minister).
- (3) In this section: **permit** means a permit under this Part.

This section was changed by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*¹¹⁹ which impacted on the ability to seek review of decisions by the Minister or delegates.¹²⁰ The effect of the amendment was that the right for third parties to challenge: issue, refusal, variation, revocation, conditions, transfer, suspension or cancellation of permits does not apply to a decision made personally by the Minister (but the subsection does apply to a decision made by a delegate of the Minister).¹²¹

The *Explanatory Memorandum* stated:¹²²

Items 386 to 388 – Section 206A

212. These items amend section 206A of the Act by inserting a new subsection 206A(2) which removes review by the Administrative Appeals Tribunal as an avenue of review for relevant decisions made personally by the Minister. This leaves the merits of these important decisions to be dealt with by the Government. Decisions made by a delegate of the Minister remain subject to review by the Administrative Appeals Tribunal.

The *Minister's Second Reading Speech*¹²³ justified the amendments citing a perceived need for 'Streamlining for efficiency and effectiveness—cutting red tape in government' generally and specifically noting:

Minor technical amendments

The bill also proposes a range of minor technical amendments. In general, these are designed to improve efficiency and effectiveness. In some cases, they seek to clarify processes. For example, the bill sets out a new way of handling requests for reconsideration of decisions taken under the act. This new process is quicker and more efficient while still allowing all interested parties to have their views heard.

No evidence was presented of unjustified delays or regulatory burdens. Merit review rights are a fundamentally important accountability mechanism that must be part of best practice environmental legislation. Review mechanisms are critical for keeping decision-makers accountable.

Recommendation

Restore merits review rights for third parties for wildlife trade decisions made by the Minister and by delegates.

Open standing to seek review of legal errors and enforce breaches

National legislation must build in mechanisms for the community to seek arms-length review of decisions, administrative processes and potential breaches of the legislation and regulations. The existence of various legal

duties on the Environment Minister and other institutions means that a failure to fulfil those duties, including a failure to meet statutory deadlines, will be enforceable by the community. While legal proceedings are rarely exercised by the general community in practice, the mere existence of these rights ensures that decision-makers are on notice to make proper and timely decisions, and that decisions are free from bias and corruption.

Legal proceedings should be heard in a court or tribunal with specialist environmental expertise, independent of the Executive government and regulatory agencies. As in NSW, any person should be able to bring civil enforcement proceedings in these circumstances (known as 'open standing').

Open standing for the public to seek judicial review of government decisions, and the right to take environmental breaches to court, means that any person can ensure that key decisions are made according to the law.¹²⁴ Such 'third party civil enforcement' is a standard component of environmental law in many jurisdictions, including in Australia. For example NSW planning laws provide 'open standing' for any person to seek judicial review, and limited standing for 'third party objectors' to seek merits review.¹²⁵

As the NSW Independent Commission Against Corruption (ICAC) notes, third party rights provide 'an important check on executive government'. These public rights reduce the likelihood of any undue favouritism being afforded in decision-making. The ICAC supports further expanding merit appeal rights in NSW, noting that the absence of third party appeal rights 'creates an opportunity for corrupt conduct to occur'.¹²⁶

For similar reasons, the current EPBC Act includes extended standing for environment groups, instead of requiring a 'special interest'. Extended standing for judicial review, and to restrain offences or seek other orders, has been critical to public interest legal proceedings under the EPBC Act. However, the threat of adverse costs orders, the significant cost of legal action, and lack of merits review remain considerable barriers to litigation. These obstacles, coupled with the very low proportion of community litigation, disprove the 'floodgates' argument often raised against extended standing provisions.¹²⁷

Recommendation

Ensure legislation provides for open standing for third party civil enforcement by community members, including orders for injunctions, declarations and compensation.





¹¹⁸ Community rights to merits reviews are supported by both the Hawke Review of the EPBC Act and the Independent Commission Against Corruption, *Anti-corruption safeguards in the NSW planning system* (2012). See also EDO NSW, *Merits reviews in planning in NSW* (2016), at: http://www.edonsw.org.au/merits_review_in_planning_in_nsw.

¹¹⁹ *Environment and Heritage Legislation Amendment Act (No. 1) 2006* <<https://www.legislation.gov.au/Details/C2006A00165>>

¹²⁰ Previous version of EPBC Act provisions – pre-2006 amendment (amendment No 165, 2006) <<https://www.legislation.gov.au/Details/C2006C00673>>.

¹²¹ *Environment and Heritage Legislation Amendment Act (No. 1) 2006* <<https://www.legislation.gov.au/Details/C2006A00165>>; The same is provided for s 221A by cl 413–415; for s 243A by cl 446–448; for s 263A by cl 463–465.

¹²² Explanatory Memorandum for *Environment and heritage Legislation Amendment Bill (No. 1) 2006* <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r2646_ems_026ca1f0-ffd5-4b0a-bcc5-64d712171985/upload_pdf/305728.pdf;fileType=application%2Fpdf>.

¹²³ Second Reading Speech, Mr Greg Hunt, (Federal Parliament, House of Representatives, 12 October 2006) <[https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar2646%20Title%3A%22second%20reading%22%20Content%3A%221%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards\);rec=0](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar2646%20Title%3A%22second%20reading%22%20Content%3A%221%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansardr%20%7C%20Dataset%3Ahansards);rec=0)>.

¹²⁴ That is, standing to challenge an environmental decision or to bring civil enforcement proceedings should not be restricted to a person 'whose interests are adversely affected by the decision', as required under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The difference is important because: *[environmental] objectives in bringing litigation – such as to prevent environmental impacts, raise issues for legislative attention and improve decision-making processes – reflect public rather than private concerns, such as protecting property and financial interests.*

¹²⁵ See for example the *Environmental Planning and Assessment Act 1979* (NSW), s. 123 and 98; *Protection of the Environment Operations Act 1997* (NSW), s. 252. NSW biodiversity, mining and water laws also provide 'open standing' for civil enforcement.

¹²⁶ See for example, ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) and subsequent submissions on reforms to the NSW planning system.

¹²⁷ See for example, ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) and subsequent submissions on reforms to the NSW planning system.

Appendix

Current structure of Part 13A of the EPBC Act

Division 1—Introduction

Objects, indigenous rights, definitions

Division 2—CITES species

Subdivision A—CITES species and CITES specimens

Listing of CITES species and stricter domestic measures

Subdivision B—Offences and permit system

Exports and import permit process

Subdivision C—Application of CITES

Management authority, scientific authority and COP resolutions

Division 3—Exports of regulated native specimens

Subdivision A—Regulated native specimens

Regulated and exempt native species

Subdivision B—Offence and permit system

Permit process and offences, register of applications and decisions

Division 4—Imports of regulated live specimens

Subdivision A—Regulated live specimens

Subdivision B—Assessments relating to the amendment of the list of specimens suitable for import

Subdivision C—Offence and permit system

Subdivision D—Marking of certain specimens for the purposes of identification

Division 5—Concepts relating to permit criteria

Subdivision A—Non-commercial purpose exports and imports

For purposes of research, education, exhibition, breeding or propagation, household pets, personal items, travelling exhibition

Subdivision B—Commercial purpose exports and imports

For purpose of an approved captive breeding, cultivation program, aquaculture program; wildlife trade operation, wildlife trade management plan (approved or accredited); consultation, assessments, public register

Division 6—Miscellaneous

Additional permit requirements, exceptional circumstances permit, conditions, review of decisions, welfare regulations, fees, illegal imports, evidence etc.





The legal wildlife trade is actually undermining,
rather than assisting, wildlife conservation



**HUMANE SOCIETY
INTERNATIONAL**

and



**Environmental
Defenders Office**



Eclectus parrot