

Chapter Twelve

Wildlife Trafficking in Australian Criminal Law

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Wildlife trafficking represents a grave threat to worldwide biodiversity. International frameworks have been established with the objective of mitigating this threat by way of regulating the trade of certain endangered or otherwise protected species. In order to augment the efficacy of such initiatives, ratification and enforcement at the domestic level are essential. In Australia, criminalisation of wildlife trafficking is achieved through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), as well as through localised legislation at the State and Territory levels. This chapter explores the criminal offences currently in operation in Australia that are relevant to wildlife trafficking, and evaluates some avenues of reform that have been proposed.

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I. Introduction

Wildlife trafficking has been widely acknowledged as a global threat to biodiversity and to the conservation of species,¹ especially those species that are at risk of endangerment or extinction. Wildlife trafficking carries a particularly negative influence on geographic locations with a high concentration of unique wildlife populations, such as Australia.² In seeking to mitigate the impact of the illegal trade—or ideally prevent wildlife trafficking altogether—criminalisation of conduct that involves or facilitates this trafficking is an essential step to be taken towards solving this multifaceted problem.

This chapter provides an overview of the criminal offences and surrounding provisions relevant to wildlife trafficking into and out of Australia, as well as within the country between the varying, and at times conflicting, State and Territory jurisdictions. After examining the relevant legislative provisions at these two levels, challenges and deficiencies obstructing the efficacious operation of these laws will be made apparent. Finally, several avenues of reform expressed by commentators will be evaluated with a view to improving the effectiveness of Australia’s criminal laws concerning wildlife trafficking into, out of, and within the country.

At the national level, it will be proposed that, despite Australia’s relatively sound national legislative framework to combat wildlife trafficking, low levels of understanding and priority as to these criminal laws, as well as

1 UN General Assembly, *Tackling illicit trafficking in wildlife*, UN Doc A/71/L.88 (5 September 2017).

2 Erika Alacs and Arthur Georges, ‘Wildlife across our borders: a review of the illegal trade in Australia’ (2008) 40(2) *Australian Journal of Forensic Sciences* 147, 147.

inadequate law enforcement responses to modern illicit marketplaces, namely the internet, hinder the fight against trafficking in fauna and flora into and out of Australia. Furthermore, the multitude of environment and conservation statutes across the States and Territories have resulted in an overly complex network of legislative measures. Adding to this complexity, conflicting laws in different jurisdictions often result in inadequate punitive responses, especially with regard to sentencing of perpetrators whose offending crosses State or Territory borders.

There is a relative dearth of literature directly addressing criminal laws concerning wildlife trafficking in Australia. This area has only been explored modestly in the past, and scholarly commentary has been somewhat limited hitherto. Moreover, the existing literature is rather circular, often referring only to the same few available publications, most of which canvas virtually identical subject matter.³ In light of this, this chapter seeks to analyse the commentary critically alongside the legislation. Recommendations for law reform articulated in the past, especially at the State and Territory level, will also be critically examined.

II. Settings

1. Background and development

Over 80 percent of Australia's flora and fauna are endemic⁴ and the country has the highest recorded extinction rate in the world.⁵ For these reasons, it would be expected that Australia greatly values its native wildlife. Wildlife trafficking is, however, not afforded a high degree of priority in Australian criminal law.⁶ While the same can be said about some foreign

3 See *ibid*; Samantha Bricknell, *Environmental Crime in Australia*, Australian Institute of Criminology, Research and Public Policy Series No 109 (2010) 63; Sherryn Ciavaglia et al, 'Current issues with the Investigation of Wildlife Crime in Australia: Problems and Opportunities for Improvement' (2015) 18 *Journal of International Wildlife Law & Policy* 244, 254.

4 Arthur D Chapman, *Number of Living Species in Australia and the World*, Report for the Australian Biological Resources Study (2nd ed, September 2009) 1.

5 Bricknell (n 3) 63.

6 Ciavaglia et al (n 3) 254.

jurisdictions,⁷ it is nevertheless surprising that criminal offences relating to wildlife trafficking are neither given adequate attention by Australian governments, nor are they implemented to full effect.

The low level of priority afforded to wildlife trafficking, coupled with unavailability or unreliability of data, means that little is known about the true scale of trafficking in fauna and flora in and out of Australia.⁸ While some data canvassing intercepted wildlife specimens and goods does exist,⁹ this alone is not enough to paint a comprehensive picture of the levels and characteristics of the illicit wildlife trade in Australia. Furthermore, it remains challenging, if not impossible, to ascertain whether recorded seizures of wildlife contraband represent a significant portion of trafficked wildlife or whether it is merely the 'tip of the iceberg' and the dark figure much larger.¹⁰ Based on the available literature and the low number of recorded seizures, it is possible that the illicit trade is vibrant and lucrative.¹¹ The apparent lack of routine surveillance of online marketplaces for trafficked wildlife products by Australian law enforcement likely further contributes to the unreliability of data in this area.¹²

Australia is a Party to the *Convention on International Trade in Endangered Species (CITES)* since 1975.¹³ *CITES*, which is discussed in detail in Chapter Six of this volume, seeks to regulate, and in some instances prohibit, international trade in endangered species of flora and fauna by establishing three appendices that ascribe various levels of trade restrictions, with the ultimate goals of protecting these species and conserving biological diversity. Pursuant to these and other conservation goals, Australia is also signatory to a number of other environmentally-focused international Conventions, including the *Convention on Biological Diversity*, which is the subject of Chapter Seven.¹⁴ A plethora of criminal

7 Greg Warchol, 'The Transnational Illegal Wildlife Trade' (2004) 17(1) *Criminal Justice Studies* 57, 57.

8 Boronia Halstead, *Traffic in flora and fauna*, Australian Institute of Criminology, Trends and issues in crime and criminal justice No 41 (November 1992) 2.

9 See Alacs and Georges (n 2) 151.

10 Ibid.

11 Halstead (n 8) 2.

12 Alacs and Georges (n 2) 151.

13 Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

14 Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

offences have been established with the objective of implementing these Conventions effectively into domestic Australian legislation.

2. Legislative settings

Section 51 of the *Australian Constitution* grants the Commonwealth a range of legislative powers and responsibilities. Relevant to the trade in wildlife are the powers concerning trade and commerce with other countries and among the States (s 51(i)) and external affairs (s 51(xxix)). While the powers afforded to the Federal Parliament by the *Australian Constitution* make no express mention of topics such as the environment, fauna and flora, or wildlife, this does not place the topic of wildlife trafficking entirely outside of Commonwealth influence. For example, the Commonwealth may, under its external affairs power, allow or prohibit certain practices or operations in Australia in order to fulfill international obligations.¹⁵ Similarly, and relevantly to *CITES*, the federal parliament may enact legislation pertaining to international trade under s 51(i) of the *Constitution*.

Offences relating to cross-border wildlife trafficking were previously set out in the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth), which seldom made reference to Australia's international obligations concerning the wildlife traded and contained a rather cumbersome set of offences that were found to be difficult to apply, interpret, and use in actual prosecutions.¹⁶ A comprehensive review of federal environmental laws in 1998 resulted in calls for a major overhaul of the legislative landscape in this area.¹⁷

Most of the obligations arising from *CITES* are now implemented into Australian law within the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*).¹⁸ This Act supplanted a number of

¹⁵ Peter M McDermott, 'External Affairs and Treaties – The Founding Fathers' Perspective' (1990) 16(1) *University of Queensland Law Journal* 123, 123.

¹⁶ Revised Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001 (Cth).

¹⁷ James Prest and Susan Downing, *Shades of Green? Proposals to Change Commonwealth Environment Laws*, Parliamentary Library, Research Paper 16 1997 – 98 (23 June 1998) 13.

¹⁸ No 91 of 1999.

earlier statutes, including the *National Parks and Wildlife Conservation Act 1975* (Cth), the *Whale Protection Act 1980* (Cth), the *World Heritage (Properties Conservation) Act 1983* (Cth), the *Endangered Species Protection Act 1992* (Cth), and the *Environment Protection (Impact of Proposals) Act 1974* (Cth). When the *EPBC Act* was first introduced in 1999, it did not contain any of the provisions reflecting *CITES* or the *Convention on Biological Diversity*.

III. Federal offences

1. Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001 (Cth)

Criminal offences pertaining to wildlife trafficking were incorporated into the *EPBC Act* with the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* (Cth). This amendment added Part 13 A to the Act, which concerns the international movement of wildlife specimens.

The Explanatory Memorandum attached to this amendment highlighted several concerns expressed in previous inquiries. Referring to a 1998 Senate inquiry into the ‘Commercial Utilisation of Australian Native Wildlife’,¹⁹ the Explanatory Memorandum expressed ongoing concern ‘about the efficacy and the enforcement of the *Wildlife Protection Act*. For example, it can be very difficult to obtain a conviction for some offences against the *Wildlife Protection Act*’.²⁰ In response to this, the amendment introduced this streamlined framework of offences to supersede those in the *Wildlife Protection Act*.

This amendment simplified the confusing jargon previously used in Australia’s wildlife trafficking offences, thereby better aligning them with the core intentions behind *CITES* and other international frameworks such as the *Convention on Biological Diversity*. It also effectively established a

19 Rural and Regional Affairs and Transport Legislation Committee, Submission to the Senate of Australia, *Commercial Utilisation of Australian Native Wildlife* (June 1998).

20 Revised Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001 (Cth) 9.

comprehensive framework that afforded specific offences to those species protected under *CITES*, thus distinguishing them from those offences applicable only to non *CITES*-listed species that are native or otherwise regulated within Australia.

The Explanatory Memorandum further clarified that the bill was being submitted with the objective of more direct and effective fulfilment of Australia's international obligations, stating that better compliance with *CITES* was the primary object of introducing the amended provisions: 'The structure and language of this Division have been deliberately chosen to mirror that of the *CITES* treaty, and therefore appear differently from that of the *Wildlife Protection Act*. This will enhance Australia's capacity to implement its *CITES* obligations.'²¹

For the purposes of this section, certain offences within the *EPBC Act* with similar functions or application are discussed jointly. Additionally, certain non-criminal provisions are highlighted that, while not prescribing offences as such, perform essential peripheral functions that enable the operation of the criminal offences discussed hereafter.

2. Offences under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)

As mentioned above, the *EPBC Act* is Australia's main national environmental law framework and Part 13 A of the Act concerns the international movement of wildlife specimens. This is where Australia's *CITES*-based offences are found. The wildlife trafficking offences prescribed under Part 13 A serve to implement the *CITES* framework in Australia.

Similarly to many other Commonwealth statutes, the *EPBC Act* uses a system of 'penalty units' to assign financial penalties that may be flexible to account for various circumstances such as inflation.²² The current value of one penalty unit is AUD 210; this value will be increased to account for inflation in 2020.²³

²¹ Ibid 3 [emphasis added].

²² *Crimes Act 1914* (Cth) s 4AA(1).

²³ Ibid s 4AA(3).

The maximum penalties prescribed by the wildlife trafficking offences below have been described by scholars such as Tanya Wyatt as severe, and as effectively reflective of the seriousness of the crime type.²⁴ In practice, however, these maximum penalties are hardly ever applied in sentencing.

2.1. Listing of species and general provisions

Section 303CA of the *EPBC Act* mandates the creation and maintenance of a list of protected species that mirrors the *CITES* Appendices and requires that each listed species have a notation attached that further informs its place in the Appendices and its date of addition to the list.

Another important provision at the outset of Part 13 A of the *EPBC Act* is s 303CB, which functions to bolster the preceding provision. Section 303CB(2) grants the Minister for the Environment powers to implement domestic measures stricter than those otherwise afforded by the *CITES* regulations. The Minister may designate that, at the domestic level, the protection of a particular species be treated with a higher degree of stringency than the global *CITES* listings demand, or that non *CITES*-listed species be treated similarly to those that are *CITES*-listed. Importantly, this provision grants the Minister such powers for the purposes of tightening restrictions, not loosening them, so as to ensure that Australia's *CITES* obligations are not undermined by affording an undue amount of discretion over the regulations at a domestic level.

2.2. Illegal import and export offences

Legislative provisions outlawing the unauthorised importing or exporting of certain endangered species are at the crux of Australia's criminal law provisions concerning wildlife trafficking. These offences cover a range of circumstances involving *CITES*-listed species, but also carry out a similar function with regard to native or otherwise regulated species, denoted in the Act as 'regulated specimens'.²⁵ With regard to offences that concern

24 Tanya Wyatt, 'A comparative analysis of wildlife trafficking in Australia, New Zealand and the United Kingdom' (2016) 2(1) *Journal of Trafficking, Organized Crime and Security* 62, 80.

25 *EPBC Act*, s 303DA.

native species, legislators have deliberately sought to mirror the *CITES* provisions, not only to enable a streamlined interpretation of the offences as a whole, but also to foreground that native species are of high priority in Australia, irrespective of their conservation status.²⁶

(a) Sections 303CC & 303DD – Export of CITES and regulated native specimens

Sections 303CC and 303DD criminalise the unauthorised export of certain species out of Australia. *CITES* obligations with regard to regulating the export of listed species are met by s 303CC, and s 303DD performs a similar function for regulated native specimens. These two offences are identical in application, and their requisite elements differ only in the species to which they may be applied. Under these sections, a person commits an offence if they export a specimen in a manner that is not authorised by the Act, and if that specimen either belongs to a *CITES*-listed species or is a regulated native specimen.

Exemptions to liability under both of these sections apply if the exporting party has a valid export permit issued under certain other provisions within the Act.²⁷ Likewise, an exemption applies under subs 303CC(5) if the Minister is satisfied that the specimen in question was acquired before the *CITES* regulations applied to it, and has subsequently issued a certificate to that effect.

A further exemption applies under subs 303DD(3) if the specimen is to be exported in accordance with an accredited wildlife trade management plan, and similar exemptions apply under subs 303CC(3) and (4) if the specimen is being exported as part of a registered exchange between scientific organisations. The evidential burden in all of the above situations of exemption lies with the defendant.

Offenders against these sections face maximum penalties of 10 years imprisonment and fines of up to 1 000 penalty units: ss 303CC(1), 303DD(1).

²⁶ Revised Explanatory Memorandum, Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 1998.

²⁷ *EPBC Act*, ss 303CG, 303DG, 303GB, 303GC.

(b) Sections 303CD and 303EK – Import of CITES and regulated live specimens

Sections 303CD and 303EK criminalise the unauthorised importation of certain species. Section 303CD specifically addresses *CITES* specimens found in such situations. Section 303EK creates an offence for unauthorised importation of a more specific set of live specimens from outside Australia.

As with the previously discussed export offences, exemptions based on allowable importation under certain permits exist within both of these import provisions.²⁸ An exemption to s 303CD applies if the imported item is a personal or household effect. This exemption is taken from Article VII(3) of the *CITES* regulations. The exemption based on registered scientific exchanges mentioned above is also applicable to this section (s 303CD(5)). A further exemption is applicable if: the specimen in question belongs to *CITES* Appendix II; the specimen is deceased and is not an identified species in any other relevant regulations; the quantity of individual specimens does not exceed any quantitative limits imposed under the *EPBC Act*; the specimen has been transported within the personal baggage of a person entering Australia; and the *CITES* authority of the country from which it has been exported has given permission for its export (s 303CD(4)). The last exemption under this section is applicable if the *CITES* authority of the exporting country is satisfied that the specimen was acquired before its *CITES* listing, and has issued a certificate acknowledging this (s 303CD(6)).

An exemption under s 303EK(2) applies if the specimen imported is an allowable regulated specimen as defined under s 303EB, and a valid permit has been issued.

Persons convicted under these sections may incur penalties of up to 10 years imprisonment, and up to 1 000 penalty units.²⁹

²⁸ Ibid ss 303CG, 303GB, 303GC.

²⁹ Ibid ss 303CD(1), 303EK(1).

(c) Section 303GQ – Imports of specimens contrary to the laws of a foreign country

Section 303GQ criminalises the intentional importation of a specimen from a country where the exportation of that specimen is illegal. It is specified that the law prohibiting the exportation from the exporting country must have a basis in CITES, similarly to Part 13 A of the *EPBC Act*. Unlike offences previously discussed, the ability of this offence to be utilised is entirely dependent on the actions of a body from an international jurisdiction; namely, the relevant *CITES* authority of the exporting country. This offence may only be applied if that body has requested either: the investigation of the offence itself; or assistance in relation to a broader class of offences, of which the offence in question is one (s 303GQ(2)).

The maximum penalty prescribed by this offence is five years imprisonment (s 303GQ(1)).

2.3. Additional offences

(a) Section 303GF – Contravening conditions of a permit

An integral aspect of effective implementation of the *CITES* framework in any domestic setting is the establishment of a valid permit or licensing system. In Australia, contravention or manipulation of such systems constitutes a criminal offence under s 303GF of the *EPBC Act*. General breaches of permit conditions attract penalties of up to 300 penalty units (s 303GQ(1)), whereas breaches involving the sale or release from captivity of a live specimen can incur penalties of up to 600 penalty units (s 303GF(3)). These are offences of strict liability, such that fault elements need not be proven for the elements of the offence.³⁰ In other words, offenders may be found liable so long as actual contravention of a permit condition can be established.

(b) Section 303GN – Possession of illegally imported specimens

Section 303GN takes a further step in implementing *CITES* regulations and the *Convention on Biological Diversity* by criminalising the possession of illegally imported specimens, regardless of whether or not the possessor

³⁰ *Criminal Code (Cth)* s 6.1.

was involved in the importation of the specimen. Eligible specimens may be either *CITES*-listed or regulated live specimens.

Exemptions from liability apply if the specimen was lawfully imported, or if the individual specimen itself was not imported, but it belongs to the progeny of lawfully imported specimens (s 303GN(3)). A subsequent exemption also applies if the defendant has a reasonable excuse (s 303GN(5)). The defendant bears an evidential burden if they seek to rely on any of these exemptions.

Persons convicted under this section face a maximum term of imprisonment of 5 years imprisonment and a fine of up to 1 000 penalty units (s 303GN(2)).

(c) Section 303GP – Cruelty (export or import of animals)

Section 303GP predominantly focuses on the humane treatment of wildlife, which is identified as a distinct objective of this Part within the *EPBC Act* (s 303BA(1)(e)). In order to incur liability under this section, offenders must be found to have exported or imported a live animal in a manner that subjects the animal to cruel treatment (s 303GP(1)(a)). The animal must be either *CITES*-listed, or an otherwise regulated specimen. The offence also mandates a mental element of knowledge, or at least recklessness, as to the cruelty imposed by the circumstances of the export or import. This offence works in tandem with the export and import provisions discussed above,³¹ requiring contravention of one of these provisions in order to apply. *CITES* itself does not mandate or necessarily encourage the inclusion of any such provision.

The penalty for this offence is imprisonment for a maximum of two years (s 303GP(1), (2)).

³¹ *EPBC Act* ss 303CC, 303CD, 303DD, 303EK.

3. Offences relevant to wildlife trafficking within other national legislative instruments

3.1. Biosecurity Act 2015 (Cth)

The *Biosecurity Act 2015* (Cth) legislates on Australia's biosecurity through a wide range of administrative, civil, and criminal provisions. Criminal provisions under this Act relevant to wildlife trafficking are contained in Part 3, which concerns prohibited goods. Under this Part, the Director of Biosecurity and Director of Human Biosecurity may make a joint determination as to goods that pose unacceptable risk to Australia's biosecurity; such goods may then be deemed 'prohibited' (s 173). A selection of the offences established under the *Biosecurity Act* with potential application to situations of wildlife trafficking are discussed below.

(a) Section 185 – Bringing or importing prohibited or suspended goods into Australian territory

Under s 185(2) of the *Biosecurity Act*, a person commits an offence by importing prohibited or suspended goods into Australia. Aggravations of this basic offence are also established under this section. The first of these aggravations takes account of whether, as a result of the importation, the person stands to obtain a commercial advantage over their potential competitors (s 185(4)). The second aggravation concerns whether the importation causes, or has the potential to cause, environmental harm or economic consequences (s 185(5)). In the context of wildlife trafficking, offenders could be prosecuted for the importation of any number of wildlife products into Australia, so long as they satisfy the requirement of being prohibited or suspended goods.

Penalties for contravention of the basic offence are up to five years imprisonment and up to 300 penalty units (s 185(2)), whereas penalties for the two flagged aggravations are up to ten years imprisonment for both aggravations, and fines of up to 2,000 penalty units for the first aggravation (s 185(4)), and up to 600 penalty units for the second (s 185(5)).

(b) Section 188 – Receiving or possessing prohibited or suspended goods brought or imported into Australian territory

Possession of prohibited or suspended goods that have been imported into Australia is an offence under s 188. Strict liability applies to this offence. An exemption to liability arises if the defendant can prove that the goods were not prohibited at the time of importation into Australia (s 188(2)). Similarly to the previous offence, this offence could be applied where wildlife products are the prohibited or suspended goods in question.

The maximum penalty for perpetration of this offence is up to 60 penalty units (s 188(1)). This is a comparatively low penalty, most likely as a result of the wide applicability of the offence due to strict liability.

3.2. Customs Act 1901 (Cth)

The *Customs Act 1901* (Cth) legislates on a wide range of topics pertaining to the importation and exportation of goods, and also establishes a number of offences. Of these offences, relatively few relate to wildlife trafficking. A handful of generally applicable offences do exist,³² but are typically not utilised in situations of wildlife trafficking, since the offence under the *EPBC Act* discussed earlier provide a more accessible point of entry for prosecutors when such circumstances arise.

Section 233 of the *Customs Act*, named ‘Smuggling and unlawful importation and exportation’, criminalises a wide range of conduct related to the unlawful carrying of certain prohibited goods into and out of Australia. The maximum penalty for this offence is 1 000 penalty units (s 233AB(1)).

IV. State and territory offences

Just as the transnational movement of wildlife specimens and products is regulated in Australian criminal law, so, too, is the movement of such products within Australia. The illegal trade of wildlife specimens and derivatives within Australia’s borders is dealt with under the legislation of the States and Territories. Unlike the relatively consolidated criminal

³² See *Customs Act 1901* (Cth) ss 50, 112.

framework at the national level, each of the States and Territories have a number of statutes that contain criminal offences relevant to the illegal capture and trade of wildlife.³³

Of note is the lack of uniformity between jurisdictions with regard to wildlife trafficking legislation. It is constitutionally enshrined that Australia's States and Territories operate as individual jurisdictions on certain matters. It is also acknowledged that, for a country as large and ecologically diverse as Australia, laws must necessarily differ from place to place in order to best address the circumstances of any particular State or Territory. The laws that best serve the mostly arid and sparsely populated terrain of the Northern Territory, for example, are largely ill-suited to the drastically different landscape of a locality such as Tasmania. As discussed later in this chapter, inconsistencies in legislation between the States and Territories can hinder enforcement efforts. Furthermore, difficulties and inadequacies may arise when circumstances of offending do not neatly conform to one jurisdiction.

Due to the sheer quantity and diversity of relevant legislation across the States and Territories, for the purposes of this section, offences and penalties with common objectives or elements from each jurisdiction are discussed categorically. Key points of divergence between jurisdictions will be signposted in order to highlight areas of weakness in the criminal legislation at the State and Territory level to be considered in the latter portion of this chapter.

1. Listing and general provisions

As with the *EPBC Act* at the national level, each State and Territory mandates the creation of a list of protected and threatened species to which their respective Acts will apply.³⁴ These lists are overseen and altered as needed

33 See Bricknell (n 3) 51 (table 15); note that the *Wildlife Conservation Act 1950* (WA) has since been repealed by the *Biodiversity Conservation Act 2016* (WA).

34 See *Biodiversity Conservation Act 2016* (NSW) s 4.2; *Biodiversity Conservation Act 2016* (WA) s 13; *National Parks and Wildlife Act 1972* (SA) sch 7; *Threatened Species Protection Act 1995* (Tas) s 13; *Nature Conservation Act 1992* (Qld) ss 76–82; *Flora and Fauna Guarantee Act 1988* (Vic) s 10; *Nature Conservation Act 2014* (ACT) s 63; *Territory Parks and Wildlife Conservation Act 1976* (NT) s 28.

by either the relevant Minister acting on scientific advice, or otherwise by a group of experts, often referred to as a ‘Scientific Committee’, or a variation thereof.³⁵ These bodies or persons act in a similar capacity to the Scientific Authority mandated under *CITES*.

Most of the States and Territories have implemented a form of permit system that regulates the movement of listed wildlife specimens in and out of each jurisdiction.³⁶ Alternatively, in some jurisdictions the relevant Minister may directly authorise certain actions.³⁷ These provisions operate largely homogenously, both with one another and with the similar *EPBC Act* provisions discussed previously, and do not tend to involve criminal offences unless contravened.³⁸

2. Illegal capture offences

The first step in the wildlife trafficking chain involves the usually unlawful acquisition of specimens from the wild.³⁹ Because wildlife traffickers and consumers of wildlife products typically value endangered species especially highly,⁴⁰ these species are usually those most often targeted for illegal capture. There are no offences at the national level that specifically outlaw the capture of certain animals, since the area tends to fall outside the legislative purview of the Federal Parliament under the Constitution, so this is instead addressed by State and Territory legislative measures.

The most common element of illegal capture offences in this context is the unlawful acquisition of a listed or otherwise prohibited specimen. Though comparable offences exist in every jurisdiction, considerations made by those offences can differ considerably. Section 88 of Queensland’s *Nature*

35 See *Biodiversity Conservation Act 2016* (NSW) s 4.9; *Flora and Fauna Guarantee Act 1988* (Vic) s 8; *Biodiversity Conservation Act 2016* (WA) s 37; *National Parks and Wildlife Act 1972* (SA) s 53; *Threatened Species Protection Act 1995* (Tas) s 8; *Nature Conservation Act 1992* (Qld) s 132; *Nature Conservation Act 2014* (ACT) s 31.

36 See, for example, *Wildlife Act 1975* (Vic) s 50; *Biodiversity Conservation Act 2016* (NSW) s 2.11; *Nature Conservation Act 2002* (Tas) s 29.

37 *Nature Conservation Act 1992* (Qld); *Biodiversity Conservation Act 2016* (WA) s 40.

38 See *Flora and Fauna Guarantee Act 1988* (Vic) s 56.

39 See Charles Bergman, ‘Wildlife Trafficking’ (2009) 40(9) *Smithsonian Magazine* 34, 35.

40 *Ibid.*

Conservation Act 1992,⁴¹ which makes it an offence for a person to take, keep or use a protected animal in Queensland, exemplifies this. The provision, although functionally similar to its counterparts in other jurisdictions,⁴² mandates a complex calculus based on the quantity and taxonomy of individual specimens unlawfully taken, in addition to those specimens' protected or threatened status, in order to determine an appropriate penalty (s 88(6)). A similar observation may be made with regard to Western Australia's *Biodiversity Conservation Act 2016*, wherein entirely separate penalties exist for offences involving cetaceans.⁴³ Discrepancies such as these are scattered throughout these pieces of legislation, and have been identified as a problem area in the past.⁴⁴

3. Illegal trade offences

Each State and Territory prescribes offences prohibiting unauthorised buying, selling, and dealing in listed wildlife.⁴⁵ These offences are comparable in that they share similar objectives and application, along with more or less uniform physical elements. The relevant New South Wales offence provides perhaps the most widely applicable example; s 2.5 of the *Biodiversity Conservation Act 2016* (NSW) makes it an offence for persons to 'deal in' animals or plants. The provision affords this term an expansive definition; to 'deal in' wildlife under s 2.5 encompasses a wide range of activities, including the buying, selling, possession, importing, and exporting of specimens prohibited by the Act. This definition encompasses the elements of each jurisdiction's comparative offences,⁴⁶ but it is one of only two jurisdictions to consolidate these prohibited actions under a single provision, the other being Tasmania with s 51 of the *Threatened Species Protection Act 1995*.

41 *Nature Conservation Act 1992* (Qld).

42 See, for example, *Wildlife Act 1975* (Vic) ss 45, 47, 47D; *Biodiversity Conservation Act 2016* (WA) ss 150, 152.

43 See *Biodiversity Conservation Act 2016* (WA) s 149(1)(a).

44 Boronia Halstead, *Wildlife Legislation in Australia: Trafficking Provisions* (1994) 2; Ciavaglia et al (n 3) 253; Wyatt (n 24) 65.

45 Bricknell (n 3) 51.

46 See, for example, *Wildlife Act 1975* (Vic) ss 47, 47D, 50; *Nature Conservation Act 1992* (Qld) ss 88, 88 A, 90 A, 91; *National Parks and Wildlife Act 1972* (SA) ss 58, 59, 60; *Biodiversity Conservation Act 2016* (WA) ss 150, 152, 157, 159, 160.

4. Animal cruelty offences

Because many wildlife trafficking methods involve inhumane and dangerous methods of transporting live specimens, animal cruelty offences are often applicable to such circumstances. Offences based on animal cruelty can provide an avenue of recourse for prosecutors in situations where the requisite elements of more complex trafficking offences cannot be made out,⁴⁷ such as where offenders are apprehended in the early stages of the trafficking process.

Most States and Territories have given effect to dedicated statutes on the topic of animal cruelty,⁴⁸ and many of the primary criminal law statutes also contain offences for serious animal cruelty.⁴⁹ These offences vary in their requisite elements, and in the severity of penalties attached. Certain animal cruelty provisions such as s 530 of the *Crimes Act 1900* (NSW) prioritise the criminal or otherwise reckless intention of the offender as a metric for liability.

Others, such as s 18 of Queensland's *Animal Care and Protection Act*, for example, make no mention of any requisite mental element to be proven. Rather, the provision allows for punishment of all manner of animal cruelty, including, relevant to the topic of wildlife trafficking, the inappropriate transport of live animals in a cruel manner under subs 18(2)(f). Offending under this provision can attract penalties of up to three years imprisonment, and fines of up to 2 000 penalty units.⁵⁰ This type of offence that requires only a physical action in order to be made out is a useful addition to the arsenal of law enforcement when it comes to intercepting wildlife trafficking operations in their early stages, or in cases where offenders have been apprehended while smuggling wildlife specimens cruelly, but perpetration of more serious offences such as those under the *EPBC Act* cannot be made out.

47 Melanie Wellsmith, 'Wildlife Crime: The Problems of Enforcement' (2011) 17 *European Journal of Criminal Policy and Research* 125, 138.

48 See *Animal Care and Protection Act 2001* (Qld); *Prevention of Cruelty to Animals Act 1986* (Vic); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1992* (ACT); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (TAS); *Animal Welfare Act 2002* (WA); *Animal Welfare Act 1999* (NT).

49 See *Criminal Code* (Qld) s 242.

50 *Animal Care and Protection Act 2001* (Qld) s 18(1).

5. Penalties

Despite an apparent lack of uniformity in legislation, there is a generally similar range of available penalties for comparable offences between jurisdictions. Offences involving illegally dealing in wildlife tend to incur maximum custodial penalties of two years imprisonment,⁵¹ as do offences involving the illegal capture of such specimens.⁵² The Northern Territory is a prominent outlier here; commission of similar offences in this jurisdiction can attract custodial penalties of up to ten years imprisonment depending on the species taken or dealt.⁵³ This could be due to the disproportionately high number of rare and valuable species in the Territory.⁵⁴ Since much of the Northern Territory is uninhabited, and thus regular policing is practically impossible, higher penalties may also have been established in the hopes of an added deterrent effect in the absence of a consistent law enforcement presence.⁵⁵

Some jurisdictions, such as Western Australia and Tasmania, prefer non-custodial sentences in their statutory penalties. In fact, Western Australia's fairly broad range of offences related to wildlife trafficking under the *Biodiversity Conservation Act 2016* (WA) do not prescribe custodial penalties of any kind. Although Tasmanian offences do prescribe custodial penalties, those penalties do not exceed 12 months imprisonment.⁵⁶

51 See, for example, *Biodiversity Conservation Act 2016* (NSW) s 2.5; *Wildlife Act 1975* (Vic) s 45; *Nature Conservation Act 1992* (Qld) s 90 A; *Nature Conservation Act 2014* (ACT) ss 134–137; *National Parks and Wildlife Act 1972* (SA) s 60.

52 *Wildlife Act 1975* (Vic) s 41; *Nature Conservation Act 1992* (Qld) s 88; *National Parks and Wildlife Act 1972* (SA) s 51; *Nature Conservation Act 2014* (ACT) s 132.

53 *Territory Parks and Wildlife Conservation Act 1976* (NT) s 66.

54 Northern Territory Government, 'Threatened animals' (Web page, 2020).

55 Ciavaglia et al (n 3) 253.

56 *Threatened Species Protection Act 1995* (Tas) s 51.

V. Challenges and opportunities

1. National challenges

The *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* was largely successful in its objective of clarifying Australia's commitment to implementation of *CITES* as aspired to in its Explanatory Memorandum, as well as producing a streamlined and comprehensive framework of legislative mechanisms to allow for easier implementation of the regulations.⁵⁷

Despite the Amendment Act providing this more convenient framework, problems of ineffective law enforcement have persisted. At the national level, the key problems with which Australia is faced with regard to combating wildlife trafficking are not necessarily legislative; rather, the issues lie in the ineffective utilisation of these laws.⁵⁸

The generally low priority of this crime type is a major contributing factor to the inadequacies of enforcement at play.⁵⁹ Most prosecutions of wildlife trafficking and illegal capture are carried out in the Magistrate's Court, and thus mostly go unreported.⁶⁰ Therefore, wildlife crime does not enjoy a substantial presence on any of the standard legal databases.⁶¹ Furthermore, few individuals or authoritative bodies in Australia tend to treat wildlife crime as a serious crime, partially due to these low levels of attention and priority, as evidenced by the typically lenient sentences imposed on offenders.

A range of potential solutions have been proposed. Some of them focus predominantly on the collection of data, with the goal of eliminating the impediment of speculation based on dark figures⁶² and thereby highlighting the actual significance of the crime type.⁶³ Other commentators such as Elizabeth Bennett instead propose that increased

57 Allan Hawke, *The Australian Environment Act: Report of the Independent Review of Environment Protection and Biodiversity Conservation Act 1999* (October 2009) 225 [12.48].

58 Ciavaglia et al (n 3) 254; Alacs and Georges (n 2) 156.

59 Alacs and Georges (n 2) 156.

60 Bricknell (n 3) xii.

61 Alacs and Georges (n 2) 148.

62 Wyatt (n 24) 80.

63 Wellsmith (n 47) 145.

accessibility of government resources must be of paramount priority, suggesting that in order to begin treating wildlife trafficking with higher priority, legislative and executive officials need to ‘start dedicating the scale of resources to illegal wildlife trade that they do to other serious crimes.’⁶⁴ To that end, she advocates for measures such as the provision of specialised enforcement personnel to combat wildlife trafficking head-on.⁶⁵

Despite variations in the proposed remedies, there is something of a consensus among the abovementioned scholarly literature that this low priority hampers the effective operation of wildlife trafficking laws, and has done so for some time. This must be addressed directly if enforcement of these laws is to improve.

Australia’s generally minimal approach to internet surveillance of wildlife trafficking marketplaces presents a visible opportunity for improvement. As observed by Erika Alacs and Arthur Georges in 2008,⁶⁶ and substantiated by Samantha Bricknell two years later,⁶⁷ Australian law enforcement ostensibly carries out no systematic surveillance of online markets in order to pinpoint Australian species being illegally dealt within the country and on international markets. Engagement with online marketplaces only appears to take place in connection with investigations that have already been established, and not as a matter of routine.

Furthermore, a 2005 report by the International Fund for Animal Welfare (IFAW), a London based non-governmental organisation, found that, even over a decade ago, internet listings of illegal wildlife products were plentiful and easy to locate.⁶⁸ Since the time of the report’s publication, Australia has ostensibly taken no major steps towards the amelioration of this problem. Due to the prevalence of online marketplaces in the illegal wildlife trade, the historical lack of attention paid to these platforms is no longer viable in combating wildlife trafficking. A thorough approach to internet surveillance by law enforcement would not only allow for increased accuracy as to quantifying the scale of the illegal wildlife trade

64 Elizabeth L Bennett, ‘Another inconvenient truth: the failure of enforcement systems to save charismatic species’ (2011) 45(4) *Oryx* 476, 478.

65 *Ibid* 478.

66 Alacs and Georges (n 2) 150.

67 Bricknell (n 3) 57.

68 IFAW, *Caught in the web: Wildlife trade on the internet* (2005) 2.

in Australia, but it would also assist law enforcement in the investigation and prosecution of offenders.⁶⁹

2. Challenges for States and Territories

At the State and Territory level, the impediments hindering effective operation of these laws appear to be more widespread; statutory flaws are apparent alongside inadequacies of enforcement. As indicated above, there is a plethora of legislation at the disposal of State law enforcement agencies. Herein lies one of the inherent problems with this State and Territory criminal legislation; because of the sheer magnitude of legislative provisions that may apply to any one case due to the nature of this illegal trade often necessitating interstate transport of the captured species, law enforcement in this area has the potential to fall victim to the very legislation that seeks to facilitate it.

In a 1994 discussion paper, Boronia Halstead suggests that this vast range of legislation, coupled with inconsistencies of legislative instruments and enforcement capabilities between jurisdictions, may result in the ineffective operation of these laws.⁷⁰ Although this observation was made over 25 years ago, at a time when Australia's national wildlife crime offences were still hampered by the shortcomings of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth), the critique outlined by Halstead here remains valid and virtually unaddressed by legislators.

These inconsistencies can lead not only to ill-informed investigation and judgments, but consequently to the imposition of far lower penalties than are appropriate.⁷¹ Moreover, double jeopardy restrictions, though performing an essential function in the interests of justice, are especially burdensome on these sorts of cases;⁷² since criminal actions cannot be carried out multiple times over the same set of facts, the State or Territory of prosecution would, understandably, prioritise its own interests in the

69 IFAW, *Killing with Keystrokes: An investigation of the illegal wildlife trade on the world wide web* (2008) 17.

70 Halstead (n 44) 2.

71 Ciavaglia et al (n 3) 250.

72 Ibid 252.

course of proceedings. This could result in sentences that are deaf to the circumstances of the offence perpetrated.

Sherryn Ciavaglia et al analysed an unreported case example from 2009 wherein a man was apprehended with dozens of specimens illegally captured from multiple jurisdictions, including Western Australia and the Northern Territory.⁷³ The offender was tried in a Queensland Magistrate's Court, and was fined only a fraction of the market value of the specimens.⁷⁴ This comparatively small fine was the sole penalty imposed, and the offender faced no form of punishment from any other State or Territory due to those jurisdictions' inability to prosecute further on the matter.⁷⁵ This is emblematic of the current state of criminal law regarding wildlife trafficking at the State and Territory level; a patchwork of statutes that, by and large, each serve their own jurisdiction well enough, but are often ignorant of the reality and prevalence of multi-state offending.

The low priority afforded to this crime type in Australia presents another impediment to effective enforcement at the State and Territory level, since it can result in law enforcement officials and members of the judiciary misunderstanding the application or effect of certain legislation.⁷⁶ In attempting to tackle this obstacle, one may look to Queensland as a potential exemplar. Section 90 A of Queensland's *Nature Conservation Act 1992*, as mentioned above, contains a set of practical examples that have presumably been included to assist in understanding the possible applications of the offence. The provision presents the following example: 'Person A buys protected wildlife from B at a market stall. Before buying the wildlife A asked B for evidence that it had been lawfully taken. In response, B replied that B did not have that evidence and that B bought the wildlife from someone else whom B did not know.'⁷⁷

Such examples would be useful additions to a multitude of trafficking offences, particularly at the State and Territory level where prosecutions often go unreported due to being heard in the lowest courts. While not directly affecting the body text of any provisions as such, a set of uniform

73 Ibid.

74 Ibid.

75 Ibid 253.

76 Halstead (n 44) 2.

77 *Nature Conservation Act 1992* (Qld) s 90 A(1).

examples allowing simple interpretation of how each provision is meant to operate would not only raise understanding of the crime type generally among the legal community, but would also allow prosecutors and judges to better address complicated circumstances of offending.

While the prospect of uniform legislation on this topic has been considered in the past,⁷⁸ a 'one size fits all' approach is not recommended because it would be ill-suited to Australia's expansive geographic area and varying biodiversity circumstances. Nonetheless, Australia would benefit from a heightened level of cohesion with regard to these State and Territory laws. Provisions already acknowledging the possibility of multi-state offending represent a step in the right direction; once again, s 90 A of the *Nature Conservation Act 1992* (Qld) exemplifies this well, containing a subsection enabling judges to consider and apply the penalties of another jurisdiction where offending may have occurred.⁷⁹ Other jurisdictions could benefit from following the example set by s 90 A by adjusting their criminal provisions in a similar fashion to allow for better acknowledgement of instances where cross-border criminal activity has occurred.

3. Penalties and sentencing

As expounded above, the penalties for contravention of the *EPBC Act's* CITES-based regulations are, on paper, quite severe. Individual offenders can face up to 10 years imprisonment and be left with fines of penalty units equating to approximately AUD 210 000. This range of available penalties is extensive, outclassing analogous penalties in the United States and United Kingdom, often by large amounts.⁸⁰ Practically these penalties do not carry the impact that this observation imputes. Actual penalties imposed on offenders of wildlife trafficking crimes do not tend to reflect the seriousness of the crimes committed; custodial sentences are extremely rare, and fines levied do not usually even equate to the market value of the specimens or products trafficked.⁸¹ Ciavaglia et al note that a 'poor grasp of the enduring negative environmental consequences by

78 See, for example, Halstead (n 44).

79 *Nature Conservation Act 1992* (Qld) s 90 A(1)(b).

80 Wyatt (n 24) 79.

81 Alacs and Georges (n 2) 155.

magistrates might be cause for the meagre penalties handed if a guilty verdict is reached'.⁸²

Pursuant to this, Alacs and Georges propose that increased severity of penalties such as fines and imprisonment is required 'to deter criminals from engaging in wildlife trafficking'.⁸³ This suggestion carries considerable merit, but in order to be effective it must be adopted at the points of prosecution and sentencing. The penalties prescribed by the *EPBC Act* offences already reflect the seriousness of wildlife trafficking. However, the rather low penalties actually imposed may negate any positive effect these maximums may otherwise bestow.

Additionally, caution must be exercised when justifying such claims by relying on the supposed benefits of criminal deterrence. Prevention of recidivism is of undeniable benefit to any crime type, but the effectiveness of deterrence as a purpose of sentencing is a point of contention among the legal community.⁸⁴ It is argued that the very existence of a criminal justice system carries something of a deterrent effect in itself.⁸⁵ Particular criticism is levelled at individual deterrence, as research suggests that it tends to have virtually no beneficial effect on rates of recidivism.⁸⁶ Moreover, due to the low average penalties, there exists a gross imbalance between the monetary incentives of wildlife trafficking and the potential risks, such that any deterrent factors at play are rendered impotent.⁸⁷ Hence, it is suggested that Alacs and Georges' recommendation be modified so these heftier penalties would instead be implemented 'to better reflect the seriousness of wildlife trafficking offences'. This alternatively phrased objective would retain the element of deterrence foregrounded by the authors, while also emphasising the low priority with which wildlife crime has grappled for decades.

82 Ciavaglia et al (n 3) 254.

83 Alacs and Georges (n 2) 155.

84 See, for example, Raymond Paternoster, 'How much do we really know about criminal deterrence' (2010) 100(3) *Journal of Criminal Law and Criminology* 765, 766.

85 Paul Robinson and John Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) *Oxford Journal of Legal Studies* 173, 173.

86 Daniel S Nagin, Francis T Cullen, and Cheryl Lero Jonson, 'Imprisonment and reoffending' (2009) 38(1) *Crime and Justice* 115, 125.

87 Ciavaglia et al (n 3) 255.

Tony Smith contends that responsibility for facilitating this increase in severity lies with lawmakers at both the State and federal levels; he asserts that legislators' intentions in setting these high maximum penalties need to be made clearer in order to 'provide better guidance for magistrates and judges, thereby enabling them more appropriately to fit the punishment to the crime.'⁸⁸ While this assertion could be beneficial in the interests of heightened understanding of the seriousness of the crime type, the more 'hands-on response' mentioned earlier is more favourable, since it utilises existing legal mechanisms without the need for legislative overhaul.

VI. Conclusion

Australian criminal laws concerning wildlife trafficking have endured very limited public attention hitherto. Despite carrying the potential for significant harm to global biodiversity and to wildlife specimens themselves, wildlife trafficking does not enjoy the attention and resources afforded to other crime types.

At the national level, Australia has the advantage of a strong legislative base from which an effective system of enforcement may develop. An efficient, functional framework of criminal offences is provided by the *EPBC Act*, but shortcomings of enforcement mean that these offences are not operating to their fullest extent. The national legislative framework examined in this chapter demonstrates that the necessary tools for successful enforcement are readily available, yet they are seldom utilised effectively by law enforcement officials or members of the judiciary. Furthermore, despite reform having been urged for over a decade as to internet monitoring of the sale and purchase of illegal wildlife products, there remains ostensibly no continuous law enforcement presence in this area.

As well as sharing the above struggles, State and Territory criminal offences in this field are further plagued by legislative concerns. The complex network of overlapping and conflicting statutes expounded upon in this chapter has

88 Tony Smith, "What price a wedgetail eagle?" An examination of penalties imposed for harming protected species' (2004) 21 *Environmental and Planning Law Journal* 445, 448.

exhibited law enforcement responses that are, for the most part, seemingly blind to the multi-state offending that is commonplace within this area.

It is apparent that Australia would benefit from a revision of the actual penalties imposed on perpetrators of wildlife trafficking offences, alongside a general heightening of priority and attention for wildlife trafficking in the Australian criminal law landscape.

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