



Independent Review

**Department of Agriculture, Water and the
Environment**

Regulation of the export of native and exotic birds

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We have prepared this report for the purpose set out in Section 2.2 of this report, pursuant to our proposal dated 7 August 2020, and it is not to be used for any other purpose without our prior written consent. Accordingly, KPMG accepts no responsibility in any way whatsoever for the use of this report for any purpose other than that for which it has been prepared.

The services provided in connection with this engagement comprise an advisory engagement, which is not subject to assurance or other standards issued by the Australian Auditing and Assurance Standards Board and, consequently no opinions or conclusions intended to convey assurance have been expressed.

This report must not be shown, copied, provided, disseminated, given to or relied on by any other person or entity without our express written consent which may be withheld in our absolute discretion.

We have considered and relied upon information, which we believe to be reliable, complete and not misleading. Nothing in this report should be taken to imply that we have verified any information supplied to us, or have in any way carried out an audit of any information supplied to us other than as expressly stated in this report. The statements and findings included in this report are given in good faith, and in the belief that such statements and findings are not false or misleading.

These findings are based solely on the information provided to us during the course of our review to date. We reserve the right to amend any findings, if necessary, should any further information become available.

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These findings are based solely on the information provided to us during the course of our review to date. We reserve the right to amend any findings, if necessary, should any further information become available.

1. Executive Summary

1.1. Introduction

Background

- 1.1.1. Between July 2015 and November 2018, the Department of Agriculture, Water and the Environment (**the Department**) issued six permits to export Australian native birds to the Association for the Conservation of Threatened Parrots (**ACTP**) in Germany for the purpose of non-commercial exhibition.
- 1.1.2. The Department has received several allegations regarding ACTP and the exports from Australia. The allegations broadly state that the true purpose of the exports was commercial and allege that ACTP has sold Australian birds in contravention of permit conditions.
- 1.1.3. The Department sought to understand whether its approach to issuing these and similar permits is aligned to the attributes of a better practice regulatory agency.

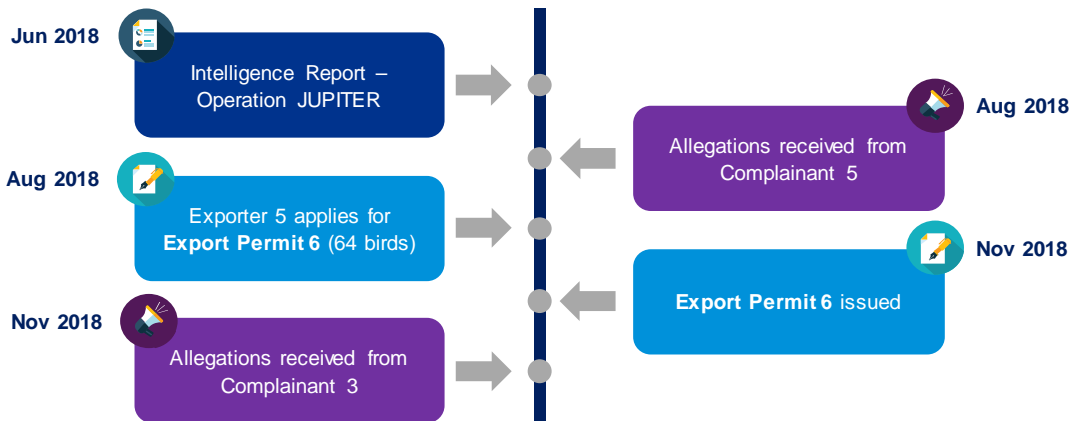
Purpose and Approach

- 1.1.4. We have used an examination of the ACTP permit approval process to identify where there are opportunities to improve the capability and performance of the Department in regulating the export of native and exotic birds.
- 1.1.5. Our approach is detailed in Section 2.4 of this report and we provide a summary below:
 - Reviewed the legislation that we were instructed is relevant to exporting native and exotic birds from Australia;
 - Reviewed the Department's export permit application and issuing process;
 - We were provided full access to Departmental records. We requested, received and reviewed 945 documents from the Department, Mr Warren Entsch MP, Federal Member for Leichhardt (**Mr Entsch**), an exporter, an external stakeholder and a journalist. We provide a full list of the 945 documents at Appendix A; and
 - We were also provided with full access to Departmental staff relevant to our review. As part of the review, we conducted interviews with 27 individuals including:
 - 17 current and former Department staff within Wildlife Trade, Office of Compliance and the Legal Division; and
 - 10 external parties, including exporters, industry representatives, journalists and a Federal Member of Parliament.

1.2. Chronology

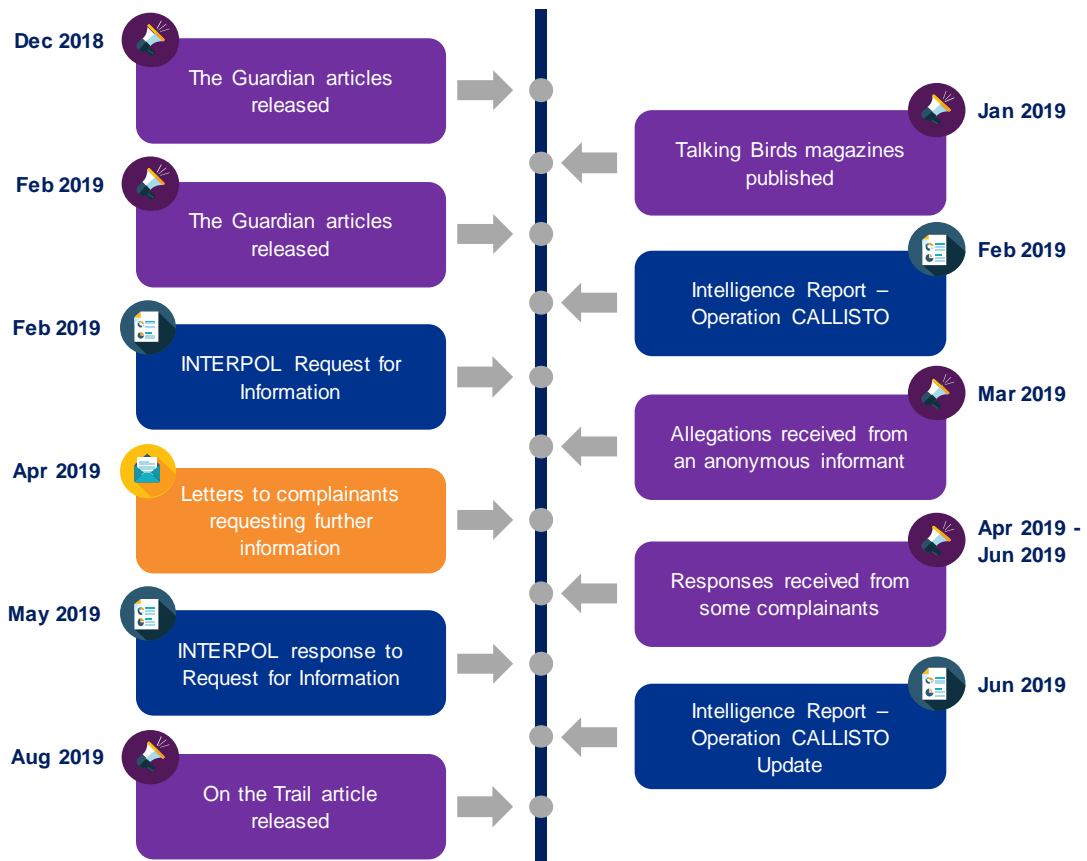
To assist with an understanding of the ACTP issues we have prepared a high-level summary of events, this is not exhaustive and should be read in conjunction with our full report. A detailed 27 page chronology based on our findings is provided at Appendix D:





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1.2.1. High-level summary of events arising after permits were issued:



¹ We note that Exports 3 and 4 were exported by the same person, and Exports 5 and 6 have been exported by the same person, for ease of reference, we have continued to refer to them as Exporter 3 and 5 respectively.

1.3. Key Findings

Based on the chronology² we have detailed, we make the following Key Findings:

- 1.3.1. The export permit decisions made by Departmental officers followed the Department's usual practice. However, the Department's usual practice does not contain adequate policies, procedures and guidelines to inform and document decisions.
- 1.3.2. After the allegations were made in relation to ACTP, further enquiries should have been made prior to the issuing of Export Permits 3, 4, 5 and 6. These enquiries were not made due to deficiencies in the systems, policies and procedures rather than any wrongdoing or misconduct by any employee of the Department.
- 1.3.3. The Department was also impeded by a number of factors beyond its control, including:
 - i) The complex nature of the governing legislation;
 - ii) Jurisdictional issues that arise in relation to the enforcement of permit conditions once birds are exported; and
 - iii) The inability and/or refusal of those making certain allegations to provide evidence to support those claims, in particular, copies of advertisements purportedly offering birds for sale unlawfully, which certain complainants claimed to possess. It is noted that whilst some of this material has been provided to this review, it was not available to the Department before this time.

1.4. Observations

- 1.4.1. Based on our Chronology and Key Findings we make a number of observations about the regulatory capacity and capability of the Department. These observations fall under the following themes:

Observations specific to ACTP

- A. *Examination of the ACTP Allegations (pre permit decisions)*: There was an opportunity to undertake further enquires prior to the issuing of Export Permits 3 to 6 that would have more fully informed the decision-making process. Further, the responses provided by the Bundesamt für Naturschutz (**German CITES authority**) in response to enquiries from the Department did not adequately resolve the concerns that had been raised.
- B. *Failure to Disclose an Existing Glossy Black-Cockatoo*: An allegation was raised that ACTP provided false and misleading information on the original facility assessment by failing to disclose an existing Glossy Black-Cockatoo. This was a relevant consideration in assessing subsequent permit applications, however, this allegation was not fully considered by the Department.
- C. *Examination of the ACTP Allegations (post permit decisions)*: The Department has been provided with names of persons who are alleged to have bought, or be in possession of ACTP birds, but we have found limited evidence that these lines of enquiry have been pursued and exhausted. However, we note there are jurisdictions challenges facing the Department in this regard. We also note at times, enquiries made by the Department were frustrated by the fact that individuals making complaints were either unwilling, or unable, to provide evidence of the birds being offered for sale. As part of this review, KPMG has been provided with what appears prima facie to be evidence of birds being offered for sale. However, this information has not previously been provided to the Department.

General Observations

- D. *The Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act or the Act)*: When considering the regulation of the export of native and exotic birds, we note:

² See Appendix D.

- The complexity of the EPBC Act and its construction makes it difficult for the Department to interpret and apply the Act clearly and consistently; and
 - Key terms are either not clearly defined, or not understood, by Departmental staff. There is confusion as to the meaning and application of important terms such as zoo and private zoo.
- E. *Policies Procedures and Guidance Material:* In order to inform a proper assessment of the relevant facts and deliver consistent decision-making, the process should be guided by appropriate policies, procedures and guidance materials. The Department currently has insufficient policies, procedures and guidance material available to assist the assessment and decision-making process.
- F. *General Decision-Making – Export Permits:* The use of a checklist style approach in decision-making can result in an inflexible approach that fails to consider all relevant factors impacting an application and may lead to critical issues being inadequately assessed. Whilst checklists can be used to navigate issues, they should prompt the decision maker to consider other relevant issues and be framed in accordance with the overall purpose of the Act.

The Department relies heavily on a Zoo/Exhibition Permit Check Sheet to make decisions, and Departmental staff do not have a process in place to consider factors outside of the Check Sheet in the decision-making process, which are relevant for decisions.

Individual risk factors are not fully assessed and incorporated into the decision-making process (for example high risk species, quantum of birds of the same type or high-risk import locations). There is no risk-based assessment conducted, as a consequence, there is limited due diligence conducted on higher risk applications.

- G. *Documentation and Reasons for Decision:* Without clear documentation and reasons for decisions, it is difficult for the Department to explain and support positions adopted during the decision-making processes. There is limited supporting documentation for Departmental decisions in relation to the issuing of ACTP permits. There were no reasons for decision and most of the permit files do not contain decision briefs or memos.
- H. *Permit Conditions:* Compliance with permit conditions is an important regulatory consideration for the Department. As the permits are for export overseas, there are jurisdictional challenges that arise when breaches are alleged in a foreign jurisdiction. Despite the jurisdictional difficulties with enforcing conditions, the Department should continue to monitor compliance with the permit conditions as far as possible. Compliance with conditions should become a relevant factor for decision makers when considering future permits.
- I. *Roles, Responsibilities and Communication:* A lack of defined roles and responsibilities may lead to general confusion, and negatively impact on the assessment and decision-making processes.

There is uncertainty about which section of the Department is responsible for receiving, assessing and responding to complaints or allegations made about compliance with permit conditions. There is no formal and structured information sharing process between the Wildlife Trade team and the Office of Compliance. Communication relies on interpersonal relationships and individual knowledge of known issues.

- J. *Systems:* Ineffective case management systems, particularly those relied upon to facilitate critical decision-making, may lead to information not being properly assessed and inconsistent decisions being made. The Department's current case management system is not fit for purpose. The system does not have system-based controls or connection between the Wildlife Trade Assessment team and the Office of Compliance.
- K. *Other Regulatory Issues:* The current export application process requires birds being exported to be captive bred. Currently, there is limited capacity and capability to assess this requirement and controls can be circumvented. Technology being considered by the Department, including the use of DNA, would assist in these assessments.

1.5. Recommendations

1.5.1. In accordance with the scope of our review, we recommend the Department:

As an immediate to short-term priority:

1. In collaboration with the Legal Division, develop a legal and administrative framework for decision-making. The framework should include policy, procedures and guidance material. Decision makers should receive training on the appropriate application of the framework, and administrative decision-making more broadly.
2. Develop appropriate templates that ensure supporting documentation for decisions are recorded. This may take the form of decision briefs or memos that outline the reasons for the decision, the factors considered, and the weighting given to each relevant factor. This will assist in promoting rationality, transparency, consistency and accountability of the decision makers.
3. Temporarily amend the decision-making delegation for eligible non-commercial exports to Senior Executive Level until the above two recommendations are implemented.

As a medium-term priority:

4. Continue to engage with the separate review of the EPBC Act being undertaken by Professor Graeme Samuel AC (**the Samuel Review**) to consider practical steps to reform the EPBC Act.
5. Implement a risk-based assessment process, with system controls and formalised communication processes, which would enable more detailed due diligence to be conducted on higher risk applications. The implementation of a risk-based approach may require further investment in human resourcing.
6. Review and clarify the roles and responsibilities of the Office of the Compliance and Wildlife Trade, particularly as they relate to assessing and responding to allegations of non-compliance with permit conditions.

As a medium to long-term priority:

7. Conduct a broader Regulatory and Compliance Review across the Department, with the aim of identifying if the issues observed are systemic.
8. Establish a registration scheme to prove lineage of specimens to be exported, including a consideration of DNA testing requirement.

2. Introduction

2.1. Background

- 2.1.1. Between July 2015 and November 2018, the Department issued six permits to export Australian native birds to ACTP in Germany for the purpose of non-commercial exhibition.
- 2.1.2. ACTP is a registered non-profit organisation based in Germany whose stated goal is the protection and conservation of endangered parrots and their habitats.³
- 2.1.3. Conditions on the permits require that the birds cannot be primarily used for commercial purposes after they are no longer needed for exhibition. Further, the birds cannot be used in a breeding program that results in the commercial sale of progeny.
- 2.1.4. Two species of the 16 species of birds exported are threatened species and are subject to an Ambassador Agreement.⁴ The holder of the birds under an Ambassador Agreement is required to report to the Department on births, deaths, sickness and also notify the Department if they intend to move the birds to another facility.
- 2.1.5. The Department has received several allegations regarding ACTP and the exports from Australia. The allegations broadly state that the true purpose of the exports was commercial and allege that ACTP has sold Australian birds in contravention of the permit conditions.
- 2.1.6. We were engaged on 14 August 2020, by the Department to conduct a review as per Sections 2.2 and 2.3.

2.2. Purpose

- 2.2.1. We have used an examination of the ACTP permit approval process to identify where there are opportunities to improve the capability and performance of the Department in regulating the export of native and exotic birds.
- 2.2.2. This report sets out the factual findings based on the review activities conducted.

2.3. Scope

- 2.3.1. We have considered the Department's performance against the attributes of a best practice regulatory agency and have made recommendations in the following areas:
 - The circumstances in which export permits were issued to the ACTP;
 - How suitability of applicants is determined, both exporter and importer;
 - The capacity the department has to ensure compliance with permit conditions and actions undertaken by the department in this regard; and
 - The regulatory capability, regulatory system and tools to support regulators to deliver effective outcomes.

³ Source: www.act-parrots.org

⁴ Ambassador Agreements are entered with the Department, the importer and the exporter.

2.4. Approach

- 2.4.1. The following section sets out our approach for this engagement.
- 2.4.2. We reviewed the legislation we were instructed was relevant to exporting native and exotic birds from Australia, as set out in Section 3.1 Summary of the Legislation⁵.
- 2.4.3. We reviewed the Department's export permit application and issuing process.
- 2.4.4. We were provided full access to Departmental records. We requested, received and reviewed 945 documents from the Department, Mr Entsch MP, an exporter, an external stakeholder and a journalist. We provide a full list of the 945 documents at Appendix A.
- 2.4.5. We were also provided with full access to Departmental staff relevant to our review. As part of the review, we conducted interviews with 27 individuals including:
- 17 current and former Department staff within Wildlife Trade, Office of Compliance and the Legal Division
 - 10 external parties, including exporters, industry representatives, journalists and a Federal Member of Parliament
- 2.4.6. Whilst we were provided with all documents requested from the Department we were not provided with all documents that we sought from external stakeholders. Specifically, we sought evidence of birds being offered for sale as alleged throughout this report on multiple occasions from multiple stakeholders. These written and verbal requests ultimately resulted in the production of advertisements from one external stakeholder. These materials can be found at Appendix E.

2.5. Limitations

- 2.5.1. It was not within our scope, nor have we sought to determine whether any party was involved in criminal conduct, nor investigate allegations of such conduct.
- 2.5.2. Nothing within this report is intended to provide legal advice, you should seek your own advice on the issues raised.
- 2.5.3. We have de-identified the individuals involved from the body of this report, however the documents as attached to the appendices have not been altered.

2.6. Disclaimer

- 2.6.1. We have prepared this report for the purpose set out in Section 2.2 of this report, pursuant to the terms of reference agreed on 14 August 2020, and it is not to be used for any other purpose without our prior written consent. Accordingly, KPMG accepts no responsibility in any way whatsoever for the use of this report for any purpose other than that for which it has been prepared.
- 2.6.2. The services provided in connection with this engagement comprise an advisory engagement, which is not subject to assurance or other standards issued by the Australian Auditing and Assurance Standards Board and, consequently no opinions or conclusions intended to convey assurance have been expressed.
- 2.6.3. This report must not be shown, copied, provided, disseminated, given to or relied on by any other person or entity without our express written consent which may be withheld in our absolute discretion.
- 2.6.4. We have considered and relied upon information, which we believe to be reliable, complete and not misleading. Nothing in this report should be taken to imply that we have verified any information supplied to us, nor have in any way carried out an audit of any information supplied to us other than as

⁵ Our review of the legislation was to inform our understanding of the process, we do not offer any legal advice or opinion in this report.

expressly stated in this report. The statements and findings included in this report are given in good faith, and in the belief that such statements and findings are not false or misleading.

- 2.6.5. These findings are based solely on the information provided to us during the course of our review to date. We reserve the right to amend any findings, if necessary, should any further information become available

3. Legislative Context

3.1. Summary of the Legislation

3.1.1. We were instructed that the Australian legislation governing the export of native and exotic birds is the Environment Protection and Biodiversity Conservation Act 1999 (**the EPBC Act** or **the Act**). The EPBC Act fulfils Australia's requirements as a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**).

Application for Permits

3.1.2. Applications for permits are made under s303CE (regarding CITES species) or s303DE (regarding exports of regulated specimens) within Part 13A of the EPBC Act. To aid in understanding, a high-level overview of each section has been outlined below.

3.1.3. Section 303GE enables the Minister to vary or revoke a condition of a permit or impose further conditions of a permit.⁶ The period in which these conditions apply may be for a length of time which is known (for example, a specified number of years)⁷ or unknown (for example, the life of the specimen).⁸

3.1.4. Exceptional circumstances may exist whereby the Minister can justify the proposed export or import of the specimen is appropriate, despite the qualifications that entitle the Minister to issue permits (under Sections 303CG, 303DG or 303EN) not being satisfied.⁹ This may involve the Minister requesting further information from the applicant prior to a decision being made.¹⁰

CITES Species

3.1.5. The permit may be issued subject to a range of conditions outlined in Section 303CG of the EPBC Act. For instance, the Minister can only issue a permit if:

- The actions will not be detrimental to the taxon or relevant ecosystem;¹¹
- There have been no contraventions to the Commonwealth, State or Territory laws in obtaining the specimen and the actions specified in the permit;¹²
- The welfare of the specimen has been upheld (regarding live specimens);¹³
- Any restrictions or conditions applicable to the specimen have been complied with;¹⁴
- Exports and imports of specimen are for an eligible non-commercial purpose; and¹⁵
- The country from which the specimen is proposed to be imported is authorised or permitted to do so.¹⁶

⁶ s303GE(3).

⁷ s303GE(5A)(a).

⁸ s303GE(5A)(b).

⁹ s303GB(1).

¹⁰ s303GB(5).

¹¹ s303CG (3)(a).

¹² s303CG (3)(b).

¹³ s303CG (3)(c).

¹⁴ s303CG (3)(d).

¹⁵ s303CG (3)(e)(i) and s303CG (3)(f)(i).

¹⁶ s303CG(3)(g).

Exports of regulated native specimens

3.1.6. Under Section 303DG, the Minister can only issue a permit if:

- The export is for an eligible non-commercial purpose;¹⁷
- The export is from an approved aquaculture program;¹⁸
- The export will not be detrimental to the taxon or relevant ecosystem;¹⁹
- The export would not be inconsistent with any recovery plan for that species²⁰ whereby the Minister must have regard to any approved conservation advice for the species (regarding threatened species);²¹
- The welfare of the specimen has been upheld (regarding live specimens); and²²
- There have been no contraventions to the Commonwealth, State or Territory laws in obtaining the specimen and the actions specified in the permit.²³

Exports for Exhibition purposes

3.1.7. Section 303FA provides exporting for exhibition as an eligible non-commercial purpose. Under Section 303FE(1), an export is determined to be for the purposes of exhibition if:

- the specimen will be used for the purpose of exhibition;
- the export is not primarily for commercial purposes; and
- the conditions specified in the regulations are satisfied.²⁴

3.1.8. The EPBC Act provides that exhibition includes a zoo or menagerie.²⁵

Contravention

Contravening conditions of a permit

3.1.9. Under Section 303GF, a permit holder or person delegated with authority of the permit is subject to a penalty in the case that an offence takes place. This may result from a contravention of a condition outlined within the permit.²⁶ The severity of the penalty would heighten in the following cases:

- the sale or other disposal of the live animal or plant or its progeny;²⁷
- release from captivity of a live animal or its progeny²⁸; and
- the escape of a live plant.²⁹

Seizure of specimens involved in a contravention of Part 13A

¹⁷ s303DG (3A)(a).

¹⁸ s303DG (3A)(b).

¹⁹ s303DG (4)(a)(i) and s303DG (4)(a)(ii).

²⁰ s303DG (4)(d).

²¹ s303DG (4A).

²² s303DG (4)(b).

²³ s303DG (4)(c).

²⁴ Regulation 9A.11 includes the following applicable conditions: (a) the exhibition presents information with a cultural, scientific or conservation content; (b) if the specimen is a live animal, it does not belong to a CITES I species; (c) the specimen is not used primarily for commercial purposes after it is no longer needed for an exhibition by the institution; (d) the specimen is not needed for conservation breeding or propagation by the exporting country; (e) if possible, the specimen comes from an animal bred in captivity or artificially propagated plant; (f) for a live export of a koala, platypus, wombat or Tasmanian devil, or an animal of an eligible listed threatened species, the exporter, the importer and the Department enter into an agreement about the treatment and disposal of the animal and any progeny of the animal.

²⁵ s303FE(3).

²⁶ s303GF(2)(c).

²⁷ s303GF(2)(3)(d)(i) and (ii).

²⁸ s303GF(2)(3)(d)(iii) and (iv).

²⁹ s303GF(2)(3)(d)(v).

3.1.10. An authorised officer may seize a specimen if they have reasonable grounds to suspect that the specimen has been used or otherwise involved in the commission of an offence against Part 13A.³⁰ The owner of the specimen may rebut the grounds on which the offence was suspected to take place under Section 444C via a formal application to the Secretary.

Welfare

Regulations relating to welfare

3.1.11. Section 303GO outlines the conditions in which live animals and live plants are to be treated. In both cases, consideration must be given to the manner in which the animal or plant is taken,³¹ held after it has been taken,³² prepared or shipped³³ and when they are under the control of the recipient.³⁴ These conditions may also deal with eliminating or minimising risk of injury and adverse health effects of the animal³⁵ or plant.³⁶ This also includes eliminating or minimising the risk of cruel treatment of the animal.³⁷

3.2. Summary of Permit Process

3.2.1. The following high-level process applies to the export of native and exotic birds from Australia for the purposes of exhibition:

- The importer applies to be recognised as a zoological organisation online by completing the following form:
 - Application for assessment as a recognised zoological organisation for the purposes of import and export of wildlife to and from Australia under Part 13A of the Environment Protection and Biodiversity Conservation Act 1999.
- The Department determines if the importer satisfies the Department's criteria for being recognised as a zoological organisation.
- The Department notifies the applicant if they have been approved as a recognised zoological organisation.
- The exporter applies for a Wildlife Trade Permit online by completing a Wildlife Trade Permit Application.
- The Department determines if the application for the export permit meets the criteria under the EPBC Act and issues the export permit. The Department has a period of 40 business days to request further information from the applicant to assist in considering the application.³⁸
- The Department issues the applicant with the export permit.
- The birds are exported within the dates the permit is valid.
- Within two weeks of the shipment, the exporter is required to provide an acquittal to the Department including all specimens, quantities and shipment date. Once the Department receives the acquittal, the permit is no longer considered active.

³⁰ s444A(1).

³¹ s303GO(2)(a)(i) and s303GO(3)(a)(i).

³² s303GO(2)(a)(ii) and s303GO(3)(a)(ii).

³³ s303GO(2)(a)(iii) and s303GO(3)(a)(iii).

³⁴ s303GO(2)(a)(iv) and s303GO(3)(a)(iv).

³⁵ s303GO(2)(b).

³⁶ ss303GO(3)(b).

³⁷ 303GO(2)(b)(iii).

³⁸ s303CF(1), s303DF(1).

4. Chronology

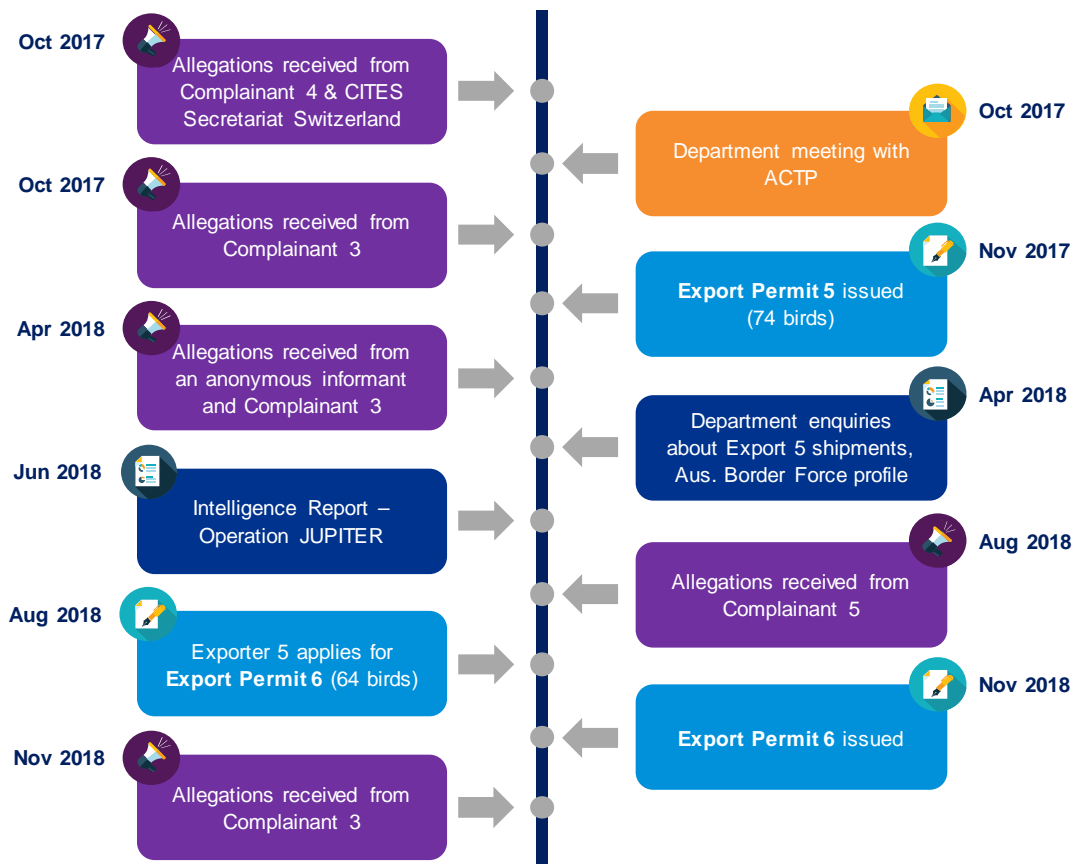
4.1. Summary of events

4.1.1. To assist with an understanding of the ACTP issues we have prepared a high-level summary of events, this is not exhaustive and should be read in conjunction with Appendix D which contains a detailed 27 page chronology based on our findings.

4.1.2. ACTP permit summary³⁹:



³⁹ We note that Exports 3 and 4 were exported by the same person, and Exports 5 and 6 have been exported by the same person, for ease of reference, we have continued to refer to them as Exporter 3 and 5 respectively.



4.1.3. The following is a high level summary of events as detailed in Section 4.3 Matters arising after permits issued below.

Post permit decisions summary



4.2. Chronology

4.2.1. The full version of the chronology can be found at Appendix D.

5. Key Findings

Based on the chronology we have detailed, we make the following Key Findings:

- 5.1.1. The export permit decisions made by Departmental officers followed the Department's usual practice. However, the Department's usual practice does not contain adequate policies, procedures and guidelines to inform and document decisions.
- 5.1.2. After the allegations were made in relation to ACTP, further enquiries should have been made prior to the issuing of Export Permits 3, 4, 5 and 6. These enquiries were not made due to deficiencies in the systems, policies and procedures rather than any wrongdoing or misconduct by any employee of the Department.
- 5.1.3. The Department was also impeded by a number of factors beyond its control, including:
 - i) The complex nature of the governing legislation;
 - ii) Jurisdictional issues that arise in relation to the enforcement of permit conditions once birds are exported; and
 - iii) The inability and/or refusal of those making certain allegations to provide evidence to support those claims, in particular copies of advertisements purportedly offering birds for sale unlawfully, which certain complainants claimed to possess. It is noted that whilst some of this material has been provided to this review, it was not available to the Department before this time.

6. Observations

6.1. Overview

Based on our Chronology and Key Findings, we make a number of observations about the regulatory capacity and capability of the Department. These observations fall under the following themes:

Observations specific to ACTP

- A. Examination of ACTP Allegations (pre permit decisions)
- B. Failure to Disclose an Existing Glossy Black-Cockatoo
- C. Examination of ACTP Allegations (post permit decisions)

General Observations

- D. The EPBC Act and Departmental Policy on Wildlife Trade
- E. Policies, Procedures and Guidance Material
- F. General Decision-Making – Export Permits
- G. Documentation and Reasons for Decisions
- H. Permit Conditions
- I. Roles, Responsibilities and Communication
- J. Systems
- K. Other Regulatory Issues

6.2. Observations specific to ACTP

A. Examination of ACTP Allegations (pre permit decisions)

6.2.1. The allegations made about ACTP can broadly be categorised as:

- whether the purpose of the exports was genuinely for an eligible non-commercial purpose (i.e. exhibition); and
- concerns about non-compliance with permit conditions.

6.2.2. These allegations raise questions about the fundamental basis of the permit applications, as such they were relevant considerations in the decision-making process for Export Permit applications 3 to 6.

6.2.3. The first complaints about ACTP were raised on 9 February 2017, after Export Permit 2 was issued, however, it was not until after the sixth and final permit was issued that most compliance enquiries were undertaken.

6.2.4. The main enquiry made in response to the complaints at the time, was to enquire generally with the German CITES authority about their knowledge of ACTP. The German CITES authority confirmed that they knew of ACTP and that:

“According to the German legal stipulations for registering a charitable non-profit organization, such entity is generally obliged to abstain from any commercial activities.”

- 6.2.5. Despite the enquiry and response being general in nature, the Department relied upon this information as the basis to issue the permits. The response was also used to form the view that the allegations should not be further considered.
- 6.2.6. There was an opportunity to undertake further enquires prior to the issuing of Export Permits 3 to 6 that would have more fully informed the decision-making process. Further, the responses provided by the German CITES authority in response to enquiries from the Department did not adequately resolve the concerns that had been raised.

B. Failure to Disclose an Existing Glossy Black-Cockatoo

- 6.2.7. An allegation was raised that ACTP provided false and misleading information on the original facility assessment by failing to disclose an existing Glossy Black-Cockatoo.
- 6.2.8. The initial facility assessment provided to the Department by ACTP in July 2015, did not include a Glossy Black-Cockatoo, however a Facebook post dated 7 November 2015, made by ACTP declares they have held a Glossy Black-Cockatoo "during the last years". ACTP have also stated that the bird was "confiscated by German authity [sic] in 2006."
- 6.2.9. Whilst the Department made enquires with the German CITES authority about the bird, the response was contradictory, stating ACTP had received the bird in late 2016. We have not been provided with any information which demonstrates that this inconsistency was further examined by the Department.
- 6.2.10. This allegation was a further relevant consideration in assessing subsequent permit applications, however, this allegation was not fully considered by the Department.

C. Examination of ACTP Allegations (post permit decisions)

- 6.2.11. In correspondence dated 12 May 2019, the German CITES authority confirmed they were aware of an advertisement listing Australian birds for sale. However, the German CITES authority also stated the advertisement was removed and that the birds in question were not sold.
- 6.2.12. The Department has been provided with names of persons who are alleged to have bought, or be in possession of ACTP birds, but we have found limited evidence that these lines of enquiry have been pursued and exhausted. However, we note there are jurisdictions challenges facing the Department in this regard. We also note at times, enquiries made by the Department were frustrated by the fact that individuals making complaints were either unwilling, or unable, to provide evidence of the birds offered for sale.
- 6.2.13. The Department appears to have placed significant weight on the advice of the German CITES authority in the determination that there was no evidence to support the allegations.
- 6.2.14. As part of this review, KPMG has been provided with what appears prima facie to be evidence of birds being offered for sale. However, this information has not previously been provided to the Department. If further export permits to ACTP were applied for in the future, the totality of all compliance information should be considered relevant to the decision-making process.

6.3. General Observations

D. The EPBC Act and Departmental Policy on Wildlife Trade

- 6.3.1. A separate review of the EPBC Act is currently being undertaken by Professor Graeme Samuel AC (**the Samuel Review**). The Samuel Review Interim Report, issued in June 2020, has identified that:
- The EPBC Act is complex and leads to confusion and inconsistent decision-making by the Department;
 - The complexity is driven by the inherently complex policy areas covered by the EPBC Act (including Wildlife Trade); and
 - The processes within the EPBC Act are heavily prescriptive, convoluted and inflexible, and are further complicated by important terminology being poorly defined or not defined at all.

- 6.3.2. We concur with the observations made in the Samuel Review (as it applies to the scope of this review) and when considering the regulation of the export of native and exotic birds, we note:
- The complexity of the EPBC Act and its construction makes it difficult for the Department to interpret and apply the Act clearly and consistently; and
 - Key terms are either not clearly defined, or not understood by Departmental staff. There is confusion as to the meaning and application of important terms such as zoo and private zoo.
- 6.3.3. These deficiencies have contributed to confusion in the export permit process, with Departmental officers finding ACTP applications particularly challenging to progress.

E. Policies, Procedures and Guidance Material

- 6.3.4. Without sufficient policies, procedures and guidance materials, decision makers risk inconsistency, inefficiency and error.
- 6.3.5. When we requested copies of relevant policies, procedures and guidance material, we were provided with:
- a Zoo/Exhibition Permit Check Sheet (**Check Sheet**) used by Assessment Officers; and
 - the procedural guideline for the assessment of “Start-up Zoos, Aquaria and Wildlife Parks” used to assess organisations as a recognised zoo.
- 6.3.6. The Check Sheet references a number of policies; however, when these were requested, we were informed that:
- “Policy ... does not necessarily mean there is a written, approved policy position. It is used more in the way of what we accept as meeting the section of the legislation or the regulation for that topic.”

We were then provided with an explanation of the policy areas referenced in the Check Sheet within the email response.

- 6.3.7. Interviews with Departmental stakeholders indicate the staff within the Wildlife Trade Assessments team have significant experience within the Department and we observed the team relies heavily on their institutional knowledge to conduct their work.
- 6.3.8. In order to inform a proper assessment of the relevant facts and deliver consistent decision-making, the process should be guided by appropriate policies, procedures and guidance materials. The Department currently has insufficient policies, procedures and guidance material available to assist the assessment and decision-making process.

F. General Decision-Making – Export Permits

- 6.3.9. The use of a checklist style approach in decision-making can result in an inflexible approach that fails to consider all relevant factors impacting an application and may lead to critical issues being inadequately assessed. Whilst checklists can be used to navigate issues, they should prompt the decision maker to consider other relevant issues and be framed in accordance within the overall purpose of the Act.
- 6.3.10. The Department uses the Check Sheet to assess applications for export permits. Whilst internal manuals or other documents are commonly utilised to assist decision makers to interpret and explain legislation, caution is required when using a checklist rather than the underpinning legislation to make relevant decisions (particularly complex law such as the EPBC Act).
- 6.3.11. The Department relies heavily on the Check Sheet to make decisions, and Departmental staff do not have a process in place to consider factors outside of the Check Sheet in the decision-making process, which are relevant for decisions. This creates tension in the current decision-making process as there is no framework that allows decision makers to consider other relevant factors and exercise discretion in the decision-making process.
- 6.3.12. Individual risk factors are not fully assessed and incorporated into the decision-making process (for example high risk species, quantum of birds of the same type or high-risk import locations). There is

no risk-based assessment conducted, as a consequence there is limited due diligence conducted on higher risk applications.

- 6.3.13. Whilst the Check Sheet references sections of the EPBC Act, Departmental officers are not considering the language and framing of the Act when making decisions. This approach poses a risk that officers are not correctly interpreting and applying the legislation in the assessment of export permit applications.

G. Documentation and Reasons for Decisions

- 6.3.14. Without clear documentation and reasons for decisions, it is difficult for the Department to explain and support positions adopted during the decision-making processes.
- 6.3.15. There is limited supporting documentation on file for Departmental decisions. There were no reasons for decision and most of the permit files did not contain decision briefs or memos.
- 6.3.16. Reasons for decisions promote rationality, transparency, consistency and accountability. Detailing the reasoning process can also assist decision makers to think carefully about their decisions and can help identify relevant principles and standards to guide future decision-making.
- 6.3.17. The preparation of reasons for decision may have assisted the Department to consider their decisions more carefully, as well as demonstrate if any additional factors were considered as part of the decision-making process.

H. Permit Conditions

- 6.3.18. Compliance with permit conditions is an important regulatory consideration for the Department.
- 6.3.19. The Minister may decide to attach conditions to export permits under s303GE of the EPBC Act. Permit conditions may be directed to the permit holder (exporter) or receiver of the specimens (importer). Section 303GF outlines that the Department can issue a penalty in the case of contravention of permit conditions.
- 6.3.20. As the permits are for exports overseas, there are jurisdictional challenges that arise when breaches are alleged in a foreign jurisdiction. During interviews with Departmental stakeholders, there was a strong view that permit conditions on overseas exports were unenforceable. The Department should be mindful of this risk when granting permits and drafting conditions.
- 6.3.21. Despite the jurisdictional difficulties with enforcing conditions, the Department should continue to monitor compliance with the permit conditions as far as possible. Compliance with conditions should become a relevant factor for decision makers when considering future permits.

I. Roles, Responsibilities and Communication

- 6.3.22. A lack of defined roles and responsibilities may lead to general confusion, and negatively impact on the assessment and decision-making processes.
- 6.3.23. There is uncertainty about which section of the Department is responsible for receiving, assessing and responding to complaints or allegations made about compliance with permit conditions.
- 6.3.24. There is no formal and structured information sharing process between the Wildlife Trade team and the Office of Compliance. Communication relies on interpersonal relationships and individual knowledge of known issues.

J. Systems

- 6.3.25. Ineffective case management systems, particularly those relied upon to facilitate critical decision-making, may lead to information not being properly assessed and inconsistent decisions being made. The Department's current case management system is not fit for purpose.⁴⁰ The system does not have system-based controls or connection between the Wildlife Trade Assessment Team and the Office of Compliance.

⁴⁰ Note, we have not conducted a system-based review.

6.3.26. The current system makes it difficult for assessment staff to identify higher risk applications, with importers or exporters with allegations raised against them. It also makes it difficult for assessment staff to share information effectively with the Office of Compliance regarding permit applications.

K. Other Regulatory Issues

6.3.27. The current export application process requires birds being exported be captive bred. To prove the native Australian birds have been legally obtained, the Department accepts the following:

- A specimen report pertaining to the animal in question, showing date of birth, place of birth, dam and sire, whether captive or wild born, identification (microchip/band/tag) and sex;
- State Government permit to hold the species if from a private holder for export; and
- A letter from the breeder declaring the birds were captive bred and demonstrating the bird's lineage.

6.3.28. Our review has identified that primarily State Government permits have been provided to prove the birds are captive bred.⁴¹ We note that whilst a person may have a license to hold a particular species of bird, there is limited capacity and capability to assess whether the bird has been captive bred and controls can be circumvented. Technology being considered by the Department, including the use of DNA, would assist in these assessments.

⁴¹ Examples of permits received per state –
NSW: Native Animal Keepers' Licence,
WA: Advanced Avicultural Licence,
VIC: Wildlife Licence,
QLD: Recreational Wildlife Licence,
NT: Permit to Export Protected Wildlife (from NT to NSW) and Protected Wildlife and Prohibited Entrants Record Book.

7. Recommendations

7.1.1. In accordance with the scope of our review, we recommend the Department:

As an immediate to short-term priority:

1. In collaboration with the Legal Division, develop a legal and administrative framework for decision-making. The framework should include policy, procedures and guidance material. Decision makers should receive training on the appropriate application of the framework, and administrative decision-making more broadly.
2. Develop appropriate templates that ensure supporting documentation for decisions are recorded. This may take the form of decision briefs or memos that outline the reasons for the decision, the factors considered, and the weighting given to each relevant factor. This will assist in promoting rationality, transparency, consistency and accountability of the decision makers.
3. Temporarily amend the decision-making delegation for eligible non-commercial exports to Senior Executive Level until the above 2 recommendations are implemented.

As a medium-term priority:

4. Continue to engage with the Samuel Review to consider practical steps to reform the EPBC Act.
5. Implement a risk-based assessment process, with system controls and formalised communication processes, which would enable more detailed due diligence to be conducted on higher risk applications. The implementation of a risk-based approach may require further investment in human resourcing.
6. Review and clarify the roles and responsibilities of the Office of the Compliance and Wildlife Trade, particularly as they relate to assessing and responding to allegations of non-compliance with permit conditions.

As a medium to long-term priority:

7. Conduct a broader Regulatory and Compliance Review across the Department, with the aim of identifying if the issues observed are systemic.
8. Establish a registration scheme to prove lineage of specimens to be exported, including a consideration of a DNA testing requirement.

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