

A Comparative Evaluation of Hong Kong's Legislative Powers to Regulate Trade in Endangered  
Wild Animals

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## **EXECUTIVE SUMMARY**

This review sets out the findings of a two-year study into the effectiveness of Hong Kong's controls on trade in endangered and threatened species of animals led by Associate Professor Amanda Whitfort of the Faculty of Law, The University of Hong Kong and Dr Fiona Woodhouse, Deputy Director (Welfare) of the Society for the Prevention of Cruelty to Animals (HK).<sup>1</sup> The review was supported by GRF Grant No 17655316 provided by the University Grants Committee of Hong Kong.

For the purpose of the review, a total of 12 interviews were undertaken with stakeholders representing various sectors of the trade.<sup>2</sup> These included the chairperson of a seafood trading association, six NGOs who have provide technical assistance to the Government, representatives from the Agriculture, Fisheries and Conservation Department (AFCD) and the Customs and Excise Department (CED), and academics who study trade in endangered species, some of whom also advise the government via the Endangered Species Advisory Committee (ESAC).

In Hong Kong, the primary legislation intended to control wildlife trade is the Protection of Endangered Species of Animals and Plants Ordinance, Cap 586. Stakeholders were asked to provide their views of the effectiveness of Cap 586 and the surrounding regulatory framework in controlling wildlife crime. It was generally agreed amongst interviewees that the legislation has proven challenging to enforce. Wildlife smuggling investigations have escalated substantially in recent years and large-scale illegal shipments, particularly from shipping containers, are increasingly seized. The average value of these seizures is also rising. Significant challenges to enforcement authorities were identified in relation to controls on import and export, licensing, traceability of animals and proving legal possession.

Seeking to address the concerns raised, the authors of the review compared Hong Kong's laws and practices with those of overseas jurisdictions known to be highly effective in controlling trade in endangered species. As a result, 38 practical recommendations for legislative/policy reforms for Hong Kong are made in the review.

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<sup>1</sup> The authors wish to acknowledge the important contributions of Dr Calton S W Law, Senior Research Assistant on this project and HKU undergraduate student researchers Joyce Lui and Maegan Ho.

<sup>2</sup> See Appendix 1 for list of interviewees and affiliations.

These include

- Amending the Organised and Serious Crimes Ordinance, Cap 455, to recognize certain wildlife offences as organised and serious crime;
- Increasing efforts to trace, restrain and confiscate the proceeds of transnational wildlife crime;
- Designating specific wildlife ports for the import of wildlife products and providing specialised and mandatory training for enforcement authorities in species identification;
- Expanding the requirements for information provided on CITES permits;
- Establishing a Scientific Authority to determine which species should be protected under Cap 586 and Cap 170 and to determine necessary import controls;
- Identifying trades that are particularly vulnerable to laundering and developing specific action plans to combat offending;
- Requiring possession permits for all CITES Appendix II species;
- Imposing strict identification controls to ensure the traceability of all live-traded species;
- Imposing mandatory requirements for declarations by importers before import;
- Introducing routine inspections for animals to be re-exported from Hong Kong (including those shipped to the Mainland);
- Training specialist prosecutors to present wildlife cases at court;
- Nominating ESAC members that have specialised knowledge in wildlife law, animal welfare and veterinary science;
- Requiring all sales, births and deaths of protected species to be reported under licence;
- Increasing public education in relation to wildlife crime; and
- Require labelling of species identity and origin on products to help consumers make more informed decisions.

The review also considered whether effective sanctions for illegal trade in wild animals are being provided on conviction in Hong Kong's courts. The authors studied recent sentencing decisions taken by the local judiciary and made comparisons with international sentencing practices for similar wildlife crimes. It was found that while sentences have increased significantly since the amendment to the maximum penalties for offences under Cap 586 in May 2018, for some species sentencing tariffs are still falling below international standards.

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## **INTRODUCTION**

### **Drivers for the wildlife trade in Hong Kong**

Wildlife trafficking is now regarded as the fourth most lucrative black market in the world, after the trafficking of drugs, people and arms. A recent U.S. Government Accountability Office report estimated the annual value of the illegal wildlife trade at US\$23 billion.

Studies repeatedly show Hong Kong to be a hub for the illegal trade in endangered species as well as for trade in many threatened species. The Territory's geographic location, in South-east Asia, and its long international trading history and established networks, facilitate its role as a wildlife trade hotspot. While some imports are for local consumption, much is transhipped or re-exported. In particular, demand for traditional Chinese medicine (some of which contains derivatives from endangered species) is enabled in China by increasing lack of regulation and growing consumer wealth. An initial survey we conducted of reported criminal cases prosecuted in Mainland China between 2014 and 2018 found that, in 50% of cases prosecuted for the smuggling of rhino horn and tiger bone, the contraband had entered the Mainland via Hong Kong (see Appendix 2 and 3).

Most of the animals trafficked through Hong Kong are not, however highly charismatic mega fauna. The Agriculture, Fisheries and Conservation Department (AFCD) and the Customs and Excise Department (CED) share joint responsibility for combatting wildlife crime. The challenges they face are daunting. Wildlife smuggling investigations have escalated substantially in recent years and large-scale illegal shipments, particularly from shipping containers, are increasingly seized. The average value of these seizures is also rising and now ranks second only to dangerous drugs. Between 2013 and 2019, customs officers in Hong Kong seized over HK\$767 million in trafficked wildlife. These included over 22 metric tonnes of ivory, 70 metric tonnes of pangolin (scales and carcasses), 1,946 metric tonnes of illegal wood and 66 metric tonnes of other endangered species (mainly reptiles). Those quantities are conservatively estimated to equate to the deaths of over 3,000 elephants, 67 rhinos and 138,000 pangolins. Depending which pangolin species are targeted, (they vary greatly in maximum size), between 345 and 2,777 animals must be killed in order to produce one tonne of scales.

Trafficked animals are also laundered through Hong Kong's legal traditional Chinese medicine, decorative arts, food and pet industries. Both trafficking and laundering are of serious concern and in the case of ivory, are well known to be inter-connected.

A two-pronged approach is therefore required to address these issues:

1. The imposition of deterrent penalties to make Hong Kong less attractive to smugglers;
2. Strict controls to ensure legal trade is quantifiable, traceable and rigorously regulated with deterrent penalties for non-compliance.

### **Hong Kong's international obligations under CITES**

The Protection of Endangered Species of Animals and Plants Ordinance, Cap 586, reflects Hong Kong's obligations, as part of China, under CITES. CITES controls trade in over 35,000 species of fauna and flora. The Convention obligates member states to enact domestic legislation to penalise the unauthorised import, export and re-export of its appendix-listed species. The Convention incorporates three Appendices which reflect the level of threat to endangered species from commercial trade.

In Hong Kong, The Protection of Endangered Species of Plants and Animals Ordinance, Cap 586, provides for criminal offences in relation to the unauthorised import, export, re-export and possession of certain CITES scheduled species. The Ordinance has three Appendices (reflecting the three Appendices under CITES). Licences are required to import Appendix I listed species, and Appendix II live animals and plants which were taken from the wild. Licences are required to possess Appendix I listed species within Hong Kong or an Appendix II live animal or plant taken from the wild (for commercial purposes). Licences are also required to export or re-export Appendix listed species.

Those species on CITES Appendix I are considered by scientists to be most at threat of going extinct. Commercial trade in these species is not considered to be sustainable and trade in wild specimens of Appendix I listed animals and plants is prohibited internationally. Permitted trade in wild caught Appendix I species is therefore primarily non-commercial (e.g. for conservation, research, education, zoos or hunting trophies), however captive bred Appendix 1 animals and plants may be traded, with appropriate certification guaranteeing their provenance. In order to import an Appendix I species an export permit/re-export certificate from the country of export (or re-export) must be issued and presented to the Hong Kong authorities on import. According to Article III.2 of CITES an export permit shall only be granted under the following four conditions:

1. A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
2. A Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora
3. A Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and
4. A Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

The export or re-export of an Appendix I species requires an export or re-export permit and may only be granted, in the case of a live animal or plant, if an import permit, in compliance with the CITES requirements has been issued and the specimen is prepared and shipped to minimize any risk of injury, damage to health or cruel treatment (Article III.4(b) CITES).

CITES Appendix II species are those not necessarily yet threatened with extinction, but for which controls are required to ensure continued sustainability. Appendix II species may be traded with certification, from exporting countries, that the animals/plants concerned were harvested legally and that the trade is not detrimental to the species concerned. Importing countries rely on the validity of this certification in order to determine whether the import should be permitted. In order to import an Appendix II species to Hong Kong, an export permit or re-export certificate (from the country of export/re-export) must be issued and presented to the Hong Kong authorities on import. Where the specimen is live and wild caught, an import permit is also required. The export or re-export of an Appendix II species from Hong Kong requires an export or re-export permit.

CITES Appendix III listed species are those which have been identified by a CITES member state as requiring legislative regulation of populations, within their own jurisdiction and for which they seek international co-operation to regulate trade internationally. While there is no requirement for a non-detrimental finding to export Appendix III species, trade requires certification of origin. In order to import an Appendix III species to Hong Kong, an export permit or re-export certificate (from the country of export/re-export) must be issued and presented to the Hong Kong authorities on import. The export or re-export of an Appendix III species from Hong Kong requires an export or re-export permit.

To ensure the welfare of live animals in trade, before issuing permits for animals listed in any of the three Appendices, the management authority of the state of export/re-export must be satisfied they will be prepared for transport and shipped so as to minimise the risk of injury, damage to health and cruel treatment.

Article VII of CITES states that the provisions of Articles III, IV and V do not apply to the transit or transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control. However, Resolution Conf. 9.7 (Rev. CoP15) states that CITES member states should inspect, to the extent possible under their national legislation, specimens in transit or being transshipped, to verify the presence of a valid CITES permit or certificate as required under the Convention or to obtain satisfactory proof of its existence.

### **The organised nature of wildlife crime**

Increasingly governments across the globe are recognising that wildlife trafficking is not only threatening the survival of species but breeding corruption, undermining the rule of law, claiming human lives, and depriving local communities of the income that can be derived from conserving their natural resources. Wildlife crime is threatening security in Africa, where militia and terrorist groups are partially funded by the illegal trade. Interpol recently warned its member countries: ‘A significant proportion of wildlife crime is carried out by organised crime networks, drawn by the low risk and high profit nature of wildlife trafficking crime. The same routes used to smuggle wildlife across countries and continents are often used to smuggle weapons, drugs and people. Indeed, environmental crime often occurs hand in hand with such offences as passport fraud, corruption, money laundering and murder’.

The UN Convention against Transnational Organised Crime recognises wildlife trafficking as a form of transnational organised crime in need of greater response. In 2016, the European Commission developed an action plan to combat illegal trade in wildlife as part of its wider initiative to strengthen the fight against terrorist financing. This includes tackling corruption, enforcing CITES through stronger criminal sanctions and increasing the awareness of organised crime specialists in wildlife trafficking. At a recent Illegal Wildlife Trade conference in London, over 50 countries adopted the ‘London 2018 Declaration’ committing to increased action to protect endangered species around the globe, and recognition of illegal wildlife trade as organised and serious crime.

### **The raising of maximum penalties for wildlife crime in 2018**

In the Chief Executive's 2016 Policy Address it was announced that the Hong Kong government would take legislative steps to ban the Territory's domestic ivory trade. At the same time, the government announced an intention to amend Cap 586 to introduce heavier penalties for the smuggling and illegal trade of endangered species. The amendments to Cap 586, which took effect on 1 May 2018, increased the maximum penalty for the unauthorised import, export, re-export and possession of Appendix I listed species to 10 years' imprisonment and a fine of \$10,000,000. The maximum penalty for offences involving Appendix II and III listed species was raised to 7 years' imprisonment and a fine of \$1,000,000. Previously a distinction was made between commercial and non-commercial purposes of use but that has now been removed. According to the Legislative Council brief, the purpose of the increased sentences is to provide a stronger deterrent against the smuggling and illegal trade of endangered species.

The amendment was long overdue. This review found that compared with overseas practice, Hong Kong's sentences for illegal wildlife smuggling have been lenient, with imprisonment rare and most offenders fined less than the 10% of the value of the contraband they have smuggled. Where imprisonment has been ordered, sentences have been short. Until the amendments to Cap 586 took effect in May 2018, the tariff for smuggling rhino horn to Hong Kong was just 3 months' imprisonment. While significantly more deterrent sentences have been passed since the maximum penalties under Cap 586 were raised in 2018, for some species sentencing tariffs still fall below international standards.

### **The need for more deterrent sentencing**

Another issue which continues to undermine criminal justice responses to wildlife offending is the failure to recognise the significant costs incurred in caring for and rehabilitating animals seized live from smugglers. In a recent case, 658 hatchling Indonesian pig-nosed turtles, (a CITES Appendix II listed species), with an estimated value of over half a million dollars, were discovered hidden in an incoming traveller's luggage. The turtles were extremely fortunate in that they were eventually returned to their natural range in West Papua, Indonesia. However, their repatriation came at a financial cost of HK\$170,000 and required extensive collaboration between the Hong Kong and Indonesian governments, and the Kadoorie Farm and Botanic Garden, which cared for the animals for 8 months prior to their return. . The costs incurred by rescue organisations, such as

the Kadoorie Farm, in caring for animals seized from smugglers are often substantial. Although CITES provides channels for the return of smuggled wildlife, the complexity in achieving wild repatriation means many animals must remain in captivity for the rest of their lives. The defendant in this case was fined \$20,000. Currently there is no mechanism to ensure that even a proportion of fines incurred can be used to compensate parties, even as a token gesture, for the costs incurred during rehabilitation and eventual disposition of the animals.

### **The need for OSCO to include wildlife crime**

Lack of deterrence in sentencing is not the only significant problem plaguing the effective prosecution of wildlife crime in Hong Kong. When large seizures of endangered species are made, AFCD may be tasked with investigating the offences under Cap 586, despite having been granted insufficient legislative powers to investigate the nature of criminal networks behind the trafficking. The primary piece of legislation used to combat organised crime in Hong Kong is the Organised and Serious Crimes Ordinance (OSCO), Cap 455. Unlike officers from the Hong Kong Police Force (HKPF) and CED, AFCD officers are not empowered to utilise OSCO's enhanced powers to investigate wildlife offending. The CED may utilise OSCO's powers, but not to investigate Cap 586 offences.

The reason for this is that unlike serious offences under the Dangerous Drugs Ordinance or the Theft Ordinance, offences under Cap 586 are not classified as 'specified offences' in Schedule 1 of OSCO. This is a significant omission, given the organised nature of the transnational trade in endangered species. The CED has a Syndicate Crimes Investigation Bureau which may utilise OSCO to combat smuggling offences which involve wildlife, under the Import and Export Ordinance. However, despite the United Nations Office on Drugs and Crime and Interpol endorsing a 'follow the money' approach, focusing on the syndicates behind wildlife smuggling, enforcement in Hong Kong has traditionally focused on the mules in the supply chain, when offenders are caught red-handed trying to smuggle in the species. Failure to include Cap 586 offences in Schedule 1 of OSCO also means Hong Kong courts are not empowered, under the Ordinance, to confiscate the proceeds of organised crime's wildlife trafficking.

In 2017, the United Nations General Assembly passed a resolution urging its members to adopt laws classifying wildlife crimes as offences which can trigger money laundering investigations and allow assets to be seized, confiscated and disposed of. The 2018 amendments to Cap 586 re-

classified some wildlife offences as ‘dual’ offences, allowing them to be prosecuted as either summary or indictable crimes. Theoretically this change would allow for money laundering charges to be brought against wildlife traffickers for dealing with the proceeds of Cap 586 offences. However, in order to lay charges for money laundering, there must be evidence that the defendant ‘dealt’ with the proceeds of crime. It is easy to envisage a situation where a defendant may have been party to a Cap 586 offence but investigators are unable to show the defendant dealt with the proceeds of the crime. In such a case, while a conviction may be possible for the offence under Cap 586, it would not be possible for money laundering charges to be laid. If Cap 586 offences were included in Schedule 1 to OSCO this problem would not arise, as the benefit obtained by wildlife trafficking could still be confiscated.

While raising the maximum penalties for offences under the Protection of Endangered Species of Animals and Plants Ordinance has been an important first step, the legislature must go further if Hong Kong is to effectively deter the criminal networks funding extinction. Given the transnational nature of wildlife crime and Hong Kong’s role as a wildlife trafficking hub, **the primary recommendation of this review is that the Organised and Serious Crimes Ordinance is amended to include Cap 586 offences in Schedule 1 of OSCO, as a matter of urgency.**

## **PART ONE: PROBLEMS WITH ENFORCEMENT IN HONG KONG**

### **Wildlife crime in Hong Kong is not considered organised and serious**

The UN Convention against Transnational Organised Crime defines an ‘organised criminal group’ as ‘a structured group of 3 or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit.’ The same Convention defines ‘serious crime’ is an offence punishable by four years or more imprisonment. The UNODC views all wildlife crime as transnational organized crime, of no less seriousness than trafficking in dangerous drugs, firearms, humans and counterfeit goods. UNODC mandates effective prevention of wildlife crime requires countries to focus on its syndicated nature and deal with it in the same way as drugs and human trafficking.

The Organized and Serious Crimes Ordinance, Cap 455, is Hong Kong's primary legislative tool for tackling organized and serious crime in Hong Kong. The Ordinance provides enhanced investigative and sentencing powers to combat organized and serious crime. These powers may be utilized when a crime alleged constitutes an 'organized crime' or a 'specified offence'. Lists of specified offences are provided at Schedules 1 and 2 to the Ordinance.

Under OSCO, 'organized crime' is defined as a Schedule 1 offence that (a) is connected with the activities of a particular triad society; (b) is related to the activities of 2 or more persons associated together solely or partly for the purpose of committing 2 or more acts, each of which is a Schedule 1 offence and involves substantial planning and organization; or (c) is committed by 2 or more persons, involves substantial planning and organization and involves (i) loss of the life of any person, or a substantial risk of such a loss; (ii) serious bodily or psychological harm to any person, or a substantial risk of such harm; or (iii) serious loss of liberty of any person.

For the purposes of combatting wildlife crime, Schedule 1 specified offences relevantly include importing or exporting unmanifested cargo, contrary to section 18 of the Import and Export Ordinance, Cap 60, theft, contrary to section 9 of the Theft Ordinance (Cap 210) and dealing with property known or believed to represent proceeds of indictable offence, contrary to section 25(1) of OSCO.

Where an offence has been specified under OSCO, certain enhanced investigative and punitive powers are granted to enforcement authorities. These include:

- Use of coercive investigative powers to gather intelligence.

Under section 3, prosecutors may apply to the Court of First Instance for a special order to investigate a person or persons involved in organised crime; and under section 4, prosecutors may apply to the Court for a special order to make available certain materials related to organised crime or the proceeds of a specified offence (and a target may be required to produce or permit access to materials).

- Power to confiscate proceeds of crime in District Court and Court of First Instance.

Under section 8, a judge may order that the benefits of a specified crime are confiscated (if the proceeds are above HK\$100,000).

- Power to issue restraint orders and charging orders.

Under section 15, a Court of First Instance judge may make an order to prohibit a person from dealing with specified realisable property and under section 16, a judge may make a charging order against any realisable property to satisfy a confiscation order or for the value of the property.

- Power for courts to impose enhanced sentences.

Under section 27, on conviction of a defendant, prosecutors may demonstrate a specified offence was linked to organised crime and seek an enhanced penalty in the District Court and the Court of First Instance (as is already being utilized for theft of incense trees).

- Money laundering charges for indictable crimes.

Section 25 permits prosecutors to pursue money laundering offences against persons dealing with the proceeds of indictable crime.

Currently, Cap 586 offences are not included in Schedule 1 to OSCO as ‘specified crimes’. This has several very significant repercussions:

- CED cannot utilise the investigative powers under section 4 of OSCO to gain access to materials related to the proceeds of wildlife crime.
- Where a person has been convicted of a wildlife crime, the Courts are not empowered to use section 8 of OSCO to confiscate the proceeds of that crime, nor can judges use OSCO to issue restraint or charging orders over property representing the benefits of wildlife crime.
- Where a person has been convicted of a wildlife crime which the prosecution alleges to have been organized, the Courts are not permitted to pass enhanced sentences under Cap 586. Only the theft of incense trees is able to attract an enhanced sentence as theft is a ‘specified crime’ under Schedule 1 of OSCO.

Recent amendment to Cap 586, making some wildlife crimes indictable are unlikely to assist with this problem. While theoretically charges could now be brought under section 25 for money laundering offences related to wildlife crime, it is very unlikely they would succeed, with the law as it now stands. Without access to the coercive investigative powers available under OSCO section 4, CED are unlikely to gather sufficient evidence to effectively pursue charges against

offenders for dealing with the proceeds of wildlife crimes under section 25. Further, not all serious wildlife offences, where defendants have benefited from the proceeds of their crime, fit within the definition of money laundering. It is possible to envisage many scenarios where an offender has benefited from wildlife crime and is liable for offences under Cap 586, yet there is insufficient evidence to establish he ‘dealt’ with the proceeds (as is required for a successful prosecution under section 25). In such cases, were Cap 586 offences included in Schedule 1, the benefits of the offending could still be confiscated by the courts. Currently this is not possible.

The likelihood that CED will seek to prosecute wildlife smugglers for money laundering, without Cap 586 offences first becoming specified offences in OSCO, is low. A 2019 report prepared by the Financial Action Task Force<sup>3</sup> evaluating Hong Kong’s capacity to address money laundering challenges noted that money laundering prosecutions are significantly fewer than the number of investigations, with most CED cases not proceeding beyond preliminary investigations. This is a particular problem for cross border cases. The HKPF has significantly greater experience in investigating money laundering than CED. Between 2013 and 2017, the police investigated 7852 cases of suspected money laundering, while the CED investigated 114. During the same five year period, the HKPF prosecuted 598 cases, with the CED only prosecuting 22. Only 3 of those cases prosecuted related to the smuggling of goods. As was noted in the report: ‘As Hong Kong is a major international trade hub, further efforts need to be made to mitigate the potential cross-border money laundering risk’.<sup>4</sup>

As noted in the 2019 FATF report ‘Even taking the CED’s narrower money laundering remit than the HKPF, the small number of cases it has prosecuted gives rise to the view that it is more concerned with the prosecution of predicate offences than money laundering.’<sup>5</sup> The re-classification of serious wildlife crime as indictable offences, opening the door to money laundering charges, is therefore likely to have no significant effect on the current problem. Only with the inclusion of Cap 586 offences in OSCO will the situation be likely to improve.

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<sup>3</sup> The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing. The FATF recommendations are recognized as the global anti-money laundering standard.

<sup>4</sup> FATF, ‘Anti-Money Laundering and Counter-Terrorist Financing Measures. Hong Kong, China.’, 65

<sup>5</sup> Ibid, 67.

**Recommendation:**

- **Amend Schedule 1 to the Organised and Serious Crimes Ordinance to include Cap 586 offences as ‘specified offences’ providing enhanced investigative powers to law enforcement authorities.**

**Insufficient investigation into proceeds of trans-national wildlife crime**

Anti-money laundering laws are a tool widely utilized by the international community to address the financial dimensions of highly profitable crimes such as wildlife trafficking. Investigators are tasked with following the money trail to identify the masterminds behind the offending. INTERPOL encourages a multidisciplinary approach to combatting illegal wildlife trade and advocates that National Security Task Forces should be set up involving police, customs, and environmental agencies, prosecutors and NGOs and include senior criminal investigators, crime analysts, financial specialists, forensic experts and DNA analysts. In Hong Kong, under both OSCO and the Mutual Legal Assistance in Criminal Assets Ordinance (Cap 525), prosecutors may seek restraint of the proceeds of crime. However, the FATF report noted that very few outgoing requests are currently being made to overseas authorities to restrain or confiscate the assets of transnational crimes. The report noted: ‘Given Hong Kong’s position as a global finance centre, there is a need for Hong Kong authorities to take a more proactive approach to identify, restrain and confiscate overseas assets representing proceeds of foreign predicates [to money laundering], with a focus on high risk crime types...it appears that Hong Kong does not routinely trace assets abroad for confiscation, with the ultimate aim of depriving criminals of their assets, and adopts a largely reactive approach. Assessors observed that this reactive approach also leads to authorities abandoning investigations/proceedings where funds have been moved abroad. This also supports the observation that more complex cases with international aspects are not vigorously pursued.’<sup>6</sup> The report also noted that confiscations are, for the most part, led by the HKPF, with limited confiscation or restraint orders pursued by CED.<sup>7</sup>

**Recommendation:**

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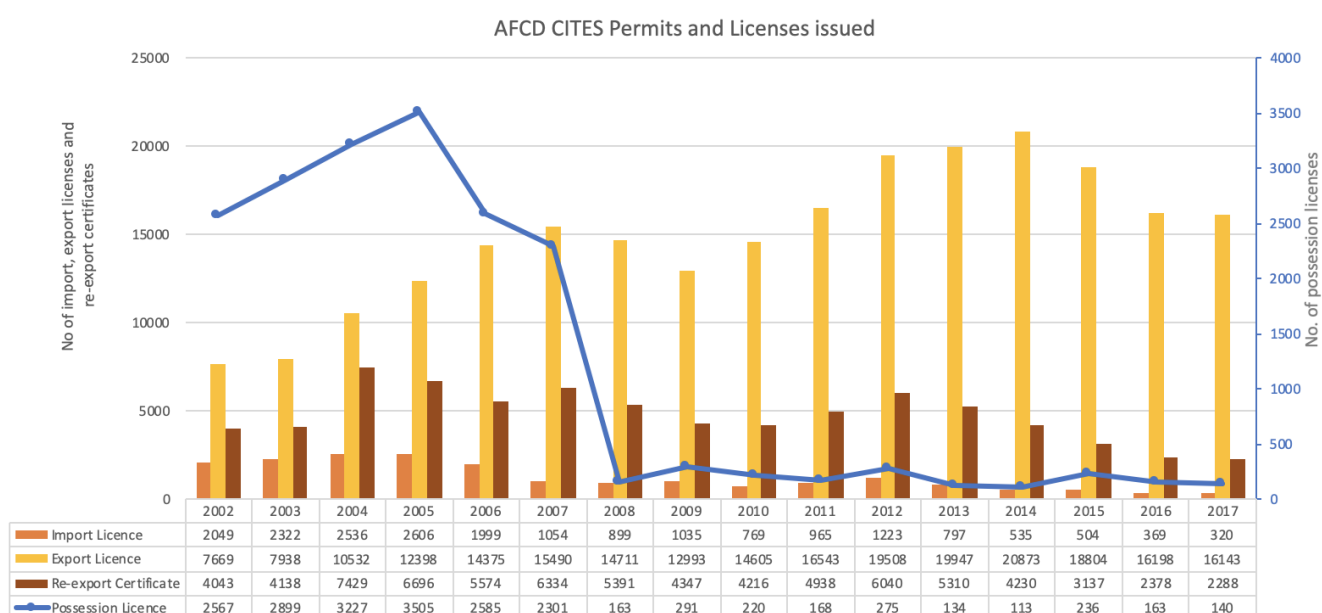
<sup>6</sup> Ibid, 79.

<sup>7</sup> Ibid, 80.

- Given Hong Kong's status as a wildlife trafficking hub, and obligations under CITES and the Convention on Biological Diversity, local enforcement authorities should take a more pro-active approach to the tracing, restraint and confiscation of the proceeds of transnational wildlife crime.
- INTERPOL's recommended approach to wildlife crime should be adopted in Hong Kong, combining the multidisciplinary expertise of police, CED, AFCD and DoJ to access senior criminal investigators, crime analysts, financial specialists, forensic experts and DNA analysts.

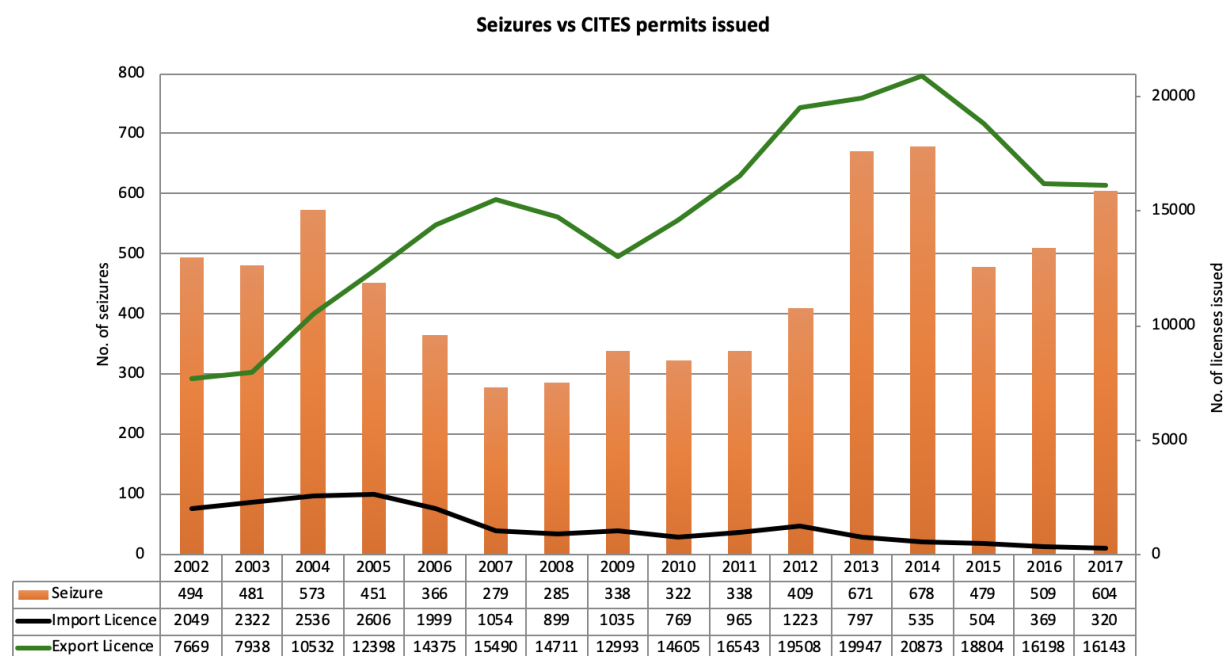
## PART TWO: IMPORT AND EXPORT CONTROLS

Hong Kong is a major trade hub for endangered species. According to AFCD figures, the number of export licenses greatly outnumbers import licenses and possession licenses.



However this data provides limited information as a single license may cover multiple species and multiple shipments. The AFCD does not release consolidated figures on the actual composition and volume of the endangered species trade. Important information such as the numbers of specimens and species imported, number of importers, traders and exporters and the proportion of specimens that are wild caught or captive bred, is not publicised.

What is striking however is that, over the past 15 years, the numbers of import licenses and possession licenses have dropped by almost 90%.<sup>8</sup> This decrease appears to be a direct result of the introduction of Cap 586 which loosened requirements for the entry of CITES listed species by making import permits only necessary for CITES Appendix I listed species and live CITES Appendix II listed species of wild origin.<sup>9</sup> Further, since the introduction of Cap 586, the number of seizures of endangered species has doubled.



The diversity of products traded requires a diversified approach to regulation for specific high-volume trades that might involve highly threatened species or the potential for laundering high value species on the brink of extinction.

The current regulatory regime for endangered species in Hong Kong is a ‘one size fits all’ approach, where the focus of legislation is largely on adherence to import and export regulations.

<sup>8</sup> Data derived from AFCD departmental annual reports from 2003 to 2018.

<sup>9</sup> See Agriculture, Fisheries and Conservation Department Endangered Species Protection, ‘Guidelines for Applying CITES Licence to Import/ Export/ Re-Export/ Possess or Re-Export Certificate’.

Compared to other jurisdictions, relatively few resources are dedicated to regulating the types of endangered species that come into Hong Kong and even fewer resources are put into the regulation of the sale and passage of endangered species products through the Territory.

Responses from both Government departments highlight the challenges in dealing with the sheer volume of the trade and verifying the accuracy of shipments that enter the HKSAR.

### **Enforcement challenges due to the high volume of trade across multiple ports of entry**

There was consensus by traders, government departments and NGOs that regulation of the large volume of trade was challenging due to a lack of resources and manpower.

Hong Kong's free port status and position as an international hub for trade and tourism make policing difficult due to the sheer volume and variety of goods that need to be processed and inspected. Hong Kong's current enforcement strategy is heavily reliant on inspections at ports of entry, with the bulk of seizures and arrests occurring at control points; its data on the trade of endangered species comes mainly from import and export licenses, as well as seizure data at these points of entry.

To put this in perspective, Hong Kong handled over 250 million tonnes of port cargo in 2018<sup>10</sup>, whilst air cargo throughput was 5.02 million tonnes. Though air cargo comprised only 1.8% of total cargo throughput, it accounted for 42% of trade value in Hong Kong and was the highest volume of air cargo handled globally.<sup>11</sup>

In a written reply, the CED indicated that it has 3,500 officers under the Boundary and Ports Branch who are responsible for control duties at all entry and exit points. Another 360 investigators work in the intelligence and investigation branch to investigate all smuggling and syndicate crimes.

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<sup>10</sup> See Table 085: Port Cargo Throughput in Census and Statistics Department, 'Statistics on Vessels, Port Cargo and Containers'.

<sup>11</sup> Census and Statistics Department, 'Hong Kong Monthly Digest of Statistics. Feature Article: Air Cargo Statistics.'

However, the CED is charged with enforcing almost 60 pieces of legislation. In 2018 – 2019, it investigated almost 30,000 cases, of which, 745 cases were handled and 523 people were charged under Cap 586,<sup>12</sup> representing 2.5% of all cases handled by the CED.

In terms of species of conservation value, Hong Kong is a well-known smuggling hub for highly endangered reptile pet species in a black market that exists alongside the legal pet trade in endangered species.<sup>13, 14, 15</sup> It also trades up to 50% of shark fin worldwide, with species that are highly threatened interspersed with species that are not regulated under CITES.<sup>16</sup>

According to the CITES trade database, in 2018, Hong Kong imported over 350 species listed in CITES Appendices I, II and III from over 36 territories, in over 40 different forms ranging from live animals to whole skins and finished carvings.<sup>17</sup>

The numerous species and immense volume and type of products (live, dead, raw and processed) pose difficulties for control point officers expected to possess specialized knowledge to identify and verify the items listed on the license.

Interviewees offered several suggestions to streamline the administrative process, as well as further measures to enhance the understanding of the trade.

### **Recommendation:**

- **Streamline the administrative burden through the designation of wildlife ports.**

Most interviewees suggested that designated points of entry for endangered species would streamline and facilitate the inspection process. Furthermore, wildlife ports would centralise

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<sup>12</sup> Customs and Excise Department, 'Customs and Excise Department Departmental Review 2018'.

<sup>13</sup> Luiselli et al., 'A Short Review of International Trade of Wild Tortoises and Freshwater Turtles Across the World and Throughout Two Decades', 170.

<sup>14</sup> See ADMCF, 'Trading in Extinction: The Dark Side of Hong Kong's Wildlife Trade.', 155

<sup>15</sup> Sung and Fong, 'Assessing Consumer Trends and Illegal Activity by Monitoring the Online Wildlife Trade'.

<sup>16</sup> See BLOOM Association, 'Wildlife Trade 2.0 Connecting the Future', 1

<sup>17</sup> United Nations Environment Programme –World Conservation Monitoring Centre, 'CITES Trade Database'.

specialised resources for identification and verification of shipments. The USA has 18 designated wildlife ports for such shipments that are staffed by US Fish and Wildlife Service officers.<sup>18</sup>

Hong Kong should designate similar dedicated wildlife ports for landing and transiting wildlife, including fishes and marine invertebrates. Traders intentionally mislabel their products or mix CITES species within non-CITES species, and species identification is very challenging (particularly for shark fins, fish swim bladders, sea cucumbers etc.). Frontline staff at designated wildlife ports should receive mandatory training on species identification. Were a positive list of permitted species introduced, this would ensure that species could be more easily identified.

It was suggested by interviewees that AFCD's current pledge to issue import permits within two days (provided all documents are submitted by traders) undermines the effectiveness of Hong Kong's licensing controls. The commitment places AFCD under pressure not to reject applications that provide all the required documents, despite situations where those documents (e.g. NDF, certificate of captive breeding) should be regarded as suspect, given that systems are not standardized between countries.

In 2018-19, the AFCD issued almost 19,000 permits and conducted almost 34,000 inspections. In 2019-20, it is projected that the department will process a similar volume.<sup>19</sup> That would mean, pending approval, on average, the AFCD processes over 70 CITES Import, Export, Re-export and Possession licenses every working day.

The AFCD commitment to issuing permits within two working days hinges primarily on the validity of the export permit issued by the CITES Management Authority of the exporting country.<sup>20</sup> The comparatively little documentation required to obtain a permit means the AFCD has limited criteria to scrutinise the suitability of import. By comparison, the criteria for import in other jurisdictions goes substantially beyond minimum CITES requirements. The China CITES

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<sup>18</sup> U.S. Fish and Wildlife Service Office of Law Enforcement, 'Designated Ports'.

<sup>19</sup> See *Head 22: Agriculture Fisheries and Conservation Department* in Hong Kong SAR Government, 'Estimates of Expenditure 2019 -2020'.

<sup>20</sup> See Agriculture, Fisheries and Conservation Department Endangered Species Protection, 'Guidelines for Applying CITES Licence to Import/ Export/ Re-Export/ Possess or Re-Export Certificate'.

authority requires 20 working days to evaluate permit applications;<sup>21</sup> the US Fish and Wildlife Service states that applicants should be prepared that the review for CITES permits can take up to 60 days.<sup>22</sup> Australia can take up to 40 days<sup>23, 24</sup> for a wildlife trade permit involving CITES species to be approved.

Consideration should be given to the introduction of an online platform for traders to upload NDF, such that a) countries can use it as a benchmark in preparing NDF and b) the quality of NDF may be enhanced with increasing public scrutiny.

### **Few basic requirements for a license**

There are no other requirements to specify where the items will be stored, if the importer has suitable holding facilities and in the case of live animals, any specifications regarding the transport conditions or keeping conditions. The importers have no obligation to show that they fulfil any specific conditions to bring in essentially, what are internationally controlled items.

Many interviewees indicated that such limited screening criteria for license applications are a missed opportunity to build a more complete picture of Hong Kong's endangered species trade. This is especially important as much of the trade in endangered species is moving online, making tracking of stock movement and outcomes increasingly difficult.

### **No serious repercussions for licence breaches**

Multiple interviewees also pointed out that there are no serious repercussions for a breach of licence conditions. Traders may still keep the licence, extend it, and make future applications for additional licences.

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<sup>21</sup> See People's Republic of China State Forestry and Grassland Administration, 'Regulations of the People's Republic of China on the Administration of the Import and Export of Endangered Wildlife'. In addition to valid CITES permits from the country of export, Chinese CITES authorities also take into consideration other criteria such as transport arrangements and impacts on biosecurity and native biodiversity (see articles 8, 10, 16 ). The application period may be extended to 30 days if Chinese authorities need more time to consider the application.

<sup>22</sup> U.S. Fish & Wildlife Service, 'CITES Permits and Certificates'.

<sup>23</sup> Australian Government Department of Agriculture, Water and the Environment, 'Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)'.

<sup>24</sup> Australian Government Department of Agriculture, Water and the Environment, 'Wildlife Trade Frequently Asked Questions'.

## **Mis-declaration and mislabelling of shipments**

The CED and the AFCD both indicated that one of the major challenges they face is that large shipments are often mis-declared or non-CITES species are mixed with CITES listed species to avoid detection. This practice was also well known to other interviewees as a means of laundering wildlife products through Hong Kong. Such mis-declarations should be heavily penalized.

## **Importers do not need to demonstrate that endangered species are legally derived**

Interviewees also suggested that Hong Kong should introduce stricter criteria to verify that the species traded are obtained via legal means.

## **Lack of a Scientific Authority**

The lack of a Scientific Authority in Hong Kong also limits the extent to which licences can be scrutinized. A competent and well-resourced Scientific Authority would enable Hong Kong to more closely collaborate with other Scientific Authorities and be better placed to evaluate licenses on a wider basis.

## **Recommendation:**

### **- Increase requirements for the amount of information provided on CITES permits**

Interviewees highlighted that the amount of information required by importers for CITES licences is minimal. Importers primarily need to furnish the AFCD with a copy of the CITES export permit from the country of origin. Laundering specimens through Hong Kong is attractive as tracing individual specimens is difficult. Specimens imported under one permit might subsequently be traded, exported or possessed by multiple parties other than the importer once in Hong Kong. This is further complicated as some CITES species do not require import permits under Cap 586.<sup>25</sup> The AFCD does not currently report the volume of imported specimens that remain in Hong Kong, nor the volume imported that is subsequently exported. For products destined for the Hong Kong market, there is also no requirement to provide a verified trading address. In essence, Hong Kong's

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<sup>25</sup> Agriculture, Fisheries and Conservation Department Endangered Species Protection, 'Guidelines for Applying CITES Licence to Import/ Export/ Re-Export/ Possess or Re-Export Certificate'.

current license system is not rigorous enough in managing the trade of endangered species within its borders.

### **PART THREE: IMPORT AND EXPORT CONTROLS IN COMPARATIVE JURISDICTIONS**

Our review of the import controls in Australia, the EU and the USA demonstrates that Hong Kong practices should be updated to better deter smuggling and laundering of endangered species.

#### **Australia's legislation**

The movements of animals, plants and products to and from the Commonwealth of Australia is regulated at the federal level through the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act). The Act is the implementing legislation to meet Australia's obligations under CITES. It is supplemented by other federal legislation,<sup>26</sup> as well as legislation at the state and territory levels of government.<sup>27</sup> Going beyond its obligations under CITES, the EPBC Act enhances the protections in CITES and imposes additional requirements. The Act's objects clause (section 303BA) of Part 13A is broader and more detailed than the preamble to CITES stating:

The objects of this part are as follows:

- a) to ensure that Australia complies with its obligations under CITES and the Biodiversity Convention;
- b) to protect wildlife that may be adversely affected by trade;
- c) to promote the conservation of biodiversity in Australia and other countries;
- d) to ensure that any commercial utilisation of Australian native wildlife for the purposes of export is managed in an ecologically sustainable way;
- e) to promote the humane treatment of wildlife;

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<sup>26</sup> E.g. the Biosecurity Act 2015, which also regulates the movement of animals, plants and products to Australia.

<sup>27</sup> State and territory governments have laws on keeping wildlife within their borders and regulate the import and export of wildlife across their borders.

- f) to ensure ethical conduct during any research associated with the utilisation of wildlife;
- g) to ensure that the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.

In order to achieve its objects, this Part includes special provisions to conserve the biodiversity of Australian native wildlife.

The clause introduces important concepts (e.g. biodiversity, humane treatment, sustainability) into the law and requires their consideration in the implementation of the Act. In particular, section 303BA(1)(h) introduces the precautionary principle into the Australian national law. The meaning and operation of the principle has been the subject of considerable debate in Australian environmental law.<sup>28</sup> In general, it may be understood as the suggestion that when ‘potential adverse effects are not fully understood, the activities should not proceed’.<sup>29</sup> This principle is also reflected in various other international instruments and other jurisdictions, e.g. EU Law.<sup>30</sup>

The Australian Minister for the Environment is empowered, under the EPBC Act, to extend the list of species to be treated as though protected species under a particular Appendix of CITES.<sup>31</sup> The Act also restricts the trade in CITES listed species beyond what is called for by the Convention as set out in the table below:

Measure	Description
Cetaceans	All species of the order cetacea treated as CITES Appendix I species. <sup>32</sup>

<sup>28</sup> See e.g. Gullett, ‘The Precautionary Principle in Australia: Policy, Law and Potential Precautionary EIAs’.; and Peterson, ‘Precaution: Principles and Practice in Australian Environmental and Natural Resource Management’.

<sup>29</sup> See Article 11(b) of the United Nations World Charter for Nature, UN General Assembly (37th sess.: 1982-1983), A RES/37/7.

<sup>30</sup> See §2 of Article 191 of the Lisbon Treaty: “*Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.*”

<sup>31</sup> Section 303CB of the Environment Protection and Biodiversity Conservation Act 1999.

<sup>32</sup> Declaration of a stricter domestic measure in accordance with section 303CB of the Environment Protection and Biodiversity Conservation Act 1999 (20 March 2017)

Elephants	All African elephants treated as CITES Appendix I species. <sup>33</sup>
Lions	All African lions treated as CITES Appendix I species. <sup>34</sup>
Rhinoceros	Permits will not be issued to import new (post-1975) hunting trophies of Appendix II listed southern white rhino. Rhino hunting trophies cannot be imported as personal and household effects. Radiocarbon dating is required to conclusively prove the age of vintage rhino horn for export. <sup>35</sup>
Declared specimens	Declared specimens <sup>36</sup> may only be imported commercially if they have been sourced from an operation that has been approved as a Commercial Import Program.
Import permits	To import species listed on Appendix II to CITES, importers must obtain both an export permit from the country of export and a wildlife trade import permit from Australia.

In exercising his or her duties under the EPBC Act, the Minister for the Environment and Energy is bound by the Principles of ecologically sustainable development provided for under section 3A of the Act, including:

“... (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

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<sup>33</sup> Declaration of a stricter domestic measure in accordance with section 303CB of the Environment Protection and Biodiversity Conservation Act 1999 (20 March 2017).

<sup>34</sup> See Declaration of a stricter domestic measure in accordance with section 303CB of the Environment Protection and Biodiversity Conservation Act 1999 (5 March 2015).

<sup>35</sup> Acceptable radiocarbon dating of rhinoceros horn can only be obtained from either the Australian National University Research School of Earth Sciences in Canberra, or from the ACT Australian Nuclear Science and Technology Organisation in Lucas Heights, NSW.

<sup>36</sup> Declared specimens are: Ramin (*Gonystylus* spp), Beluga sturgeon (*Huso huso*) originating from the Caspian Sea, South African ghaap (*Hoodia gordonii*), and all specimens originating from countries not a party to CITES.

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; ...”

This reflects Australia’s responsibility under the Convention on Biological Diversity.

Australia has stricter measures than CITES for the import of Appendix-II species of wild origin. These can only be imported if the Australian Scientific Authority has approved the trade as coming from an approved commercial import programme as recognized under the EPBC Act. Evaluation is done by the Australian Scientific Authority (as designated under CITES).

Similar to the United States’ Lacey Act (discussed below), section 303GQ of the EPBC Act proscribes the importation of specimens contrary to foreign law, regardless of whether the specimen is listed under CITES. However, distinct from the Lacey Act, a prosecution can only be instituted under this section where requested by the CITES Authority of that foreign country.

Distinct from many other jurisdictions, the EPBC Act also has a range of enforcement mechanisms for managing non-compliance that allow for certain third parties (‘interested persons’) to apply to the Federal Court for an injunction to stop a party from engaging in conduct that constitutes an offence or other contravention of the EPBC Act or Regulations including Part 13A) (section 475). The EPBC Act defines an ‘interested person’ as a person or organisation whose interests have been, or would be, affected by the conduct in question, or who has been engaged in a series of activities for the protection or conservation of (or research into) the environment at any time within the past two years.<sup>37</sup> These provisions allow civil society groups to play a watchdog role, enhancing the enforcement and compliance mechanisms of the EPBC Act.

These provisions are strengthened by the broader review mechanisms under section 303GJ, which allows for administrative tribunal review of decisions to grant (as well as refuse) permits.

The Australian Government Department of the Environment and Energy coordinates enforcement matters. Most investigations are undertaken at the federal level, by the department and the

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<sup>37</sup> See e.g. *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd* (2008) 164 LGERA 432; *Krajniw v Brisbane City Council (No 2)* [2011] FCA 563; *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510

Australian Border Force or the Australian Federal Police. The maximum penalties provided for under the EPBC Act are as follows:

- Possession of illegally imported CITES specimens (section 303GN): 5 years imprisonment or 1,000 penalty units (AU\$210,000<sup>38</sup>), or both.
- Exportation (without permit) of CITES specimens (section 303CC): 10 years imprisonment or 1,000 penalty units (AU\$210,000), or both.
- Importation (without permit) of CITES specimens (section 303CD): 10 years imprisonment or 1,000 penalty units (AU\$210,000), or both.
- Importation of specimens (whether or not CITES listed) contrary to foreign law (section 303GQ): 5 years imprisonment.
- Cruel treatment of CITES listed live animal specimens (section 303GP): 2 years imprisonment.

### **The European Union's legislation**

The primary legal device through which CITES is implemented in the EU is a set of Regulations known as the EU Wildlife Trade Regulations, which are regularly updated and which member states are required to implement directly through local legislation.

Currently the EU Wildlife Trade Regulations are:

- Council Regulation<sup>39</sup> (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (the Basic Regulation);
- Commission Regulation (EC) No 865/2006 (as amended by Commission Regulation (EC) No 100/2008, Commission Regulation (EU) No 791/2012;

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<sup>38</sup> Penalty units are equivalent to AU\$210: see section 4AA of the Crimes Act 2014 (Cth).

<sup>39</sup> Regulations are binding legislative act. It must be applied in its entirety across the EU. Although they are directly applicable in all EU Member States, the necessary enforcement provisions must be transferred into national legislation and supplemented with national laws, as these are matters that remain under the sovereignty of each Member State. It is left to Member States to determine appropriate sentences for infractions contrary to regulations. They may be compared with 'directives' and 'decisions'. Directives are legislative acts that sets out a goal that all EU countries must achieve but where individual countries are left to devise their own laws on how to reach those goals. Decisions are also binding, but not of general application and are only binding on those to whom it is addressed (e.g. an EU country or an individual company) and they are directly applicable.

- Commission Implementing Regulation (EU) No 792/2012) laying down detailed rules concerning the implementation of the Basic Regulation (the Implementing Regulation), and
- Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in the Basic Regulation on the protection of species of wild fauna and flora by regulating the trade therein and amending the Implementing Regulation (the Permit Regulation).
- Commission Recommendation No 2007/425/EC specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations. The recommendation identifies a set of actions for the enforcement of the Basic Regulation on the protection of species of wild fauna and flora by regulating trade therein, commonly referred to as the 'EU Enforcement Action Plan'.

### **The Basic Regulation**

The Basic Regulation deals with the protection of species of wild fauna and flora by regulating trade therein. It lays down the provisions for import, export and re-export as well as internal EU trade in specimens of species listed in its four Annexes. It provides for procedures and documents required for such trade (import and export permits, re-export certificates, import notifications and internal trade certificates) and it regulates the movement of live specimens. It also sets out specific requirements for Member States to ensure compliance with the Regulation and to impose adequate sanctions for infringements.

The four Annexes introduced under the Basic Regulation extend beyond CITES protected species to include other species in a single, unified legislative regime:

#### **Annex A:**

- All CITES Appendix I species, except where EU Member States have entered a reservation;
- Some CITES Appendix II and III species, for which the EU has adopted stricter domestic measures;
- Some non-CITES species;

#### **Annex B:**

- All other CITES Appendix II species, except where EU Member States have entered a reservation;
- Some CITES Appendix III species
- Some non-CITES species;

Annex C:

- All other CITES Appendix III species, except where EU Member States have entered a reservation;

Annex D:

- Some CITES Appendix III species for which the EU holds a reservation; and
- Some non-CITES species in order to be consistent with other EU regulations on the protection of native species, such as the Habitats Directive<sup>40</sup> and the Birds Directive.<sup>41</sup>

The provisions of the EU Wildlife Trade Regulations therefore provide greater protection for endangered species than that which is required from CITES in a number of important respects.

- The EU Wildlife Trade Regulations include in the four Annexes additional species that are not included in the CITES Appendices.<sup>42</sup> Additional species are typically protected by other European and international agreements requiring that they be protected.<sup>43</sup>
- The import conditions for species in Annexes A and B are stricter than under CITES and require:

<b>Annex</b>	<b>Conditions</b>
A/B	Commission has not established an import restriction in accordance with Article 4.6 of the Basic Regulation.

<sup>40</sup> Council Directive 92/43/EEC of 21 May 1992.

<sup>41</sup> Directive 79/409/EEC adopted in April 1979, amended to Directive 2009/147/EC.

<sup>42</sup> For a full list of species protected by the Basic Regulation, see <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R1320&from=EN>.

<sup>43</sup> E.g. the Crested Porcupine is an Annex A species because of its status under the Convention on the conservation of European wildlife and natural habitats (Bern Convention): see <https://eunis.eea.europa.eu/species/1424>.

A	Management Authority <sup>44</sup> is satisfied that the specimens are not to be used for primarily commercial purposes i.e. will be used for purposes of which the non-commercial aspects clearly predominate.
A/B  A  A  A  A	<p>Scientific Authority has advised the Management Authority of its finding (after considering possible opinion Scientific Review Group) that:</p> <ul style="list-style-type: none"> <li>- import would not have a harmful effect on the conservation status of the species or decrease the population concerned;</li> <li>- import is under exceptional circumstances required for the advancement of science or for essential biomedical purposes; species is the only one suitable and there are no captive bred animals;</li> <li>- specimens are intended for captive breeding (animals) or propagation (plants) from which conservation benefits will accrue to the species concerned;</li> </ul> <p>-specimens are intended for research or education aimed at the preservation or conservation of the species ;</p> <ul style="list-style-type: none"> <li>- import is for other purposes that are not detrimental to the survival of the species concerned.</li> </ul>
A/B	Management Authority in consultation with the Scientific Authority are satisfied that there are no other conservation factors against import.
A/B	Scientific Authority is satisfied that intended accommodation for live animals/plants at the place of destination is adequately equipped to conserve and care for them properly.
A/B	Applicant to provide documentary evidence that specimens were obtained in accordance with legislation on the protection of the species: for CITES specimens an export permit or re-export certificate, or copy thereof. Where a copy of an export permit or re-export certificate was the basis for the issue of an import permit, the latter shall only be valid if at the time of introduction it is accompanied by the valid original (re-)export document.

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<sup>44</sup> i.e. A national administrative authority designated, in the case of a Member State, in accordance with Article 13(1)(a) or, in the case of a third country party to the Convention, in accordance with Article IX of the Convention.

Under the EU Wildlife Trade Regulations an import permit is required for Annex A and Annex B species, to be applied for at the competent authorities in the Member State. An import notification is required for Annex C and D species. An import notification is a declaration filled in by the importer and to be submitted, where appropriate together with CITES Appendix III documents from the (re-)exporting country, to the customs office of introduction into the Community.<sup>45</sup> Among the conditions for issuing a permit for import of specimens of Annex A and Annex B species are housing conditions, i.e. that ‘the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly’.<sup>46</sup>

The Basic Regulation, together with and Council Directive (EEC) No 95/29/EEC on the protection of animals during transport, make compliance with the IATA Live Animals Regulations for air transport and the CITES Guidelines for Non-Air Transport legally binding. The transport into, from or within the Community of specimens from Annexes A to D should be undertaken in such a way as to minimize the risk of injury, damage to health or cruel treatment and in conformity with Community legislation on the protection of animals during transport. The Commission can also restrict imports for specimens of Annex B species subject to high transport mortality.

The Basic Regulation also contains special provisions for trade within the European Community, i.e. within and between individual Member States of the EU. It prohibits a broad range of commercial activities<sup>47</sup> involving Annex A specimens.<sup>48</sup>

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<sup>45</sup> See Annex 2 to Implementing Regulation and is available from the competent authorities in each Member State.

<sup>46</sup> See Article 4(2)(b) of Council Regulation (EC) No 338/97.

<sup>47</sup> Purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain, sale, keeping for sale, offering for sale, and transport for sale.

<sup>48</sup> Subject to certain general exemptions, e.g. internal trade in artificially propagated Annex A plants or trade between scientific institutions with a non-commercial purpose, such as for research or education. A Management Authority of a Member State can grant a specific exemption by means of a certificate on a case-by-case basis and under certain conditions.

Finally, Annex D contains species for which Community imports warrant monitoring beyond those listed in CITES.<sup>49</sup> The decision to include a species into this Annex is taken by the Committee on Trade in Wild Fauna and Flora on the basis of a proposal by the Commission and after consultation of the Scientific Review Group. Data for import of Annex D species is compiled yearly by UNEP-WCMC. If the data gives rise to serious conservation concerns, inclusion of a species into Annex B may be considered. Many Member States go beyond these requirements to impose stronger restrictions on the commercial use of CITES listed species.<sup>50</sup>

The export and re-export conditions for species in Annexes A, B and C are stricter than under CITES and require:

<b>Annex</b>	<b>Conditions</b>
A	Export and re-export are subject to completion of the necessary checks and the prior presentation, at the customs office at which the export formalities are completed, of an export permit or re-export certificate issued by a management authority of the Member State in which the specimens are located.
A	Provision by the applicant of documentary evidence that the specimens have been obtained in accordance with the legislation in force on the protection of the species in question; where the application is made to a Member State other than the Member State of origin, such documentary evidence shall be furnished by means of a certificate stating that the specimen was taken from the wild in accordance with the legislation in force on its territory.-
A/B/C	Management Authority is satisfied that: <ul style="list-style-type: none"> <li>(i) Live specimens will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; AND</li> </ul>

<sup>49</sup> As well as species listed in CITES Appendix III for which one or more EU Member States have entered a reservation.

<sup>50</sup> E.g. the Ivory Act 2018 (UK), which prohibits the commercial use of ivory items or those containing ivory regardless of their age, with limited exceptions.



Personal ownership certificates are non-transferable. If the specimen dies, is stolen, destroyed or lost, or if it is sold or if ownership of the specimen is otherwise transferred, the certificate must be immediately returned to the issuing management authority.

A resolution on the EU Action Plan was adopted by the European Parliament in 24 November 2016. The EU Action Plan comprises a series of measures to be taken by EU institutions<sup>53</sup> and/or Member States. Under the recommendation, Member States are expected to provide sufficient finance and human resources to support these measures. The Action Plan is intended to provide the impetus and framework for making better use of existing resources. The measures are essentially designed to improve cooperation between all the players concerned, make more effective use of existing tools and policies, and strengthen synergies between them, so that wildlife trafficking can be better tackled across the EU and globally.

The measures, which are designed to address a complex problem holistically by involving all relevant organisations, are based on three priorities:

Priority 1: Preventing wildlife trafficking and addressing its root causes;

Priority 2: Implementing and enforcing existing rules and combating organised wildlife crime more effectively; and

Priority 3: Strengthening the global partnership of source, consumer and transit countries against wildlife trafficking.

Under each priority are objectives, providing for specific actions and timelines (2016-2020), with assignment of specific responsibility to the relevant body.

Actions under the second priority are intended to boost enforcement, cooperation and reclassify wildlife crime as a form of serious crime and source of organised crime. The EU and Member States conducted a review of shortcomings in implementation, and strategies for tackling them are

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vertebrates other than captive born and bred birds shall be marked by means of a uniquely numbered unalterable microchip transponder conforming to ISO Standards or, where the competent management authority is satisfied that this method is not appropriate because of the physical or behavioural properties of the specimen/species, the specimens concerned shall be marked by means of uniquely numbered rings, bands, tags, tattoos or similar means, or be made identifiable by any other appropriate means.

<sup>53</sup> The European Commission and/or the High Representative of the EU for Foreign Affairs & Security Policy / Vice-President of the European Commission.

to be developed, to ensure that existing rules are enforced more consistently across the EU (Objective 2.1). They further sought to increase capacity to combat wildlife trafficking of all parts of the enforcement chain and the judiciary to take effective action in the EU, to improve inter-agency cooperation and coordination, communication and data flow by sharing best practice at EU level (Objective 2.2). They accepted that fighting organised crime more effectively in the area of wildlife trafficking required targeted awareness-raising amongst specialists on organised crime, cybercrime and money laundering, and they agreed to implement the international commitments they have made, to ensure that their laws on organised crime cover wildlife trafficking and that appropriate penalties can be imposed for trafficking (Objective 2.3). Finally, international cooperation on enforcement was to be improved through participation in international law enforcement operations, technical assistance and targeted financial support (Objective 2.4).

### **EU penalties and enforcement**

Penalties for importation and dealing in species protected by CITES are left to individual EU Member States and are not provided for under the EU regulations. EU Member States are also responsible for enforcement of their obligations under the EU Wildlife Trade Regulations. As a result, there are considerable differences in systems used to enforce the EU Wildlife Trade Regulations.<sup>54</sup>

Civil society and the EU Commission have expressed serious concerns about the uneven severity of penalties for offences, and in particular that the severity of fines and prison sentences imposed fail to reflect the seriousness of the crimes and the value of the wildlife on the international (black) market, and lack deterrent effect.<sup>55</sup> In 2016, the EU Commission expressed its concern that significant differences in how the Member States implement and enforce the EU Wildlife Trade Regulations represented a major risk: ‘criminals can easily exploit this state of affairs by diverting trade routes accordingly, as a number of cases in recent years have shown. It has also emerged, in

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<sup>54</sup> European Commission, ‘Analysis and Evidence in Support of the EU Action Plan against Wildlife Trafficking’, §4.1.1.

<sup>55</sup> Ibid.

various reports and during the stakeholder consultation, that lack of awareness and political engagement are also major obstacles to combating wildlife trafficking effectively'.<sup>56</sup>

Of particular concern to the EU Commission were the low-level of sentences available for wildlife trade offences in some states, as shown below.<sup>57</sup>

<b>State</b>	<b>Prison (<u>Max</u>)<sup>58</sup></b>	<b>Fine (Max, Euro)</b>
Austria	<u>5y</u>	1,800,000
Belgium	<u>5y</u>	300,000
Bulgaria	<u>5y</u>	10,000
Cyprus	<u>3y</u>	1,700
Czechia	<u>8y</u>	Unspecified
Germany	<u>5y</u>	1,800,000
Denmark	<u>1y</u>	Variable
Estonia	5y*^^	Unspecified
Greece	10y	500,000
Spain	5y	Unlimited
Finland	2y**	Variable
France	10y*	150,000
Croatia	5y	13,160
Hungary	3y	308,106
Ireland <sup>59</sup>	2y	100,000
Italy	1y^	103,000
Lithuania	4y	37,650
Luxembourg	6m	Unspecified

<sup>56</sup> European Commission, 'EU Action Plan against Wildlife Trafficking (2016) 38 Final', 9.

<sup>57</sup> See §4.1.1, Tables 2 and 3 in European Commission, 'Analysis and Evidence in Support of the EU Action Plan against Wildlife Trafficking', 42, 43.

<sup>58</sup> Key:- \* if conducted as an organized criminal group, ^ may be doubled for repeat offences, ^^ abuse of official position.

<sup>59</sup> Section 74(3) of the Wildlife Act 1976 (Ireland).

Latvia	2y	28,000
Malta <sup>60</sup>	2y	4,659
Netherlands	6y	81,000
Poland	5y	175,000
Portugal	3y	37,500
Romania	3y	3,575
Sweden	4y	Variable
Slovenia	5y*	16,690
Slovakia	8y	331,930
United Kingdom <sup>61</sup>	7y	Unlimited

### **The USA's Legislation**

The US Lacey Act is a commonly cited model that could be implemented in Hong Kong where the trade of endangered species should not be permitted if their trade is illegal in their source countries.

The primary legislation providing for the protection of species (including CITES species) from international trafficking are generally provided for under Title 16 of the USC with certain provisions included in Title 18. The principal statutes relating to the international trafficking of species are the Lacey Act<sup>62</sup> and the Endangered Species Act<sup>63</sup> (ESA). However, additional protections are provided under other statutes such as:

The Marine Mammal Protection Act (MMPA);

The Wild Bird Conservation Act<sup>64</sup> (WBCA);

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<sup>60</sup> Section 54(2)(u) of the Environment Protection Act (Malta).

<sup>61</sup> Regulation 8 of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (UK).

<sup>62</sup> 16 USC §3371 et seq and 18 USC §§42, 43.

<sup>63</sup> 16 USC §1531 et seq.

<sup>64</sup> 16 USC §4901 et seq.

The Multinational Species Conservation Acts<sup>65</sup> (MSCA”);

The Pelly Amendment<sup>66</sup>; and

The Migratory Bird Treaty Act<sup>67</sup> (MBTA).

The regulatory schemes under the above legislation are enforced by various US Government agencies, including the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS).

The US Department of Justice has an Environmental Crimes Section which prosecutes illegal wildlife trade offences. Rather than simply relying on the pertinent wildlife statute, CITES violations are prosecuted under the Lacey Act, which penalizes the import of species in contravention of other countries’ laws with up to 5 years’ imprisonment. The Department also uses money laundering legislation to seize the proceeds of wildlife crime. The US directs wildlife shipments to a limited number of customs points of entry where there are wildlife inspectors or specialized inspectors with detailed training.<sup>68</sup>

Under the Lacey Act, importers to the USA must show they took precautions to ensure the import was legally sourced: they must submit an import declaration stating the country of origin, the supplier, species, volume and value. The EU utilise a similar system with the EU Timber Regulations.

The Lacey Act (1900) was originally enacted to protect US native wildlife from commercial exploitation and other threats. When first passed, it was the first federal law protecting wildlife. It enforces civil and criminal penalties for the illegal trade of animals and plants. However, it has

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<sup>65</sup> i.e. the African Elephant Conservation Act (16 USC §4201 et seq), the Asian Elephant Conservation Act, the Great Ape Conservation Act, the Marine Turtle Conservation Act, and the Rhino and Tiger Conservation Act (16 USC §5301 et seq).

<sup>66</sup> 22 USC §1978,

<sup>67</sup> 16 USC §703 et seq.

<sup>68</sup> See the Green Customs Initiative (<https://www.greencustoms.org>) and UNODC-WCO Container Control Programme. (<https://www.unodc.org/unodc/en/ccp/index.html>)

since been amended to regulate the import of any species protected by international or domestic law, as well as the spread of invasive, or non-native, species (also ‘injurious wildlife’).<sup>69</sup>

The Act prohibits international or interstate commerce in wildlife that has been *taken, possessed, transported, or sold* in violation of *foreign law*. This makes it a crime in the US to trade in wildlife or wildlife products that have been unlawfully acquired in, or removed from, another country.

The Act is based on strict liability such that violators can face criminal and civil sanctions even if they did not know that they were dealing with protected species. However, penalties vary in severity based on the violator’s level of knowledge about the product: penalties are higher for those who knew they were trading in protected species. For those who do not have knowledge, penalties vary based on whether the individual or company in question did everything possible to determine that the materials were legal. This concept is called due care,<sup>70</sup> whereby the onus is put upon the violator to show they have taken due care to ensure they were not trafficking in protected species.

The ‘foreign law’ aspect of the Lacey Act focuses on the key question of legal acquisition in the country of origin. US law enforcement officers, for example, have successfully used this provision to stop the importation of wildlife accompanied by CITES permits from an intermediary country because the specimens in question could never have lawfully left the country of origin.

Lacey Act violations are treated as very serious, those involving international trafficking are typically felony offences that carry higher penalties. Those found guilty can be sent to prison for up to five years and fined as much as US\$250,000. Maximum fines jump to US\$500,000 for a

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<sup>69</sup> The Lacey Act authorizes the Secretary of the Interior to list as “injurious” any wildlife deemed to be harmful “to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States.” It prohibits import of any live specimen of a listed species without a permit from the FWS.

<sup>70</sup> i.e. Anyone who “*in the exercise of due care should know*”.

company or organization (see table below).<sup>71</sup> Seized specimens are subject to forfeiture and traffickers are liable for the costs incurred in the storage, care, and maintenance of species seized.<sup>72</sup>

The Lacey Act automatically covers trafficking in all foreign species that are prohibited according to the foreign law of the specimen's origin. These features make US protections fundamentally different from CITES, by directly recognizing the rights of countries to protect their wildlife resources. Under the Lacey Act, to enforce the law prosecutors are required to look behind CITES permits to the underlying legality of trade in protected species.

The Endangered Species Act is intended to implement both the international conservation obligations of the USA as well as its domestic species conservation priorities. The Act aims to provide a framework to conserve and protect endangered and threatened species and their habitats. It prohibits trafficking in designated protected species and provides for financial assistance to states and incentives to develop and maintain conservation programs to comply with treaties and conventions such as CITES and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (Western Hemisphere Convention), although it is stricter in several respects. In this regard, the species covered by ESA extend beyond those covered by CITES. ESA is supplemented by the MSCAs, which function as amendments to the ESA.

The Secretary of the Interior (whose Department includes the FWS), is required under the Act to determine which species must be afforded protection according to a specific set of criteria.<sup>73</sup> The Secretary is specifically restricted to making his or her determinations *solely on the basis of the best scientific and commercial data available* and is required to conduct reviews, including of efforts by local and foreign governments to provide protection. To support implementation of ESA,

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<sup>71</sup> The largest financial penalty issued under the Lacey Act was for Lumber Liquidators, which was sentenced in 2016 to US\$7.8 million in criminal fines, \$969,175 in criminal forfeiture and more than \$1.23 million in community service payments for illegal lumber trafficking. The sentence also included five years of probation, and additional government oversight. See Department of Justice Office of Public Affairs, 'Lumber Liquidators Inc. Sentenced for Illegal Importation of Hardwood and Related Environmental Crimes'.

<sup>72</sup> 16 USC §3374.

<sup>73</sup> 16 USC §1533.

the Secretary of the Interior is required to, and the FWS maintains an up-to-date online, searchable database of protected species, including foreign species.<sup>74</sup>

Under the ESA, listed species are categorized as either threatened or endangered. These categories do not directly equate to CITES Appendices. The listing of a species under CITES and the ESA involves different processes and listing criteria. While the inclusion of a species in Appendix I or II requires a consideration of whether the species ‘is or may be affected by trade’, a listing under the ESA is based on whether one or more of five factors are affecting the species: a) loss or destruction of habitat; b) overutilization; c) disease or predation; d) inadequacy of regulatory protection; and e) other natural or man-made factors. While some species are listed by both CITES and the ESA and others are only listed by one of them, there is not always a direct correlation between how a species is listed under CITES and how it is listed under the ESA.

The MSCAs further specifically prohibit (i.e. without the requirement for review and determination by the Secretary of the Interior) trafficking in specific species such as the African elephants, rhinos and tigers.

The US has the highest number of wildlife trafficking seizures and prosecutes the most traffickers. In 2004 to 2015, the US accounted for 43% of World WISE seizure incidents.<sup>75</sup>

The maximum sentences provided for trafficking in species under US law are set out below:<sup>76</sup>

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<sup>74</sup> See U.S. Fish & Wildlife Service, ‘Species Search’.

<sup>75</sup> See United Nations Office of Drugs and Crime, ‘World Wildlife Crime Report, 2016. Trafficking in Protected Species.’, 29.

<sup>76</sup> Adapted and expanded from Kramer et al., ‘The US Ivory Market: A New Baseline’.

Act	Code §	Criminal Cases <sup>77</sup>						Civil Cases <sup>78</sup>
		Felony			Misdemeanour			
		Class <sup>79</sup>	Jail	Fine US\$ <sup>80</sup>	Class <sup>81</sup>	Jail	Fine US\$ <sup>82</sup>	Fine US\$
Lacey Act <sup>83</sup>	16 USC §3373	D	5y	250,000(I) <sup>84</sup> 500,000(O) <sup>85</sup>	A	1y	250,000(I) 500,000(O)	635 <i>(mark.)</i> 25,409 <i>or</i> <i>max of</i> <i>predicate</i> <i>law</i>
Lacey Act (Injurious) <sup>86</sup>	18 USC §42(C)				B	6m	250,000(I) 500,000(O)	
ESA <sup>87</sup>	16 USC §1540				A Endangered B Threatened	1y 6m	100,000(I) 200,000(O) 25,000	1,270/ 24,132/ 50,276
MMPA <sup>88</sup>	16 USC §1361				A	1y	20,000	10,000

<sup>77</sup> In the US legal system, non-petty criminal cases are classified in one of two categories: felonies and misdemeanours. Felonies are generally considered more serious offenses. Criminal convictions may result in fines, jail time, and other sentences. Sentencing Guidelines apply to all criminal violations except for Class B misdemeanours.

<sup>78</sup> In the US legal system, civil cases are generally disputes between individuals, and are adjudicated through civil court to determine whether the defendant is financially liable for plaintiff injuries.

<sup>79</sup> See 18 USC §3559 for sentence classification.

<sup>80</sup> See 18 USC §3571 for fine maximums.

<sup>81</sup> See 18 USC §3559 for sentence classification.

<sup>82</sup> See 18 USC §3571 for fine maximums.

<sup>83</sup> Trafficking in species protected by foreign law.

<sup>84</sup> I = Individual.

<sup>85</sup> O = Organization

<sup>86</sup> Trafficking in invasive / injurious species.

<sup>87</sup> Trafficking in endangered species.

<sup>88</sup> Trafficking in marine mammals, including all cetaceans (whales, dolphins, and porpoises), all sirenians (manatees and dugongs) and several marine carnivores (seals, otters, walrus, and polar bears).

MBTA <sup>89</sup>	16 USC §707	E	2y	2,000				
African Elephant Conservation Act <sup>90</sup>	16 USC §4224				A	1y	100,000(I) 200,000(O)	10,055
Rhinoceros and Tiger Conservation Act <sup>91</sup>	16 USC §5305a				B	6m	5,000(I) 10,000(O)	12,000

Responsibility for enforcement of the Lacey Act and ESA is largely held by the FWS. However, the enforcement provisions create broad powers of enforcement and specific duties on executive authorities:

- The Secretaries of the Interior, Transportation, and the Treasury are required by law to enforce the Lacey Act.<sup>92</sup> They are specifically empowered to utilize by agreement, with or without reimbursement, the personnel, services, and facilities of any other Federal agency or any State agency or Indian tribe for purposes of enforcing the Act.

Under the ESA, all federal agencies are required to utilize their authorities in furtherance of the purposes of the ESA, and insure that any action by such agencies are not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of critical species.<sup>93</sup>

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<sup>89</sup> Trafficking in protected birds (nests, and eggs).

<sup>90</sup> African elephant trafficking.

<sup>91</sup> Trafficking in rhinoceros or tiger.

<sup>92</sup> 16 USC §3375.

<sup>93</sup> 16 USC §1536.

## **PART FOUR: IMPROVING HONG KONG'S ENDANGERED SPECIES POLICIES**

### **Interpretation of obligations under international treaties**

Hong Kong has made no legislative changes to comply with the extension of the UN Convention on Biological Diversity (CBD) to Hong Kong in 2011. This is despite the fact that Article 3 of the CBD places a duty on Hong Kong to ensure that local trade in wildlife does not negatively impact on vulnerable species in other jurisdictions.

The implementation of Cap 586 alone cannot fulfil these obligations: Cap 586 is narrowly focussed on CITES- listed species<sup>94</sup> and is not obliged to take into consideration the legality nor the destructive impact of such supply chains on vulnerable habitats, communities and non-CITES listed species.

Consequently, Hong Kong's due diligence under Cap 586 extends no further than the CITES Management Authority of the exporting country for CITES-listed species, and remains silent on its CBD obligations towards all vulnerable species.

By comparison, one of the stated purposes of the Australian EPBC Act is to promote the conservation of biodiversity in Australia and other countries. In exercising his or her duties under the EPBC Act, the Minister for the Environment and Energy is bound by the Principles of ecologically sustainable development to ensure that the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.

The US Lacey Act allows the wildlife laws of other countries to be upheld. It makes the US an enforcement partner for any nation that has laws to protect its wildlife from unlawful take and trade. Prosecution is not based on administrative oversight (i.e. failure to obtain a CITES permit), but upon violation of the origin country's natural treasures and heritage, premised upon the assumption that it would never under any circumstances have authorized its export. This prohibition on trafficking in 'tainted' wildlife applies regardless of who commits the original

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<sup>94</sup> According to its long title, Cap 586 is "[a]n Ordinance to give effect in Hong Kong to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ... to regulate the import, introduction from the sea, export, re-export, and possession or control of certain endangered species of animals and plants and parts and derivatives of those species; and to provide for incidental and connected matters."

violation. Individual wildlife dealers or businesses that knowingly bring contraband wildlife into the US may face Lacey Act charges even if they were not responsible for its illegal removal from the wild or unlawful export from the country of origin.

Similar to the United States' Lacey Act, section 303GQ of the EPBC Act proscribes the importation of specimens contrary to foreign law, regardless of whether the specimen is listed under CITES.

Under the Lacey Act, importers to the USA must show they took precautions to ensure the import was legally sourced: they must submit an import declaration stating the country of origin, the supplier, species, volume and value. The EU utilise a similar system with the EU Timber Regulations.

It is obvious that a global network of similar laws would extend the reach and effectiveness of national conservation legislation, strengthen its enforcement, and improve safeguards for species at risk.

### **Controls on import of CITES listed species**

Australia adopts more stringent controls on the import of Appendix 1 listed species than CITES requires. All species of the order cetacean, all African elephants and all African lions are treated as CITES Appendix I species. The EU's Basic Regulation also extends beyond standard CITES protections and includes, in the top-level protection of Annex A, some CITES Appendix II and III species and even some non-CITES species. The import of species listed in Annex A and Annex B of the EU Regulations requires that the Scientific Authority has advised the Management Authority of its finding that their import would not have a harmful effect on the conservation status of the species or decrease the population concerned. The import of Annex A and B species also requires that the Scientific Authority is satisfied that intended accommodation for live animals/plants at the place of destination is adequately equipped to conserve and care for them properly. In the USA, the species covered by ESA also extend beyond those covered by CITES. While the inclusion of a species in CITES Appendix I or II requires only a consideration of whether the species 'is or may be affected by trade', a listing under the ESA is based on whether loss or destruction of

habitat; overutilization; disease or predation; inadequacy of regulatory protection or other natural or man-made factors are affecting the species.

In Hong Kong, species protected under Cap 586 schedules are only those listed in CITES. Further, the species list protected under the Wild Animal Protection Ordinance, Cap 170, is not representative of current threats to local species. The list includes species that are not under threat and omits hundreds that are currently at risk. There is also no general provision for some major taxa, for example marine fishes and invertebrates, unlike in many other countries.<sup>95</sup>

In Hong Kong, only where an Appendix II specimen is live and wild caught, is an import permit required under Cap 586. In Australia, all Appendix II specimens require import permits, as do imports of EU Basic Regulation Annex A and B species (effectively requiring import permits for CITES App I, II, some III and non-CITES species to the EU).

For the import of Appendix II species of wild origin to Australia, permits are only granted if the Australian Scientific Authority has approved the trade as from an approved commercial import programme as recognized under the Environmental Protection and Biodiversity Conservation Act. Evaluation is done by the Australian Scientific Authority (as designated under CITES).

All imports of live animals to the EU must comply with the IATA Live Animals Regulations for air transport and the CITES Guidelines for Non-Air Transport of Live Wild Animals and Plants. The EU also restricts imports for specimens of Annex B species which are subject to high transport mortality. Similarly, the Australian government keeps and regularly updates, a federal 'List of Specimens Taken to be Suitable for Live Import', made pursuant to section 303EB of the Environment Protection and Biodiversity Conservation Act 1999.

### **Recommendation:**

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<sup>95</sup> This is despite AFCD noting in 2011 that 21 freshwater species were considered of conservation concern. See Whitfort, Amanda et al., 'A Review of Hong Kong's Wild Animal and Plant Protection Laws' 13-14.

- **A Scientific Authority should be established in Hong Kong to determine which species should be protected under Cap 586 and Cap 170. Determination of controls in imports should take into account conservation, welfare and invasive species concerns.**

### **Oversight of licensing**

Effective licensing systems require that agents should be required to both keep records of and submit to licensing authorities all transactions involving wildlife in their possession (within a specified period of time following the transaction). This permits both agents and transactions to be traced.

The AFCD is charged with providing permits for legal trade in endangered species and with ensuring trade is compliant with local licensing requirements. Where permits are found to be irregular (e.g. the wrong species is listed), the Department can refuse to issue import or possession permits and may seize animals possessed in contraband of CITES restrictions. Unfortunately, problems with licensing control in Hong Kong have led to laundering of valuable and endangered species.

Many of the issues raised by interviewees, in particular, the loopholes in the current control regimes for endangered species can be traced back to the choice by the government of the time to loosen controls with the introduction of Cap 586 and the repeal of Cap 187.

The goal in revising the control regimes was threefold; namely:

1. To bring Hong Kong legislation in line with its CITES obligations;
2. Revise the control regime to reduce operational inconsistencies, *making it more convenient for traders and government and reducing compliance costs for traders*;
3. Revise the licensing system so that permits would be issued by shipment or by keeping premise, rather than by individual species.

According to a background brief to the Legislative Council's Bills Committee in 2005 explaining why the controls under Cap 187 were to be reduced under the draft Cap 586<sup>96</sup>:

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<sup>96</sup> Legislative Council Secretariat, 'Background Brief to the Bills Committee on Protection of Endangered Species of Animals and Plants Bill'.

*...the current provisions in the Ordinance maintained a certain degree of control over the possession or control of endangered species, including a licensing requirement for the import of endangered species under Appendix II. The objective of these additional controls was to tackle the problem of smuggling, which was rampant when the Ordinance was first enacted in 1976.*

*Since then, the trades have been requesting for streamlining of the licensing system with a view to facilitating trading. In view of the decreased number of contraventions over the years ..., it was considered appropriate to remove certain control measures to minimize inconvenience to the trade without compromising the obligations under CITES.<sup>97</sup>*

Evidently, the revision of the licensing regime was decidedly pro-trade. At the time, the loosening of controls with the introduction of Cap 586 was deemed appropriate, as wildlife smuggling rates had dropped significantly since the 1970's. The legacy of the decision has meant that Hong Kong's open attitude towards trade and relaxed legal controls have provided a generous umbrella for illegal flows of endangered species through the Territory.

In particular, this loosened control system was a major reason why Hong Kong remained a flourishing market for ivory subsequently and garnered major global attention for attracting large amounts of ivory to its shores.

Reports by undercover investigators<sup>98, 99</sup> revealed how Hong Kong's system of legal controls was easily hijacked, providing traders with a means to launder a stream of illegal ivory through Hong Kong to China over several decades. Even traders interviewed noted that the system was weaker than Mainland controls and fundamentally flawed.

A report by the World Wildlife Fund Hong Kong (WWF- HK) summed up seven weaknesses of the current system with respects to ivory.

1. Illegal products were already available in the city. Ivory had been seized in other regional countries after passing through Hong Kong.

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<sup>97</sup> Ibid, 2.

<sup>98</sup> Knights et al., 'Illusion of Control. Hong Kong's "Legal" Ivory Trade'.

<sup>99</sup> Edwards and Lo, 'The Hard Truth. How Hong Kong's Ivory Trade Is Fueling Africa's Poaching Crisis'.

2. Ivory traders were able to launder illegal ivory using permits issued by the government due to the lack of details required in permits.
3. Numerous loopholes existed in the system:
  - No individual identification for pieces of ivory nor were traders required to notify the government when raw ivory was processed. Thus, no certificates were issued for pieces finished in Hong Kong.
  - The lack of a local laboratory to verify the age of ivory.
  - Reliance on traders to self-report stockpiles every five years when the license was up for renewal.
4. The illegal re-export of ivory from Hong Kong was rampant and it was a major challenge to identify and seize such ivory.
5. Penalties were not sufficiently deterrent and policing of traders inadequate.
  - In particular, prosecutions were largely confined to smuggling. Traders were not prosecuted for infringing even basic license conditions e.g. not displaying licenses. One trader interviewed cited the high penalties in China, US and UK for illegally trading ivory as sufficiently deterrent for traders as compared with Hong Kong.
6. Limited resources.
  - Available data suggested that the government did not allocate enough resources to adequately regulate the trade. Traders themselves had suggested more rigorous controls such as those in China, as verifiable legal provenance would increase the value of the finished ivory.
7. Lack of transparency prevented consumers from having adequate information regarding the legality of the product they had purchased.

After significant public pressure, the Administration's solution to the above problems was to ban the domestic trade in ivory from the end of 2021.

Based on our interviews, such flaws as were identified for ivory are systemic to the trade in other endangered species. Unlike ivory, banning their trade is not a viable solution. At this point of time, there has been no follow up study by the government to determine whether the degree of abuse is similarly pervasive in the legal trade of other species.

As a first step, the government should develop priority plans for endangered and threatened species that are traded in large quantities and work with stakeholders to develop robust licensing measures.

#### Case Study: Live Reef Food Fish Trade

A report published in 2015 found Hong Kong takes 70-80% of the regional live reef food fish trade.<sup>100</sup> In 2013, the United Nations Office on Drugs and Crimes estimated the illegal trade in live reef fish in Asia and the Pacific region to be worth US\$850 million.<sup>101</sup> Hong Kong trade in live reef fish represents both illegal and legally sourced animals some of which are threatened (according to the IUCN Red List criteria).<sup>102, 103</sup> While much of the live reef fish entering Hong Kong arrives by air, a significant portion is landed by fishing vessels.<sup>104</sup> Loopholes in reporting requirements for locally registered fishing vessels allow them to land fish without customs inspection. Fish cargo (carrier only) vessels (which must declare their cargo and manifests to CED) are known to mis-register as fishing vessels which are exempted from declaring.<sup>105</sup> Inexplicably, these cargo vessels also have a Marine Department Director's exemption from reporting their entry and exit to Hong Kong, differing in this respect from other cargo vessels.

This exemption makes these boats difficult to track or trace, which would enable better oversight of their movements and allow CED to check they are declaring their cargo. Moreover, the Marine Fish (Marketing) Ordinance, Cap 291, which requires all fresh marine fish to be landed and sold at the wholesale fish markets operated by the Fish Marketing Organization, excludes live marine fish and transshipped fish. This leads to substantial underreporting of live fish including the CITES II listed Humphead (or Napoleon) wrasse (*Cheilinus undulatus*) brought into Hong Kong as cargo

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<sup>100</sup> Muldoon et al., 'Mostly Legal, But Not Sustainable – How Airlines Can Support Sustainable Trade in Live Reef Food Fish'.

<sup>101</sup> United Nations Office of Drugs and Crime, 'Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment'.

<sup>102</sup> Sadovy de Mitcheson et al., 'Fishing Groupers towards Extinction: A Global Assessment of Threats and Extinction Risks in a Billion Dollar Fishery'.

<sup>103</sup> Shelley, Milner-Gulland, and Bjorndal, 'Social, Economic, and Regulatory Drivers of the Shark Fin Trade'.

<sup>104</sup> Agriculture, Fisheries and Conservation Department, 'Report on Live Marine Fish Trade January to December 2012'.

<sup>105</sup> Cheuk and Sadovy de Mitcheson, 'A Facial Recognition Tool and Legislative Changes for Improved Enforcement of the CITES Appendix II Listing of the Humphead Wrasse, *Cheilinus undulatus*'.

(the majority source of live fish). Avoiding inspection, traders are able to import illegal numbers of CITES controlled listed species such as the Humphead wrasse.<sup>106</sup> These fish and other vulnerable members of the grouper species are imported to meet not only the high local demand of Hong Kong people but to supply China's increasingly affluent market. It has been suggested that as much as 50% of the live reef fish trade imported to Hong Kong is destined for mainland China.<sup>107</sup> China imposes up to 30% tax on food directly imported, however Hong Kong is tariff free. By routing the fish through Hong Kong traders are able to significantly improve their profits because of the long-standing trade networks into and through Hong Kong into the mainland.

For live reef fish, as for many other endangered species, loopholes in Hong Kong's legislation and lack of oversight have allowed legitimate permits to be used to launder illegally obtained specimens, amongst legally sourced animals. This problem was compounded by the changes to the legislation in 2006. At that time, in an effort to remove what was regarded by government to be excessive control of the trade, Cap 187 was replaced by Cap 586.

The legislation now permits the AFCD to issue import permits based on individual consignments, or keeping premises, regardless of the number of species or individuals involved.<sup>108</sup> Companies trading in controlled species may seek possession licences for multiple species, which are valid for 5 years. Without requirements for individual tagging of animals which identifies their origin, and assigns unique individual identifiers, this licensing practice has provided opportunities for unscrupulous traders to launder illegally sourced animals.<sup>109</sup> Traders also are not required to report sales of products to the AFCD. This leads to easy laundering of illegal and legal products, as long as the traders keep the number of individuals in their possession below the quota upon inspections. Better control and oversight of Hong Kong registered vessels importing live fish is needed to ensure reporting of cargo to customs, as required by law.

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<sup>106</sup> Sadovy de Mitcheson et al., 'The Trade in Live Reef Food Fish - Going, Going, Gone. Volume I: Main Reports I, II & III'.

<sup>107</sup> Hanson et al., 'Greening China's Fish and Fish Products Market Supply Chains'.

<sup>108</sup> Agriculture Fisheries and Conservation Department Endangered Species Protection Division, 'Endangered Species Advisory Leaflet No. 2(Revised)'.

<sup>109</sup> Wu and Sadovy de Mitcheson, 'TRAFFIC IUCN Joint Report: Humphead (Napoleon) Wrasse *Cheilinus Undulatus* Trade into and through Hong Kong'.

## Greater consolidation of possession regulation

Endangered species protection should be included in the conditions of existing licenses, rather than enforced in isolation, as trade in endangered species cannot be adequately regulated by Cap 586 alone.

The lack of consolidated regulation over the supply chain is consistent with many trades that are vulnerable to laundering. The gaps in data mirror the separation of government regulation for each trade as well as gaps in traceability. The lack of consolidation occurs both between departments, as well as within departments.

### Example 1: Live Reef Food Fish Trade

Numerous reports have been produced regarding Hong Kong's role as a major importer, exporter and consumer and supply chain issues are well known.<sup>110, 111, 112</sup> The AFCD has also participated in Asia Pacific Economic Co-operation (APEC) and other related regional events on the LRFFT since the late 1990s.<sup>113, 114, 115, 116</sup>

A 2011 report found that end markets in Hong Kong had little incentive to introduce sustainability schemes as individual restaurants felt no real pressure to demonstrate Corporate Social Responsibility (CSR).<sup>117</sup> The complexity of the trade makes government regulation one of the few tools left to encourage traders to source their products responsibly.

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<sup>110</sup> Lee and Sadovy, 'A Taste for Live Fish: Hong Kong's Live Reef Fish Market'.

<sup>111</sup> Sadovy et al., 'While Stocks Last: The Live Reef Food Fish Trade'.

<sup>112</sup> Sadovy de Mitcheson et al., 'The Trade in Live Reef Food Fish - Going, Going, Gone. Volume I: Main Reports I, II & III'.

<sup>113</sup> Agriculture, Fisheries and Conservation Department, 'Reef Fish Trade'.

<sup>114</sup> Muldoon and Scott, 'Creating the International Standard for the Trade in Live Reef Food Fish'.

<sup>115</sup> Muldoon, Cola, and Soede, 'Live Reef Food Fish Trade in the Coral Triangle: First Regional Workshop'.

<sup>116</sup> Gillett, 'Monitoring and Management of the Humphead Wrasse *Cheilinus undulatus*'.

<sup>117</sup> See Martosubroto and Muldoon, 'Final Report for Workshop on Market-Based Improvements in the Live Reef Fish Food Trade (LRFFT) Held in Bali, March 1-3, 2011', 19.

Despite this, there has been little progress in improving regulation and enforcement. There are two main reasons for this. Firstly, there is no single authority that oversees the entire trade; oversight for the LRFFT is spilt over multiple departments along the supply chain. Secondly, though the trade is regulated by several laws, there are multiple exemptions, exclusions and limitations that limit their intent.

For example, Cap 291, the legislation that controls the landing, import and export of marine fish in Hong Kong, was enacted in 1962. At the time, local demand for marine fish was met by fish from Hong Kong waters<sup>118</sup> and live seafood was exempted in the definition of “marine fish”. Since the 1970s, Hong Kong’s LRFFT has expanded to the far reaches of Southeast Asia. However, unlike Cap 586, this ordinance has not been updated to reflect the changing reality of the marine fish trade in Hong Kong.

A 2018 report summarised these shortcomings and the resulting loopholes in existing legislation.<sup>119</sup>

Legislation	Enforcement authority	Limitations
<p><b>1. Entry and exit (import and export declarations)</b></p> <p>Customs Cap 60</p> <p>Import and Export Ordinance</p> <p><i>To provide for the regulation and control of the import of articles into Hong Kong, the export of articles from Hong Kong, the</i></p>	CED	<p><b>Exemption of Fishing Craft Registered or Licensed in Hong Kong</b> from providing customs declarations. Fish carriers/cargo vessels such as those carrying LRFF have been allowed by the Hong Kong government (AFCD) to operate under this exemption, despite the clear intention of the law to limit the exemption only to local fishing vessels.</p>

<sup>118</sup> See Lau, ‘Taking from the Wild: Moving Towards Sustainability in Hong Kong’s Wildlife Trade’, 47

<sup>119</sup> See Sadovy de Mitcheson et al., ‘The Trade in Live Reef Food Fish - Going, Going, Gone. Volume I: Main Reports I, II & III’, 116-117

<p><i>handling and carriage of articles within Hong Kong which have been imported into Hong Kong or which may be exported from Hong Kong, and any matter incidental to or connected with the foregoing.</i></p>		<p><b>Limited specificity</b> required in customs declarations.</p> <p><b>Exemption of transhipments</b> from customs declarations.</p> <p><b>Limited manifest particulars</b> despite government guidance.</p>
<p><b>2. Entry and sale</b></p> <p>Fish Marketing Cap 291 Marine Fish (Marketing) Ordinance</p> <p><i>To provide for the control of the landing and wholesale marketing of marine fish, for the control of the importation and exportation thereof, for establishing a Fish Marketing Organization for encouraging co-operative markets, for a scholarship fund for persons who may benefit or be connected with the marine fisheries and fish marketing industries and for matters incidental thereto.</i></p>	FMO, AFCD	<p>No oversight of entrance and exit of live seafood</p> <p>No ability to monitor the composition and volumes of the trade in detail.</p>

<p><b>(Excludes</b> “<i>all crustaceans or molluscs and fish alive and in water</i>” in the definition of “marine fish”.)</p>		
<p><b>3. Conservation (local waters)</b></p> <p>Fisheries Regulations</p> <p>Cap 171 Fisheries Protection Ordinance</p> <p><i>To promote the conservation of fish and other forms of aquatic life within the waters of Hong Kong and to regulate fishing practices and to prevent activities detrimental to the fishing industry.</i></p>	<p>AFCD</p>	<p><b>Exclusion:</b> Live carriers are not registered/licensed as fishing vessels with AFCD</p>
<p><b>4. Food safety</b></p> <p>Cap 612</p> <p>Food Safety Ordinance</p> <p><i>An Ordinance to establish a registration scheme for food importers and food distributors; to</i></p>	<p>FEHD</p>	<p>Lack of specific measures to trace LRFF species to origin.</p>

<p><i>require the keeping of records by persons who acquire, capture, import or supply food; to enable food import controls to be imposed; to re-enact Part VA of the Public Health and Municipal Services Ordinance; to make consequential and related amendments to that Ordinance and another Ordinance and to provide for incidental and connected matters.</i></p>		
<p><b>5. Conservation (CITES)</b></p> <p>Cap586 Protection of Endangered Species of Animals and Plants Ordinance</p> <p><i>An Ordinance to give effect in Hong Kong to the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington D.C. on 3 March 1973; to regulate the import, introduction from the sea, export,</i></p>	<p>AFCD</p>	<p>Lack of investigative mandate and capacity, considering the organised and serious nature of the trafficking of CITES- listed species</p> <p>Limited offence provisions</p> <p>Lenient sentencing for offences</p>

<i>re-export, and possession or control of certain endangered species of animals and plants and parts and derivatives of those species; and to provide for incidental and connected matters.</i>		
<p><b>Entry and exit (vessels)</b></p> <p><b>Vessels Licensing</b></p> <p>Cap 548 Merchant Shipping (Local Vessels) Ordinance</p> <p><i>An Ordinance to provide for the regulation and control of local vessels in Hong Kong or in the waters of Hong Kong and for other matters affecting local vessels, including their navigation and safety at sea (whether within or beyond the waters of Hong Kong).</i></p>	Marine Department	<p><b>Exemptions for local fish carriers and fishing vessels</b> (Class III (a) and III (c)) from reporting arrivals and departures into and from Hong Kong waters.</p> <p>Class III (a) fish carriers (&gt;300 GT), which travel internationally, were not included within a recent amendment which required the installation and use of an AIS in Class I and Class II (in March 2018) vessels.</p>

Table adapted from Sadovy de Mitcheson et al.(2018), 116.

#### Example 2: Exotic Pet Trade

The pet trade absorbs a large number of endangered species, in particular, reptiles. The increasingly globalized nature of the pet trade and the risks it carries, including zoonotic disease, establishment of invasive species, as well as the animal welfare issues across the supply chain is

well documented.<sup>120</sup> Hong Kong's import of live CITES listed animals for the pet trade has increased nine-fold from 105,000 in 2007 to 900,000 in 2016: importing a total of more than four million individuals during this period.<sup>121</sup>

Surprisingly, the AFCD has data regarding the number of animals imported for the pet trade but not the animals actually sold by licensed trader transhipped or re-exported to other countries, indicating that traceability in the pet trade could be further improved.<sup>122</sup> Animal welfare is also a concern with 70% mortality claimed to be industry standard by a major international supplier,<sup>123</sup> and reptiles being considered as “throw away” pets.<sup>124</sup>

Regulation of the supply chain is split between different sections of the AFCD. The AFCD's Animal Management Division oversees the supply, trade and ownership of pets in Hong Kong. It is also responsible for dealing with abandoned animals and providing public education regarding responsible pet ownership. However, there is no obvious collaboration between the Endangered Species Protection and Animal Management Divisions in terms of public education, trade, responsible pet ownership, responsible sourcing nor trading conditions.

Animal traders have to apply for a license, and some are bound by a Code of Practice, as well as being subject to inspections by the AFCD's animal management inspectors to ensure they fulfil license conditions. Traders are also subject to additional inspections by the Endangered Species Protection division if they possess CITES I species and CITES II species of wild origin.

Unlike dog traders, reptile traders do not need to provide documentation regarding the origin of their stock nor are they bound to provide buyers with any documentation verifying the source of

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<sup>120</sup> For a summary of literature regarding these concerns, see Warwick et al., ‘Exotic Pet Suitability: Understanding Some Problems and Using a Labeling System to Aid Animal Welfare, Environment, and Consumer Protection’, 17-20.

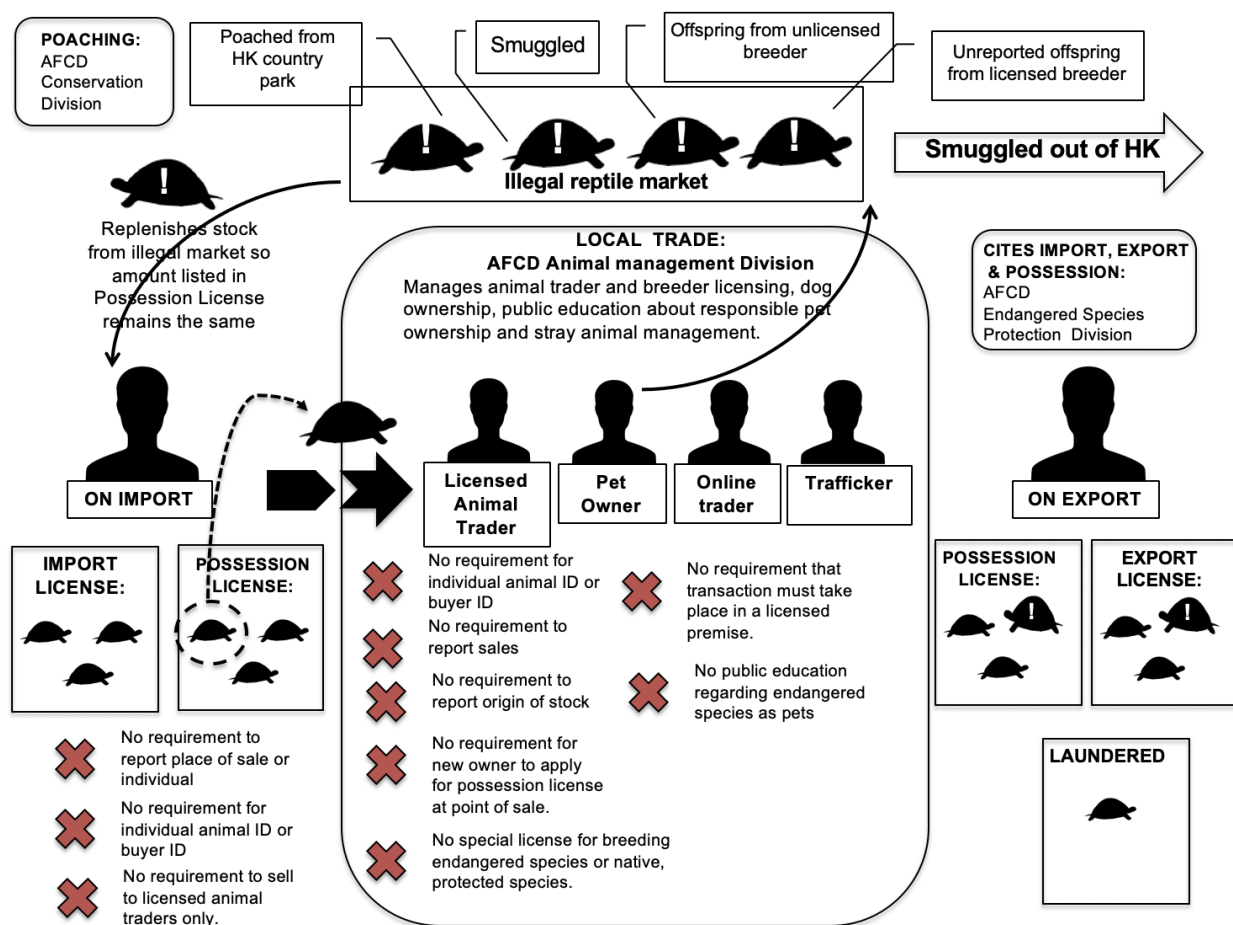
<sup>121</sup> See ADMCF, ‘Trading in Extinction: The Dark Side of Hong Kong's Wildlife Trade.’, 125

<sup>122</sup> Government of the Hong Kong Special Administrative Region, ‘LCQ14: Protection of Animal Rights and Welfare’.

<sup>123</sup> US Global Exotics, a major supplier of exotic pets in the US and Europe testified that a 70% death rate was considered industry standard. See Ashley et al., ‘Morbidity and Mortality of Invertebrates, Amphibians, Reptiles, and Mammals at a Major Exotic Companion Animal Wholesaler’.

<sup>124</sup> Pulkkinen, ‘Everett Pet Shop Owner Turned Animal Smuggler: I Went Too Far Chasing My “Dream”.’

their animal. In a recent study, it was estimated that almost 40% of turtles traded online in Hong Kong were illegally traded, with neither CITES import permits nor possession licenses.<sup>125</sup>



*Diagram: How fragmented regulation of wild caught reptiles in the pet trade results in laundering*

Additional conditions should be added to Animal Trader Licenses for reptiles so that all reptiles traded in Hong Kong can be traced back to a verifiable legal source for public health, conservation and welfare reasons. The AFCD's Animal Management Division was able to do this for the dog

<sup>125</sup> Sung and Fong, 'Assessing Consumer Trends and Illegal Activity by Monitoring the Online Wildlife Trade'.

trade in 2016 under Cap 139B.<sup>126</sup> For endangered species, animals should be traceable at least back to the CITES Import Permit. Importers should also only be permitted to sell to licensed animal traders.

Similarly, CITES import permits should only permit the trade of imported reptiles at the premises of licensed animal traders. Currently, there is no such stipulation.

There has also been concern that native species are vulnerable to smuggling as there are limited ways to verify whether an animal was poached locally or legally imported.

Poaching pressure on Hong Kong's wildlife has increased exponentially in recent years. Hong Kong still has wild populations of intensely poached and highly valued chelonian species such as the golden coin turtle (CITES Appendix II), big-headed turtle (CITES Appendix I) and Beale's turtle (CITES Appendix II). For some species, Hong Kong is one of the last remaining habitats where breeding continues in the wild.<sup>127</sup> The risk of poaching for these animals requires urgent legislative intervention.

Between 2012 and 2016, the AFCD collected over 900 animal traps.<sup>128</sup> Inspectors from the Society for the Prevention of Cruelty to Animals Hong Kong (SPCA HK) have also removed 457 traps since 2010. In 2019, 90 traps were removed, accounting for almost 20% of the total number of traps collected in a decade.<sup>129</sup> Though there might be some overlap in figures due to joint operations between the SPCA and the AFCD, the high number of traps recovered in recent years is of grave concern. In December 2019, 18 animal traps were found in a single site.<sup>130</sup>

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<sup>126</sup> See Food and Health Bureau and Agriculture, Fisheries and Conservation Department, 'Legco Panel on Food Safety and Environmental Hygiene. Proposed Measures to Further Enhance Regulation of the Pet Trade.', 3.

<sup>127</sup> Malone and Watson, 'The Insidious Black Market Taking Hong Kong Turtles to the Brink of Extinction'.

<sup>128</sup> Government of the Hong Kong Special Administrative Region, 'LCQ 15: Combat Illegal Hunting of Animals by Animal Traps'.

<sup>129</sup> Society for the Prevention of Cruelty to Animals (Hong Kong), 'A Destructive Weapon: Illegal Traps'.

<sup>130</sup> Lo, '18 Animal Traps Seized by Hong Kong Authorities after Stray Puppy Found Snared'.

Traps are controlled under Cap 170 and it is imperative that penalties under the Ordinance keep up with developments under Cap 586 to effectively protect vulnerable populations.<sup>131</sup>

Cap 170 is currently enforced by the AFCD's Conservation Division. The AFCD's Conservation Division, its Endangered Species Protection Division, Inspection and Quarantine Division and Animal Management Division should consider if the trade, import and export of CITES species that occur locally should be banned or subject to additional measures, until loopholes have been studied and closed.

Both Cap 139B (Section 3) and Cap 586 (Section 23(3)) make provisions for the Director of the AFCD to stipulate additional license conditions and these provisions should be duly utilized.

### **Public education**

There has also been little public education regarding the problem of endangered species in the pet trade. International studies show that the majority of pet owners fail to meet the specific dietary, environmental and behavioural needs of exotic animals in captivity.<sup>132</sup> Many buyers perceive reptiles to be cheap pets that are easy to care for, sellers often provide inadequate and or incorrect information and veterinarians report that poor husbandry and neglect as the most common problems seen.<sup>133, 134</sup>

In 2016, the top five reptile species imported for the Hong Kong pet trade<sup>135</sup> included over 500,000 Yellow Spotted River turtles, a species that can grow up to 45cm long, weigh 8 kilograms and live

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<sup>131</sup> The easy availability of traps and the difficulty in prosecuting trap possession cases also contribute greatly to the problem. Despite the recovery of over 900 traps between 2012- 2016, only one prosecution was recorded annually during the same period. (See Government of the Hong Kong Special Administrative Region, 'LCQ 15: Combat Illegal Hunting of Animals by Animal Traps'.)

Currently, possession of a hunting appliance is not an offence *per se*, under section 7(2) of Cap 170; rather it is the possession of such an appliance "*for the purpose of hunting any wild animal*" which constitutes an offence. Thus, defendants may argue possession of such traps for sale or to trap non-wild animals as a defense.

<sup>132</sup> RSPCA, 'Far from Home: Reptiles That Suffer and Die in Captivity'.

<sup>133</sup> RSPCA, 'Handle with Care: A Look at the Exotic Pet Trade'.

<sup>134</sup> RSPCA, 'Shell Shock: The Continuing Illegal Trade in Tortoises'.

<sup>135</sup> See The Government of the Hong Kong Special Administrative Region, 'LCQ14: Protection of Animal Rights and Welfare'. Annex 2.

up to 30 years;<sup>136</sup> over 48,000 green iguanas, tree dwelling lizards that can grow up to 2 meters long<sup>137</sup> as well as more than 40,000 Spurred Tortoises that can weigh more than 50 kilograms and grow to over 70cm in length.<sup>138</sup> These animals require substantial, specialised resources for a healthy life in captivity and cannot be adequately cared for in an apartment. Furthermore, the keeping of exotic animals is prohibited in public housing.<sup>139</sup>

In the US, large populations of abandoned green iguanas have become invasive. Though many iguanas die prematurely within the first year due to poor care, those that survive are released or given away to reptile rescue groups.<sup>140</sup> In Florida, due to their large numbers and the consequent damage they cause, wildlife managers have had to permit residents to humanely kill green iguanas on their own property.<sup>141</sup>

A 2017 RSPCA report examined the motivations of beginner reptile owners to better understand the drivers of poor welfare in exotic reptiles.<sup>142</sup> It found that reptile owners had diverse motivations and despite their growth in numbers, there had been no concurrent widespread education and low awareness about the difficulties of keeping such pets. The report found that online information was difficult to navigate and often inconsistent. Pet owners primarily rely on and cling to information received at point of sale, even in the face of new knowledge. Reptiles were often sold on or given away, resulting in knowledge of their care being further diluted.

Interviewees opined that the public should be educated as to the suitability of a species and its source (i.e. wild caught or captive bred, and how to tell the difference). Public education should come under the umbrella of existing Responsible Pet Ownership campaigns run by the Animal Management Division, with resources and input from the other Divisions.

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<sup>136</sup> Senneke and Tabaka, ‘*Podocnemis Unifilis* - (Yellow-Spotted Amazon River Turtle) Care’.

<sup>137</sup> Gingell, ‘*Iguana Iguana* Common Iguana’.

<sup>138</sup> San Diego Zoo, ‘African Spurred Tortoise *Geochelone sulcata*’.

<sup>139</sup> Hong Kong Housing Authority, ‘Marking Scheme for Estate Management Enforcement’.

<sup>140</sup> National Geographic, ‘Green Iguana’.

<sup>141</sup> Florida Fish and Wildlife Conservation Commission, ‘Green Iguana *Iguana iguana*’.

<sup>142</sup> White and Barber, ‘Understanding the Motivations of Beginner Reptile Pet Owners’.

In Hong Kong there are also no clear policy decisions regarding the implications for animal management when unsuitable animals (endangered or otherwise) are permitted for import then abandoned or escape to the wild. The release and establishment of exotic animals into Hong Kong's natural environment is a known issue<sup>143,144,145,146</sup> The government has so far chosen not to implement legislation which would control the import of unsuitable species, preferring to focus on public education discouraging abandonment.<sup>147</sup>

Given that pet owners are seldom fully prepared for the responsibility of owning exotic pets and the rapid growth of exotic pet ownership, a pro-active policy approach is needed to reduce the burden of dealing with abandoned animals and its associated problems.

In some countries, regulations have been put in place to limit the species permitted for import, sale and ownership. Countries such as Singapore<sup>148</sup> and Australia<sup>149</sup> have regulations stipulating the type of pets permissible for import and sale. Positive Lists, a list of species that are suitable and permitted to be kept as pets may be an effective way to streamline regulation of the exotic pet trade and prevent/ limit the many problems it creates. The Eurogroup for Animals, an alliance of over 70 European animal advocacy groups, has advocated for Positive Lists as “the most effective, concise, transparent, enforceable and economically feasible way to regulate the exotic pet trade”.

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<sup>143</sup> Leven and Corlett, ‘Invasive Birds in Hong Kong, China’.

<sup>144</sup> See HK Wildlife Trade Working Group, ‘Wildlife Crime: Is Hong Kong Doing Enough’, 17.

<sup>145</sup> Chan et al., ‘Spatial Ecology of the Introduced Chinese Water Dragon *Physignathus cocincinus* in Hong Kong’.

<sup>146</sup> The Government of the Hong Kong Special Administrative Region, ‘LCQ22: Prevention of Alien Species’ Invasion of Hong Kong’s Natural Environment’.

<sup>147</sup> Ibid

<sup>148</sup> See Singapore Animal and Veterinary Service, ‘Animals Allowed for Sale’.

<sup>149</sup> Australia does not permit of the import of live specimens if they are not on the Live Import List of the Department of Water, Agriculture and the Environment. See Australian Government Department of Agriculture, Water and the Environment, ‘Household Pets’.

<sup>150</sup> Eurogroup for Animals, ‘The Exotic Pet Trade’.

To date, Belgium<sup>151</sup>, Luxembourg<sup>152</sup> and the Netherlands<sup>153</sup> have implemented Positive Lists for various groups of animals. For example, the Belgian Positive List for reptiles lays out some criteria for reptiles that are permitted for pet keeping. Permitted species must be captive bred, safe to handle, easy to house, their diet must be easily obtained, and their natural environment must be easily replicated in captivity. Importantly, they must also not pose a risk as invasive species.<sup>154</sup>

### **Recommendations:**

- **The Government should conduct a study to evaluate the effectiveness of current trade controls. Such a study should prioritise trades that are high in volume and deal with species that are particularly endangered or commonly mis-declared. Similar to the study of dog trade controls under Cap 139B, understanding the current loopholes should be the first step in developing workable controls and action plans across the supply chain with stakeholders, rather than the current ‘one size fits all’ approach to possession controls. Without such a study, it is impossible to determine that Hong Kong’s regulatory controls under Cap 586 are adequate.**
- **The trade, import and export of CITES species that occur locally should be banned or subject to additional measures, until loopholes have been studied and closed.**
- **Responsible pet ownership initiatives should include the exotic pet trade.**

#### *With regard to the live reef fish trade:*

- **Possession licences should record details of individual specimens (from tagging or other methods that distinguish individuals) rather than a quota.**
- **Live fish cargo vessels should be correctly registered with the Marine Department (as cargo and not active fishing vessels) and efforts made to ensure they declare their manifests and cargo to CED. Such cargo vessels should also be required to report their entry to and exit from Hong Kong to the Marine Department.**
- **The definition of ‘fish’ should include live fish in Cap 291.**

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<sup>151</sup> Department Omgeving, ‘Positieve lijst reptielen’.

<sup>152</sup> The Luxembourg Government, ‘Animal Protection in Luxembourg’.

<sup>153</sup> See National Government, The Netherlands, ‘Positieflijst Zoogdieren (‘huisdierenlijst’)

<sup>154</sup> Department Omgeving, ‘Bijlage I –Criteria voor Opname op de Positieve Lijst Reptielen’.

### **Specific Problems related to Appendix II Species**

The 2006 replacement of Cap 187 with Cap 586 relaxed the requirement for those in possession of Appendix II species to hold a licence. For species in Appendix II, captive bred/ranched or dead specimens do not require possession licenses. Licences are only required for possession of wild caught species that are live. As noted above, licences for possession of live Appendix II species are issued to premises for a set number of animals, rather than for each animal. Without the ability to identify individual animals, unscrupulous traders may claim specimens are the result of captive breeding or replace legally caught animals with those procured illegally. Moreover, since ranched animals have been wild-caught before being grown out, there is no legitimate reason to exclude them from the possession licence requirement for wild-caught animals.

### **Recommendation:**

- **Captive-bred/ranched and dead specimens of Appendix II species should require possession licenses along with live wild caught specimens.**

Currently, it is difficult to separate specimens claimed to be captive bred or ranched animals from wild caught animals and indeed ranched animals are wild caught. Ranching is poorly defined in Hong Kong, where the distinction is only made between captive bred and wild caught. Where challenged defendants may be required to provide evidence that controlled animals were not taken within Hong Kong. However, in the absence of a marking system allowing the identification of individuals, false permits/transaction invoices may be used to disguise poaching/illegal imports.

Microchipping is widely used in other jurisdictions to reliably identify individuals, including live animals that are used for food. A less invasive method is to photograph the characteristics of specimens (e.g. facial marking, body size) and establish a photo database. In accordance with the Australian EPCB Act, section 303EU the Secretary may:

- a) require specimens to be marked; and*
- b) deal with the manner in which specimens are to be marked; and*
- c) deal with the times at which marking is to occur; and*
- d) deal with the removal or destruction of marks; and*
- e) deal with the replacement or modification of marks; and*

- f) require that marking be carried out by persons approved in writing by the Secretary under that determination; and*
- g) deal with the circumstances in which marks may be, or are required to be, rendered useless; and*
- h) in the case of a mark that consists of a label, tag, band or device:*
  - i) set out specifications relating to the label, tag, band or device; and*
  - j) require that any destruction or removal of the label, tag, band or device be carried out by a person approved in writing by the Secretary under that determination.*

It should be noted that in the case of a live animal, the legislation requires that marking must not involve undue pain or distress to the animal or undue risk of the death to an animal or plant.

### **Recommendations:**

- **Importers should be required to ensure individual chipping/ring tags (or other identification methods) for live animals arriving in Hong Kong to permit traceability of CITES imported species (and avoid laundering). The same requirements should be applied to WAPO (Cap 170) protected species which are traded under permit. This should be made mandatory for species that are particularly vulnerable to laundering.**
- **The AFCD should keep a list of registered breeding farms/hatcheries in HK and in source countries and require suppliers to tag their specimens to identify captive-bred animals.**

### **Transaction oversight**

Once animals are imported and sold it is extremely difficult to determine whether they were wild caught or captive bred. Further confusion occurs in the case of ranched animals which require evidence, for CITES- listed species, that wild capture for ranching is not detrimental to the species. The problem is exacerbated by the lack of requirement for buyers to provide their details on purchase of controlled species, which would permit the AFCD/traders to ensure they seek possession licences. The lack of regulation on the possession of exotic pets encourages the trade. Further, traders who have breached the conditions of their licenses may still keep the license and extend it.

Conversely the Australian licensing system requires:

- *Licence holders keep and maintain up-to-date records of all transactions and changes in stock.* (All States require licence holders to keep and maintain such records of wildlife transactions).
- *All licence holders submit regular returns to the regulatory authority.* (All States require licence holders to submit regular returns of wildlife transactions).
- *Some assessment of a licence applicant's suitability as a licence holder to be made, including whether the person has a record of offences against relevant wildlife legislation.* (Most states require details of any such criminal record to be included in applications for a licence).
- *Strong penalties for failure to comply with record keeping requirements and submission of returns.* (All States provide for penalties for failure to comply with record-keeping requirements and in some states the fine is automatic and issued by the computerised licensing system).
- *Strong penalties for the provision of false or misleading information in licence applications, documentation, or in response to queries by authorized officers.* Specific penalties for the provision of false or misleading information apply in Queensland (maximum fine of \$6,000), South Australia (\$2,000 maximum fine for requirements under the Act and \$1,000 for requirements under regulations) and Victoria (20 penalty units).
- *For all transactions, the names and licence numbers of both parties to each transaction to be recorded, to enable cross-referencing and verification of records submitted.* All States, except for the Northern Territory, require that records stipulate the source of fauna and the identity of all parties to transactions. Details of progeny and deaths are required in records in most state's legislation.
- *Where wildlife is consigned, the consignor must ensure that the licence number and name of both the sender and the receiver are clearly displayed, unless the consignee is a licence holder.*

### **Recommendations:**

- **Hong Kong should require licence holders to keep and maintain up to date records of source of supply (of marked animals), sales, births and deaths (as is required under Cap 139B to control the dog trade).**

- **The suitability of applicant's for licences should be assessed and licences withheld where appropriate (e.g. for past breaches of conditions).**

### **Licensing of Imports**

In Hong Kong importers are allowed to submit all declaration documents within 2 weeks after shipment arrivals, and some do not declare. Hong Kong remains the only major trading economy that permits this practice.<sup>155</sup> This leads to difficulty in gathering data on what is being imported into Hong Kong. To rectify this, CED have a voluntary scheme, the Trade Single Window (TSW), for traders to declare imports before the products arrive which should be made compulsory for wildlife. The data could then be used to study the wildlife specimens with large volumes coming to Hong Kong, which then could be used to prioritize species/products for enforcement.

The TSW was launched in December 2018 and will include online submission of Cap 586 licenses in 2023.<sup>156</sup> This could be a valuable opportunity for the Government to add combined reporting criteria for license applications bringing together multiple reporting systems to facilitate verification.

A lack of bilateral partnerships between Hong Kong and other source countries, makes verifications of legal wildlife products difficult. While this continues, the AFCD should grant no licences for imports of Appendix II species unless the source country's NDF is publicly available for inspection. While the AFCD checks the validity of export permits issued by source countries through the CITES system, products contravening national laws in source countries (for example, shark fins from India or undersized humphead wrasse from Indonesia) are permitted import into Hong Kong. To assist in this regard, Hong Kong should develop better partnerships with important trading source countries. A voluntary partnership agreement (VPA) scheme<sup>157</sup> has been reached between the EU and source countries of timber to develop a license system. EU provides resources

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<sup>155</sup> Office of Trade Single Window Operation, 'About Trade Single Window'.

<sup>156</sup> According to the Office of Trade Single Window Operation, Licenses to Import/ Introduce by Sea/ Export/ Re-export Endangered Species will be included in Phase 2 from 2023 in batches on a voluntary basis. See Office of Trade Single Window Operation, 'Types of Documents under Phase 2'.

<sup>157</sup> European Forest Institute, 'Voluntary Partnership Agreements'.

to facilitate the development of such systems. The USA and China also provide financial resources for African countries to enhance enforcement in national park/other forms of wildlife protections.

The current HS code system does not contain sufficient information, for most threatened species, such as the identity of species or whether the products were processed (e.g. processed vs unprocessed shark fins). This makes understanding the wildlife trade market in Hong Kong difficult. At a minimum, information about the species should be contained in the code. In the US, to enhance traceability of wildlife products, the details such as species identity, country of origin, volume and value must be reported. HS code systems vary between countries, leading to difficulties in comparing declared trade volume of different products on the international market. Hong Kong government should collaborate with other important trading hubs (e.g. Singapore) and develop a unified HS code system.

#### **Recommendations:**

- **Traders should be required to declare wildlife imports before the products arrive in Hong Kong.**
- **AFCD should grant no licences for imports of Appendix II species unless the source country's NDF is publicly available for inspection.**
- **The government should collaborate with other important trading hubs (e.g. Singapore) and develop a unified HS code system.**
- **Frontline staff at designated wildlife ports should receive mandatory training on species identification.**
- **A positive list of permitted species should be introduced to ensure that species are more easily identified.**
- **AFCD's current pledge to issue import permits within 2 days (provided all documents are submitted by traders) should be withdrawn.**
- **AFCD should consider collaborating with the relevant exporting authorities in source countries that regularly send threatened/listed wildlife to Hong Kong.**

#### **Re-export**

Under the EU Basic Regulation, the export and re-export conditions for species in Annexes A, B and C are stricter than under CITES. Before permitting export or re-export the EU member state

must be satisfied that, any live specimens are prepared and shipped so as to minimize the risk of injury, damage to health or cruel treatment; any non-CITES Appendix 1 species listed in Annex A are not to be used for primarily commercial purposes and, in the case of export to another CITES member of specimens listed in Annex I of the Convention, an import permit has been issued. There must also be no other factors relating to the conservation of the species which militate against issuance of the export permit.

In accordance with Article 5 of the Basic Regulation, where an application for a re-export certificate concerns specimens introduced into the European Community under an import permit issued by another Member State, the management authority must first consult the management authority which issued the permit. Such practice provides a safeguard on illegal trafficking and its adoption in Greater China would be a useful practice to deter smuggling from Hong Kong/Macau to the Mainland.

In Hong Kong, animals trans-shipped to Mainland/re-exported are currently not provided with sufficient protection from smuggling. Poached animals from Hong Kong or animals that have entered the Territory illegally may leave without the consideration or inspection which would permit falsified documents to be discovered.

Along with more stringent checking of CITES permits and inspection protocols, traders should be required to indicate the destinations of their cargo (e.g. domestic markets or the Mainland) when they apply to the AFCD for import licences. Under current controls it is not possible to determine the final destination of imports.

### **Recommendations:**

- **Routine inspection of animals to be re-exported from Hong Kong and their permits should be required.**
- **Traders seeking to re-export species from Hong Kong should be required to indicate the destinations of their cargo (e.g. domestic markets or the Mainland).**

### **Protecting welfare**

Safeguarding the welfare of live wild animals in capture and transport is problematic regardless of whether it is done for the purpose of legal or illegal trade. Capture methods may

involve cruelty and injury to the individual sought, and inappropriate holding facilities and illegal transport methods may compromise welfare. Animals that are live caught are more likely to suffer from disease or injuries than those which elude their captors. Targeted animals may face serious environmental challenges in capture and transport (including crushing, asphyxiation, dehydration, starvation, temperature shock and stress). In addition, where an animal has been captured for the sole purpose of deriving value from it after its death, the animal may be subjected to cruel treatment before death and inhumane methods of slaughter.

To avoid ill treatment of wildlife, the Australian Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act) requires that all wildlife be treated humanely. Similarly, the EU Basic Regulation, together with Council Directive (EEC) No 95/29/EEC requires compliance with the IATA Live Animals Regulations for air transport and the CITES Guidelines for Non-Air Transport of Live Wild Animals and Plants meaning that transport of wildlife must be undertaken in such a way as to minimize the risk of injury, damage to health or cruel treatment. The Secretariat of the CITES Convention urges all CITES member states to adopt the IATA and CITES Transport Guidelines.

#### **Recommendations:**

- **Cap 586 should be amended to require the humane treatment of animals traded live and set welfare standards for transport.**
- **Where welfare is compromised and wild animals (whether endangered or not) have suffered during import, export or trade, prosecutions under Cap 169 the Prevention of Cruelty to Animals Ordinance should be proactively pursued.**

## **PART FIVE: SENTENCING**

The United Nations Office on Drugs and Crime's Wildlife and Forest Crime Analytic Kit<sup>158</sup> cites problems in deterring wildlife offences due to lenient sentencing. To better deter offenders, the United Nations encourages courts to impose penalties for wildlife offences which take into account

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<sup>158</sup> United Nations Office of Drugs and Crime, 'Wildlife and Forest Crime Analytic Toolkit', 135-6.

the extent of harm caused or likely to be caused to the environment, including the natural habitat, species and biodiversity, by the commission of the offence.<sup>159</sup> However such sentences are unlikely to be passed without not only investigators of wildlife offences, but also prosecutors and judges understanding the full impact of offences. In many cases, incomplete evaluations of the extent of culpability which should be attached to the defendant results from lack of understanding of extent of harm caused by wildlife offences.

A 2014 report prepared by the EU's Judicial Co-operation Unit, Eurojust, found that many member states considered lack of awareness of the impact and scope of wildlife crime required correction at the judicial level. The report recommended information should be routinely provided to courts identifying current levels of extinction for species illegally traded, as well as the illegal 'market price' of those species.<sup>160</sup> The report endorsed the exchange of national case information between member states to encourage better recognition of harms to the environment caused by wildlife offences.<sup>161</sup> When passing sentences for wildlife crimes it is important that judges consider not only the harm to the individual animals traded, but to the species as a whole and the ecosystem from which they are taken. For keystone species, poaching will often have very serious consequences for other species. Such information should be routinely provided to judges by prosecutors in order to better inform sentencing. To this end, the Species Victim Impact Project, run by The University of Hong Kong has been assisting in prosecutions for the past two years.

In some countries specialist courts and benches now deal with environmental crimes. In Asia, such courts have been set up in Malaysia, Indonesia, Pakistan and the Philippines and will begin operation in Thailand in 2022. These specialized court systems allow judges to gain the expertise necessary to deal with wildlife cases.

A 2006 report prepared by TRAFFIC for the European Commission found that the development of prosecutorial expertise in preparing wildlife crime cases for court plays a critical role in securing deterrent sentences. The report endorsed the development of specialised prosecution units as had

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<sup>159</sup> Ibid.

<sup>160</sup> Eurojust, 'Strategic Project on Environmental Crime Report'.

<sup>161</sup> Ibid., 34-5.

occurred in Finland, Sweden and Holland.<sup>162</sup> In 2011, Scotland appointed specialist prosecutors for wildlife and environmental prosecutions and later Crown Counsel to advise on appeals.<sup>163</sup> In England and Wales, guidelines for sentencing wildlife offences had been introduced by the Magistrates' Association in 2002,<sup>164</sup> and updated in 2009,<sup>165</sup> however concerns have been expressed as to their limited detail and applicability.<sup>166</sup> In 2012, a House of Commons Environmental Audit Committee recommended, that specialised prosecutors be appointed in England and Wales, or that general prosecutors receive specialist training in presenting wildlife crime cases at court.<sup>167</sup>

Tried, until 2018, as summary offences, lenient sentencing in the magistracies has been an ongoing problem in the effective deterrence of wildlife crime in Hong Kong. The Hong Kong Court of Appeal has stated that the prime considerations in sentencing offenders for breaches of CITES under Cap 586 should be protection and deterrence.<sup>168</sup> In reality however, many sentences for breaches of CITES imposed under Cap 586 have been lenient. Imprisonment for trade in (as opposed to theft of) critically endangered species has been rare and, even when gaol terms are imposed, sentences have usually been short. In June 2012, a woman who smuggled two rhinoceros' horns into Hong Kong for onward sale to China was sentenced to two months' imprisonment. On appeal, the court ruled this sentence adequate although the woman had, by her own admission, trafficked rhinoceros horn before.<sup>169</sup> The same month, a Chinese national who pleaded guilty to smuggling 43 critically endangered Palawan Forest Turtles (an Appendix II listed species) into

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<sup>162</sup> Garstecki, 'Implementation of Article 16, Council Regulation (EC) No. 338/97, in the 25 Member States of the European Union'.

<sup>163</sup> Edinburgh Crown Office and Prosecutorial Fiscal Service, 'New Specialist Prosecutors Appointed for Wildlife and Environmental Crime'.

<sup>164</sup> Magistrates' Association, 'Sentencing for Wildlife Trade and Conservation Offences'.

<sup>165</sup> Magistrates' Association, *Costing the Earth, Guidance for Sentencers. The Magistrates' Association, London, UK.*

<sup>166</sup> Flynn, 'Sentencing Wildlife Trade Offences in England and Wales. Consistency, Appropriateness and the Role of Sentencing Guidelines.'

<sup>167</sup> House of Commons Environmental Audit Committee, 'Environmental Audit Committee - Third Report Wildlife Crime'.

<sup>168</sup> HKSAR v Xie Jinbin [2011] 2 HKLRD 631.

<sup>169</sup> HKSAR v Cheung Mo Tak, HCMA 89/2012, (unreported High Court Magistracy Appeal, 8 June 2012).

Hong Kong from the Philippines was sentenced to 6 weeks' imprisonment.<sup>170</sup> The man had been convicted four months earlier of smuggling 20 of the same species of turtle, along with 16 other endangered turtles into Hong Kong. On the earlier occasion he was fined HK\$8,000.<sup>171</sup> In March 2014, two Egyptian nationals were convicted of illegally smuggling 70 radiated tortoises, 9 spider tortoises (both Appendix I species) and 39 Greek tortoises (an Appendix II species) inside their checked luggage into Hong Kong.<sup>172</sup> Both defendants were sentenced to suspended sentences of two months' imprisonment. One defendant was fined HK\$45,000 and the other HK\$40,000. The animals were valued by the Kadoorie Farm and Botanical Garden to be worth HK\$759,000 on the black market.<sup>173</sup> Two days later, in the same magistracy, a defendant was convicted of smuggling 116 radiated tortoises and 10 ploughshare tortoises (both Appendix I species) and 96 leaf chameleons (an Appendix II species) into Hong Kong inside checked luggage.<sup>174</sup> Ploughshare tortoise are the world's rarest tortoise species, with as few as 100 adults remaining in the wild.<sup>175</sup> The defendant was sentenced to 6 weeks' imprisonment for the Appendix I species and 4 weeks' imprisonment for the Appendix II species. The sentences were ordered to be served concurrently. The value of the animals was estimated to be HK\$1,340,000.<sup>176</sup> In 2018, a man was convicted of possessing of a pair of pre-CITES ivory chopsticks. The chopsticks were sold to an undercover officer from an art curio shop, run by the man, in Central Hong Kong. The man was, at the time of the sale, a member of the government's Endangered Species Advisory Committee. He was fined \$8,000.<sup>177</sup>

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<sup>170</sup> *HKSAR v Zhang* (unreported decision of the Magistrates Court, 15 June 2012):

<sup>171</sup> Schoppe and Shepherd, 'The Palawan Forest Turtle under Threat from International Trade'.

<sup>172</sup> *HKSAR v Sameh and Abdelaziz* (unreported decision of the Tsuen Wan Magistrates Court, 15 March 2014).

<sup>173</sup> Kadoorie Farm and Botanic Garden, 'Live Animals in Illegal Trade: A Review of Selected Holding and Repatriation Costs and Enforcement Outcomes for Local Confiscations'.

<sup>174</sup> Unreported decision of the Tsuen Wan Magistrates Court, 17 March 2014.

<sup>175</sup> Morgan and Chng, 'Rising Internet-Based Trade in the Critically Endangered Ploughshare Tortoise *Astrochelys yniphora* in Indonesia Highlights Need for Improved Enforcement of CITES'.

<sup>176</sup> Above n 140.

<sup>177</sup> *HKSAR v Lau Sai-yuan*, unreported decision of the Eastern Magistrates Court, 9 January 2018.

The amendments to Cap 586, which took effect on 1 May 2018, increased the maximum penalty for the unauthorised import, export, re-export and possession of Appendix I listed species to 10 years' imprisonment and a fine of \$10,000,000. The maximum penalty for offences involving Appendix II and III listed species was raised to 7 years' imprisonment and a fine of \$1,000,000. Import, export and possession offences against the Ordinance are also now dual offences, allowing them to be tried on indictment. Since 2018, the majority of serious wildlife crime offences have been prosecuted in the District Court.

Since the 2018 amendment, eight rhino horn cases have been prosecuted in the District Court. In each case the defendant smuggled between 1.32 and 20.41 kilogrammes of horn into Hong Kong secreted inside baggage or hidden on their persons. The District Court judges have adopted starting points of between 12 and 39 months' imprisonment. After reduction for guilty pleas and personal mitigation, each of the defendants was imprisoned for between 8 and 26 months.

Whilst these sentences are substantially higher than the 2-month starting point used in *HKSAR v Cheung Mo Tak*, they remain lower than the sentences imposed in two other key jurisdictions for targeted wildlife trafficking enforcement: the USA and China.

On 28 March 2018, Edward Levine was sentenced after jury trial in the US District Court of Nevada to 27 months' imprisonment for selling 2 black rhino horns (weighing 4.5kg) for US\$55,000 to an undercover officer. The sentence was confirmed on appeal to the United States Court of Appeal for the Ninth Circuit.<sup>178</sup> On 14 February 2018, Guan Zong Chen, a Chinese national, plead guilty in the District Court of Massachusetts and was sentenced to 19 months' imprisonment for leading a conspiracy to export products made from rhino, ivory and coral from the USA to China.<sup>179</sup> The products were estimated to be worth US\$700,000. He was ordered to forfeit the products and pay their value in substituted assets. Guan had prior convictions in China for trafficking products to the USA to stock his shop. Unable to leave China, because of his conviction he used contacts in the USA to purchase products for him from US auctions over a two-year period and post them to Hong Kong, where they were picked up and transported to the Mainland. On 14 January 2017, Irish National Michael Hegarty was sentenced to 18 months'

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<sup>178</sup> No. 18-10110 (9th Cir. 2018).

<sup>179</sup> No. 1:15-CR:103 48 (D. Mass.)

imprisonment by the Federal Court of Miami after pleading guilty to smuggling one rhino horn libation cup from the USA to the UK.<sup>180</sup> Hegarty was part of a transnational gang which had conspired to purchase the cup at an auction in the USA then smuggled it to the UK for purchase by a Hong Kong national. Hegarty was arrested in Belgium via an Interpol Red Notice and extradited to the USA.

Sentences for smuggling rhino horn into China are also significantly higher than those imposed in Hong Kong. In 2016, a 59-year-old man was sentenced by the Shanghai Intermediate People's Court to five year's imprisonment and fined 20,000 RMB for smuggling 6kg of rhino horn on a flight from Hong Kong to Shanghai. The same year, four defendants were sentenced for trafficking 9kg of rhino horn which they had purchased in South Africa. One of the defendants (a 60-year-old female) flew with the horn to Hong Kong and then on to Beijing. The flight to Beijing was chosen as the defendant had paid a ground staff member to collect her checked baggage for her. The woman was sentenced to 11 years' imprisonment. The ground staff and the purchasers were each sentenced to six years' imprisonment by the Beijing Intermediate People's Court. Also in 2016, a 43 year old man was sentenced to 12 years' imprisonment for smuggling 15kg of rhino horn from Malawi, through Hong Kong to China. In mitigation he stated he had been told the rhino horn courier business would earn him 10,000 to 20,000RMB per kilo smuggled and needed to make money. In 2017, a 29-year-old man was sentenced by the Xi'an Intermediate People's Court to 6 years' imprisonment for assisting in the smuggling of 25 kg of rhino horn from South Africa to Xi'an via Hong Kong. The defendant had flown to South Africa and agreed with two Chinese nationals living there to bring horn to China. They bought the horn and the two men flew with it to Hong Kong where the Defendant collected it and flew to Xi'an. A customs officer in Xi'an had been bribed to let it pass through customs. Their suspicious behaviour alerted other officers and the horn was discovered. The two persons who had brought the horn to Hong Kong escaped detection.

In Hong Kong, most illegal smuggling does not involve large mammals. Rare turtles and tortoises, of high value to collectors, are targeted by poachers for their high profit potential and small size, which makes them easy to secrete in luggage. Four cases involving turtle smugglers have been heard in the District Court since the amendment to the law in 2018. Each case involved large

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<sup>180</sup> No. 14-CR-20347 (S.D. Fla.)

numbers of animals, with a value of between HK\$35,000 and 2.5 million on the black market. The starting points imposed ranged from 12 to 36 months' imprisonment.

While these sentences are again significantly longer than those laid down in the magistracies pre-amendment in 2018 they have been, for the most part, still lower than the sentences imposed for comparable offences involving Hong Kong smugglers prosecuted in the USA. On 12 April 2016, a Canadian national Kai Xu, was sentenced to 57 months' imprisonment and ordered to pay \$17,000 in restitution by the District Court of Michigan for smuggling endangered turtles (including the Carolina Box turtle which is sought by collectors in Hong Kong).<sup>181</sup> Xu was a full-time smuggler with 20 aliases, which he used to buy and sell turtles online. He smuggled the animals in air packages, suit cases and strapped to the bodies of his couriers. On the day of his arrest he had packed more than 1000 turtles in a suitcase, sent with a runner to fly from USA to China, where the profit for the illegal sale of endangered turtles is three times what can be made in the USA.

In 2018, four men were sentenced for smuggling endangered turtles between the USA and Hong Kong by post in socks or candy boxes, labelled as snacks. The animals were valued at over US\$400,000 and included Big headed tortoises from Hong Kong, a species which is under severe threat from poachers in local country parks. Hong Kong animals were poached and sent to collectors in the USA while US turtles were smuggled into Hong Kong for local collectors. The ringleader Steven Baker was sentenced to 3 years' imprisonment by the District Court of Southern Carolina.<sup>182</sup>

### **Relating penalties to market and conservation value**

A 2018 publication by the United Nations Office on Drugs and Crime recommended that when sentencing wildlife crimes, judges should not only take into account the value of the specimens involved in the offence and the benefits (financial and material) to the offender but also the damage caused by the crime to the species and to the ecosystem from which it was taken, including the

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<sup>181</sup> No 5: 14-CR-20804 (E.D. Michigan).

<sup>182</sup> No 5: 18-CR:00205 (D. S. C.).

costs of rehabilitating specimens (where they have been live traded).<sup>183</sup> The Hong Kong University in conjunction with the Kadoorie Farm and Botanical Garden, has been running a Species Victim Impact Project providing up to date scientific data on the impact of wildlife crime to criminal justice authorities since 2017. This project provides briefing statements for over 100 of Hong Kong's most commonly smuggled endangered species to government departments for use in prosecutions.

Some European countries determine the level of fine for endangered species trade in accordance with severity of impact on the species assessed by experts to assist the sentence. In Italy, for example, a combination of the market value of the species and the threat to its conservation is used to determine the level of fine applied to wildlife offenders.<sup>184</sup> The maximum sentence for Appendix 1 species is determined at six times its value.<sup>185</sup> In Finland, the Nature Conservation Act provides that compensation levels for environmental harms caused by wildlife crimes should be calculated in accordance with the monetary value of the species, as determined by the Ministry of the Environment.<sup>186</sup>

US legislation provides for wider sentencing powers than Hong Kong. In particular, both criminal fines and forfeiture orders may be supplemented by orders that allow authorities to recover the costs of enforcement (e.g. storage, care, and maintenance of species seized). From the point of seizure, animals require housing in appropriate holding facilities, usually with access to specialist veterinary care. If the animals are forfeited it may be possible to repatriate them for conservation purposes, but for some animals, repatriation may not be possible, due to harms in trade or the risk in returning them to the wild. The cost in rehabilitating the animals and housing them for the rest of their lives may be significant, both from an economic and human resource perspective.

### **Recommendations:**

- **Hong Kong should train specialist prosecutors in wildlife crime. Endangered species cases should not be briefed out to Fiat Counsel without specialised training.**

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<sup>183</sup> United Nations Office of Drugs and Crime, 'Guide on Drafting Legislation to Combat Wildlife Crime', 35.

<sup>184</sup> Cirelli, 'Enforcement of International Wildlife Trade Controls in Italy'.

<sup>185</sup> Legge 150/1992 at art 2.

<sup>186</sup> Nature Conservation Act 1096/1996 at section 59.

- In sentencing wildlife crimes, judges should not only take into account the value of the specimens involved in the offence and the benefits (financial and material) to the offender but also the damage caused by the crime to the species and to the ecosystem from which it was taken, including the costs of rehabilitating specimens (where they have been live traded). This can be assessed from the Species Victim Impact Statements provided by HKU to AFCD and DoJ.
- Fines imposed should reflect the costs of rehabilitating specimens (where they have been live traded).
- Amendments which would allow orders to be made permitting the recovery of the costs of care and maintenance of species seized should be legislated.

## **PART SIX: NEED FOR GREATER OVERSIGHT**

### **Specialist advice to the Endangered Species Advisory Committee (ESAC)**

The ESAC is responsible for providing advice on matters related to Cap 586 to the AFCD, but currently no members have the training to provide legal advice. There are also no members to advise on animal welfare or issues of veterinary public health.

#### **Recommendations:**

- The composition of ESAC should include a lawyer with a background in wildlife trade, such that he/she may provide legal advice to the AFCD.
- ESAC should also include members with backgrounds in animal welfare and veterinary science to advise on animal welfare and public health implications on the extraction, slaughter, keeping and sale of endangered species that are traded or that are considered for trade in Hong Kong.

### **Reporting**

Fractured reporting systems hamper efforts for any meaningful analysis of the legal endangered species trade. Gaps in the data collected by the Government and a heavy reliance on self-reporting

from traders mean there is currently no consolidated government data that lays out import, export and possession volumes of endangered species in Hong Kong.

Though an Inter-departmental Task Force has been set up, chaired by the AFCD, with representatives from the HKPF and the CED, it is hard to determine what progress in terms of inter-department consolidation has occurred on the ground. At a minimum, the Task Force should produce consolidated reports regarding seizures. The AFCD and CED continue to produce separate annual reports, with varying figures.

Given that interviewees all cited mis-declaration as a well-known tactic and a recurring challenge, inclusion of figures regarding mis-declaration offences and other license breaches would also be helpful.

The Task Force does not lay out any measures, targets or goals to achieve. This lack of qualitative performance indicators makes it difficult for any meaningful evaluation of its work, an observation that has been made by both the Auditor General, as well as interviewees in this study.

#### **Recommendations:**

- **The Interdepartmental Task Force should produce consolidated reports regarding the trade in endangered species. It should also consider a long-term strategy with meaningful performance indicators. The UK National Police Chief's Council's 'Wildlife Crime Policing Strategy 2018-2021' provides a pertinent example.**
- **The Interdepartmental Task Force should be expanded to develop an arm that collaborates daily, on an operational basis.**

#### **Consolidated oversight of trade**

Interviewees observed that as the trade spans multiple licensing regulators, whose remits are primarily non-CITES related (e.g. public health, animal welfare or food safety) there is very little collaboration within the government, or even within government departments to enhance education efforts across the supply chain.

One major loophole noted arises from endangered species representing only one part of the licensed trade of other products. License conditions seldom require traders to report sales generally and thus sale data for endangered species in Hong Kong is often absent.

The AFCD indicated that traders voluntarily report the import and export of non- CITES listed endangered species, suggesting that traders are not averse to providing additional information. Requiring sales to be reported would improve the government's understanding of the trade and enable the AFCD to better respond to public complaints.

### **Recommendation:**

- **Increase consolidation of government oversight across supply chains and impose a requirement that sales are reported as a trading license condition.**

### **Education**

Interviewees also observed that the Government does too little in terms of public education regarding CITES and its role in the trade of endangered species. The primary means of raising public awareness regarding endangered species has been press releases, print materials, talks and visits to the Endangered Species Centre in Cheung Sha Wan. Interviewees highlighted the need for greater attention to be paid to Hong Kong's demand for, and consumption of, endangered species. To facilitate this, interviewees suggested the government require retail and wholesale outlets to label each species identity and origin on products. Interviewees called for a consolidated effort by the government to address consumption issues in addition to the current preference for highlighting smuggling and seizures.<sup>187,188, 189</sup>

### **Recommendations:**

- **Targeted educational efforts need to address the trades in which endangered species exist and should not just focus on CITES legislation.**

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<sup>187</sup> Agriculture, Fisheries and Conservation Department Endangered Species Protection, 'Publicity Materials'.

<sup>188</sup> Agriculture, Fisheries and Conservation Department, 'Traveller Jailed for Smuggling Ryukyu Black-Breasted Leaf Turtles'.

<sup>189</sup> Agriculture, Fisheries and Conservation Department, 'Public Reminded Not to Bring in Endangered Species without Required Licence'.

- **The government should require retail and wholesale outlets to label species identity and origin on products to help consumers make more informed decisions.**

## Appendix 1

### Interviewees and affiliations

#### Academics and researchers

Michael Lau	Ecologist
Shaw Pang Chui	CUHK
Sung Yik-Hei	Lingnan University
Yvonne Sadovy	HKU

#### Government

Boris Kwan Timothy Lam	AFCD Endangered Species Protection Division
Written response	Customs and Excise Department

#### NGOs

Alex Hofford	WildAid
Allen To Tracy Tsang	World Wildlife Fund Hong Kong
Anthony Young	Hong Kong Reptile and Amphibian Society
Gary Ades	Kadoorie Farm and Botanic Garden
Stan Shea	Bloom Association

#### Trade

Lee Choi Wah	Hong Kong Chamber of Seafood Merchants Limited
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## Appendix 2

Hong Kong's role in rhino horn smuggling prosecutions reported in Mainland China from 2014 to 2018

Year of case	From	To	Quantity (kg)
2014	Nigeria	Guangzhou	0.420
2014	Egypt	Beijing	0.480
2014	Mozambique	Beijing	6.200
2014	South Africa	Beijing	6.400
2014	Hong Kong	Fuzhou	9.320
2015	Nigeria	Beijing	4.445
2015	Eswatini (through Hong Kong)	Shanghai	8.266
2015	Angola	Beijing	0.075
2016	Hong Kong	Shanghai	6.275
2016	Malawi (through Hong Kong)	Fuzhou	15.180
2016	South Africa (through Hong Kong)	Kunming	9.724
2016	Vietnam	Guangxi	1.350
2016	Vietnam	Hekou	0.432
2016	South Africa (through Hong Kong)	Beijing	9.055
2017	South Africa (through Hong Kong)	Xian	25.750
2017	Russia	Giyamusi	70.750
2018	Qatar (through Hong Kong)	Guangzhou	1.720
2018	Hong Kong	Shenzhen	2.000
2018	Vietnam	Xishuangbanna	5 (items)

### Appendix 3

Hong Kong's role in tiger bone smuggling prosecutions reported in Mainland China from 2014 to 2018

Year of case	From	To	Quantity (kg)
2014	Indonesia (through Hong Kong)	Jinan	unspecified
2015	Bangladesh	Kunming	0.750
2016	South Africa (through Hong Kong)	Kunming	7.763
2016	Laos	Xishuangbanna	16.390
2017	Hong Kong	Shenzhen	1.000

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