

NWC | NATIONAL WHISTLEBLOWER CENTER

May 24, 2018

Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
CANBERRA ACT 2600

RE: Submission for the Parliamentary inquiry into the trade in elephant ivory and rhino horn

Dear Committee:

The National Whistleblower Center (NWC) is a non-partisan, nonprofit organization based in Washington, D.C. that has worked for over thirty years to promote whistleblower rights and protections through a variety of avenues, including litigation, legislative advocacy, public education, and grassroots support. Whistleblowers are a powerful mechanism for good governance, citizen engagement, and an active civil society.¹

The National Whistleblower Center strongly encourages the Australian government to enact laws and policies that will activate whistleblower rewards to incentivize the detection, reporting, and prosecution of illegal elephant ivory and rhino horn trafficking.

The decision to undertake this parliamentary inquiry is highly commendable.² This letter will focus on: A) the effectiveness of domestic legislation and compliance frameworks to restrict trade in elephant ivory and rhinoceros horn products, with particular regard to the role of the Australian Federal Police and the Australian Border Force; B) engagement by Australian law enforcement agencies with regional and international counterparts to address the illegal trade in elephant ivory and rhinoceros horn; and C) the nature and effectiveness of measures, models, and

¹ In 2016, NWC was selected as a Grand Prize winner and the People's Choice Award winner for its Global Wildlife Whistleblower Program in the Wildlife Crime Tech Challenge, sponsored by USAID in partnership with the Smithsonian Institution, National Geographic, and TRAFFIC.

² As a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as well as one of 193-member states of the United Nations to adopt the Sustainable Development Goals (SDGs), NWC is encouraged to see Australia taking appropriate steps to ensure that it is fully implementing CITES and SDGs 15 and 16, and taking a leadership position for other nations on this issue.

legislation adopted in other jurisdictions to address the trade in elephant ivory and rhinoceros horn. This letter aims to present a possible solution, or at least a powerful tool in the legislative and law enforcement toolbox, to combat this ongoing calamity.

I. Whistleblower rewards incentivize high-quality tips and are a crucial piece of the law enforcement arsenal

Evidence demonstrates that effective law enforcement, community empowerment, and protection of resources are all furthered by an environment in which those with information are incentivized to become whistleblowers. Successful prosecution of cases initiated by these whistleblowers will then establish a cycle of accountability through: (1) encouragement of whistleblowing; (2) detection and reporting by whistleblowers; (3) prosecution based on whistleblower disclosures; (4) sanctions that sponsor the continued detection of crime and deter future crime; and (5) use of the collected proceeds to benefit the public through restitution and rewards. Assets from the wrongdoer sponsor law enforcement and rewards for whistleblowers, and no general revenues are needed once the cycle is set in motion. This can create a system that encourages those that proactively follow the law and curbs illegal activity by altering behavior - but government support is needed for such a system to even be possible.

Studies have shown that “[a] strong monetary incentive to blow the whistle does motivate people with information to come forward ... without the negative side effects often attributed to them.”³ Moreover, a 2017 study by WWF and TRAFFIC on ivory consumers in Mainland China demonstrated that “messages related to severe penalties for wildlife crime and great personal loss most affected their intent to purchase ivory.”⁴ Prioritization by investigators at the relevant government agency allows for the government to choose which cases to pursue, while prosecutorial discretion allows the government to decline to intervene in a case, if needed. In other areas of criminal misconduct, the investigative tools of the government are regularly used to ensure that information is accurate; whistleblower provisions are no different. Whistleblower provisions are a source of information for both law enforcement (prosecutions) and civil society (accountability to the public).

This approach accounts for the facts on the ground. Statements from elected leaders, law enforcement officials who work directly with whistleblowers on the ground, and appointed

³ ALEXANDER DYCK ET AL., WHO BLOWS THE WHISTLE ON CORPORATE FRAUD? UNIV. OF CHI. (2006), <http://faculty.chicagobooth.edu/luigi.zingales/papers/research/whistle.pdf>.

⁴ The study was conducted by GlobeScan and released in December 2017. See FACT SHEET: DEMAND UNDER THE BAN – CHINA IVORY CONSUMPTION RESEARCH, WORLD WILDLIFE FUND & TRAFFIC (Dec. 2017), https://c402277.ssl.cf1.rackcdn.com/publications/1134/files/original/NEW_Fact_Sheet_Reducing_Demand_for_Ivory_in_China12.11.17_%28003%29.pdf?1513103483. Note that the strength of the messages tested differ across consumer segments and subgroups.

leadership in the agencies that have implemented whistleblower programs demonstrate the high regard for whistleblowers held by those who rely on whistleblower tips for their jobs.⁵ Statistics on the use of whistleblower tips by the relevant agencies verify their effectiveness; in fact, whistleblower tips are by far the highest detection method for law enforcement in every single region in the world.⁶

Whistleblower tips are so effective that such programs are massive revenue producers for U.S. government agencies. In FY 2017, the U.S. government recovered over \$3.7 billion through its civil fraud program.⁷ Of this amount, whistleblowers were directly responsible for the detection and reporting of over \$3.4 billion (92%).⁸ As a result of this assistance, whistleblowers were awarded \$392 million (11.5%).

Further, the U.S. Government Accountability Office, an independent agency, recently concluded an audit of U.S. wildlife whistleblower programs, noting the effectiveness of financial rewards as a law enforcement tool.⁹

Implementation with wide dissemination of whistleblower reward programs has been shown to dramatically increase¹⁰ the number of high-quality confidential reports that are essential to detecting wildlife crimes and enforcing the laws prohibiting illegal trafficking worldwide, which will help combat the current extinction crisis.

II. Whistleblower reward programs are particularly well-suited in the fight against elephant ivory and rhino horn trafficking

⁵ See, e.g., PRESS RELEASE: JUSTICE DEPARTMENT RECOVERS OVER \$3.7 BILLION FROM FALSE CLAIMS ACT CASES IN FISCAL YEAR 2017, REMARKS OF ACTING ASSISTANT GENERAL CHAD A. READLER, U.S. DEP'T OF JUST. (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017> (“Because those who defraud the government often hide their misconduct from public view, whistleblowers are often essential to uncovering the truth.”).

⁶ *Detection*, ASSOC. OF CERTIFIED FRAUD EXAM'RS (2016), <https://www.acfe.com/rtn2016/detection.aspx>.

⁷ *Fraud Statistics – Overview*, CIVIL DIVISION, U.S. DEP'T OF JUST. (2017), <https://www.justice.gov/opa/press-release/file/1020126/download>;

⁸ Note that these recoveries occur under qui tam provisions, which allow for private citizen – the whistleblower – to bring the case for the government as well as themselves.

⁹ See COMBATING WILDLIFE TRAFFICKING: OPPORTUNITIES EXIST TO IMPROVE THE USE OF FINANCIAL REWARDS, GAO -18-279, GOV'T ACCOUNTABILITY OFF. (May 8, 2018), <https://www.gao.gov/products/GAO-18-279>.

¹⁰ CHART: SANCTIONS RECOVERED BY THE U.S. GOVERNMENT FROM WHISTLEBLOWER DISCLOSURES UNDER THE FALSE CLAIMS ACT (FY 1987 – FY 2017), <https://www.whistleblowers.org/storage/fca%201987-2017.jpg>

Wildlife trafficking is often either part of a network engaged in criminal trafficking, or another avenue for such illegal activity. Its purpose is illicit profit, and its tools more often than not corruption; those who engage in wildlife trafficking and further the extinction crisis do not care about the survival of a species or the sustainability of our planet, but their own benefit. Elephants, rhinoceroses, and other species are simply collateral damage.

Elephant ivory and rhinoceros horn is often difficult for law enforcement, already stretched thin, to detect, especially as significant portions of the criminal activity can occur in countries with little law enforcement capacity. Moreover, information is often in the hands of those involved in the illegal activity and is necessarily hidden from view. For example, fishing and transport ships that are out at sea for weeks or months at a time, or items crossing national borders that sees thousands or even millions imports a day, are both classic examples of the difficulties of law enforcement in the era of globalization. Finally, combatting wildlife trafficking requires international cooperation and a view that looks beyond borders.

In enacting new policies to halt the extinction crisis caused by the trade of elephant ivory and rhino horn, Australia should consider policies with a proven track record. U.S. laws that have proved particularly effective include the Foreign Corrupt Practices Act,¹¹ which is used to prosecute individuals and corporations for bribes paid in a foreign country by foreign nationals to foreign government officials, and the False Claims Act,¹² which is used to impose liabilities on individuals or companies who commit customs violations or make false statements on documents to the government (including undervaluation and misclassification of goods for import at U.S. borders). These laws use paperwork to catch wildlife trafficking. Additionally, U.S. conservation and anti-wildlife trafficking laws such as the Endangered Species Act, the Act to Prevent Pollution from Ships, the Fish and Wildlife Improvement Act, and the Lacey Act, include whistleblower provisions.

In the examples given above, whistleblower provisions have proven critical to assisting law enforcement: the Act to Prevent Pollution on Ships (APPS), which codified the MARPOL Convention in U.S. domestic law, has made the U.S. the number one enforcer of MARPOL,¹³ and the False Claims Act has successfully detected fraud against the government since enacted

¹¹ See *Foreign Corrupt Practices Act*, NAT'L WHISTLEBLOWER CNTR., <https://www.whistleblowers.org/wildlife-crime/foreign-bribery>.

¹² See *The False Claims Act is America's Most Important Whistleblower Law*, NAT'L WHISTLEBLOWER CNTR., <https://www.whistleblowers.org/take-action/save-americas-most-important-whistleblower-law>.

¹³ See Yelena Wang, *Whistleblower Detection Credited in 76% of the Last 100 APPS Cases*, NAT'L WHISTLEBLOWER LEGAL DEF. & EDUC. FUND (May 11, 2018), <https://www.whistleblowersblog.org/2018/05/articles/environmental-whistleblowers/whistleblower-detection-credited-in-76-of-last-100-apps-cases/>.

by President Abraham Lincoln in 1863. Such laws are powerful because they encompass the actions involved in the trafficking process.

Congress recognizes the effectiveness of whistleblower rewards as well: in May 2018, the Wildlife Conservation and Anti-Trafficking Act (H.R. 5697) was introduced by leading members of the House Natural Resources Committee. This legislation strengthens wildlife crime detection by mandating whistleblower rewards, enhances enforcement mechanisms, and increases wildlife conservation funding by requiring that monies recovered through successful prosecution are put directly into conservation efforts.

Explicit authority for government enforcement and clear protocols that ensure proper implementation are critical to the success of these whistleblower laws. Recent cases in which wildlife traffickers received minimal penalties may inadvertently demonstrate to other traffickers that elephant and rhino species survival is not a priority for the Australian government; as such, strong enforcement and enhancement of laws is key.

A strong whistleblower program has the ability to revolutionize the detection of wildlife crime, radically increase the effectiveness of law enforcement, and potentially assist in reversing the extinction crisis.

More information on the applicability of whistleblower laws in the fight against wildlife crime can be found in NWC Executive Director Stephen M. Kohn's award-winning article in the *Environmental Law Reporter*, which focused on wildlife whistleblowers.¹⁴

III. Conclusion

The National Whistleblower Center welcomes additional communication with the Committee or others interested in enhancing whistleblower protections as a tool to halt elephant ivory and rhinoceros horn trafficking and the accompanying destruction of other species and habitat, and is willing to provide additional information upon request.

Sincerely,

Stephen M. Kohn, Esq.
Executive Director

By: Maya Efrati
Legal Fellow

¹⁴ STEPHEN M. KOHN, *MONETARY REWARDS FOR WILDLIFE WHISTLEBLOWERS: A GAME-CHANGER IN WILDLIFE TRAFFICKING DETECTION AND DETERRENCE*, 46 ELR 10054 (Jan. 2016), https://www.whistleblowers.org/storage/Wildlife_Whistleblowers_Article.pdf.