

Threatened Species Legislation Amendment Act 2004

Long Title

An Act to amend the *Threatened Species Conservation Act 1995* and other threatened species legislation to make provision for critically endangered species and ecological communities and to make further provision for conservation of threatened species, threatened species recovery and threat abatement processes and integration with natural resource management and land use planning; and for other purposes.

1 Name of Act

This Act is the *Threatened Species Legislation Amendment Act 2004*.

2 Commencement

(1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).

(2) Schedule 3.1 [1], [8] and [10]-[17] and 3.2 commence on the date of assent.

3 Amendments

The Acts and Regulation specified in the Schedules to this Act are amended as set out in those Schedules.

Schedule 1 Amendment of Threatened Species Conservation Act 1995 No 101

(Section 3)

[1] Section 4 Definitions

Omit the definition of "**Advisory Council**" from section 4 (1).

[2] Section 4 (1)

Omit the definition of "**Director-General**". Insert instead:

"Department" means the Department of Environment and Conservation. **"Director-General"** means the Director-General of the Department.

[3] Section 4 (1)

Insert in alphabetical order:

"BDAC" means the Biological Diversity Advisory Council established under Part 9A. **"catchment action plan"** or **"CAP"** means a catchment action plan approved under Part 4 of the *Catchment Management Authorities Act 2003*. **"critically endangered ecological community"** means an ecological community specified in Part 2 of Schedule 1A. **"critically endangered species"** means a species specified in Part 1 of Schedule 1A. **"critically endangered species and ecological communities"** means species and ecological communities specified in Schedule 1A and **"critically endangered species or ecological community"** means a species or ecological community respectively specified in that Schedule. **"environmental planning instrument"** or **"EPI"** means an environmental planning instrument under the *Environmental Planning and Assessment Act 1979*. **"NPW Act"** means the *National Parks and Wildlife Act 1974*. **"NRC"** means the

Natural Resources Commission established under the *Natural Resources Commission Act 2003*. "**Priorities Action Statement**" means a Threatened Species Priorities Action Statement under Part 5A. "**SEAC**" means the Social and Economic Advisory Council established under Part 9A. "**vulnerable ecological community**" means an ecological community specified in Part 2 of Schedule 2.

[4] Section 4 (1), definition of "list"

Insert ", 1A" after "Schedule 1".

[5] Section 4 (1), definition of "threatened ecological community"

Insert ", Part 2 of Schedule 1A" after "Schedule 1".

[6] Section 4 (1), definition of "threatened species"

Omit the definition. Insert instead:

"**threatened species**" means a species specified in Part 1 or 4 of Schedule 1, Part 1 of Schedule 1A or Part 1 of Schedule 2.

[7] Section 4 (1), definition of "threatened species, populations and ecological communities"

Insert ", 1A" after "Schedules 1".

[8] Section 4 (1), definition of "threatened species, population or ecological community"

Omit "either of those Schedules". Insert instead "any of those Schedules".

[9] Part 2, Introductory note

Insert after the first dot point relating to Schedule 1:

â€¢ in Schedule 1A, of critically endangered species and ecological communities, and

[10] Part 2, Introductory note

Insert "and vulnerable ecological communities" after "in Schedule 2, of vulnerable species".

[11] Part 2, Introductory note

Omit "lists of endangered populations and endangered ecological communities and threatening processes".

Insert instead "lists of critically endangered species, endangered populations, endangered and critically endangered ecological communities and threatening processes".

[12] Part 2, Introductory note

Omit "Division 4 describes the process by which species that are endangered may be listed provisionally in Schedule 1".

Insert instead "Division 4 describes the process by which species that are endangered or critically endangered may be listed provisionally in Schedule 1 or 1A".

[13] Section 6 Lists of endangered and critically endangered species, populations and ecological communities

Insert after section 6 (4):

(4A) Part 1 of Schedule 1A contains a list of critically endangered species for the purposes of this Act.

(4B) Part 2 of Schedule 1A contains a list of critically endangered ecological communities for the purposes of this Act.

[14] Section 6 (5) and (6)

Insert "or critically endangered" after "endangered" wherever occurring.

[15] Section 7

Omit the section. Insert instead:

7 Schedule 2 list of vulnerable species and ecological communities

- (1) Part 1 of Schedule 2 contains a list of vulnerable species for the purposes of this Act.
- (2) Part 2 of Schedule 2 contains a list of vulnerable ecological communities for the purposes of this Act.
- (3) Any vulnerable species that is a listed threatened species under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth is marked with an asterisk to show that it is considered to be a threatened species nationally.
- (4) Any vulnerable ecological community that is a listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth is marked with an asterisk to show that it is considered to be a threatened ecological community nationally.

[16] Section 9 Listing of nationally threatened species and ecological communities

Insert ", 1A" after "Schedule 1" wherever occurring.

[17] Part 2 Listing of threatened species, populations and ecological communities and key threatening processes

Omit Division 2 of Part 2. Insert instead:

Division 2 – Eligibility for listing

10 Listing of species

- (1) A species is eligible to be listed as a "**species presumed extinct**" at a particular time if, in the opinion of the Scientific Committee, it has not been recorded in its known or expected habitat in New South Wales, despite targeted surveys, over a time frame appropriate, in the opinion of the Scientific Committee, to its life cycle and form.
- (2) A species is eligible to be listed as a "**critically endangered species**" if, in the opinion of the Scientific Committee, it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.
- (3) A species is eligible to be listed as an "**endangered species**" if, in the opinion of the Scientific Committee:
 - (a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and
 - (b) it is not eligible to be listed as a critically endangered species.
- (4) A species is eligible to be listed as a "**vulnerable species**" if, in the opinion of the Scientific Committee:
 - (a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and
 - (b) it is not eligible to be listed as an endangered or critically endangered species.

11 Listing of populations

- (1) A population is eligible to be listed as an "**endangered population**" if, in the opinion of the Scientific Committee, it is facing a very high risk of extinction in

New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations.

(2) A population is not eligible to be listed as an endangered population if it is a population of a species already listed in Schedule 1 or 1A.

12 Listing of ecological communities

(1) An ecological community is eligible to be listed as a "**critically endangered ecological community**" if, in the opinion of the Scientific Committee, it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.

(2) An ecological community is eligible to be listed as an "**endangered ecological community**" if, in the opinion of the Scientific Committee:

(a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as a critically endangered ecological community.

(3) An ecological community is eligible to be listed as a "**vulnerable ecological community**" if, in the opinion of the Scientific Committee:

(a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as an endangered or critically endangered ecological community.

13 Threatening processes eligible for listing as key threatening processes

(1) A threatening process is eligible to be listed as a "**key threatening process**" if, in the opinion of the Scientific Committee:

(a) it adversely affects threatened species, populations or ecological communities, or

(b) it could cause species, populations or ecological communities that are not threatened to become threatened.

(2) The regulations may prescribe criteria for the determination of matters under this section.

14 Regulations prescribing criteria under this Part A regulation that prescribes criteria for the purposes of section 10, 11, 12 or 13 is not to be made unless the Minister certifies in writing that:

(a) the criteria are based on scientific principles only, and

(b) any criteria for listing under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth were given due consideration before the regulation was made.

[18] Section 16 Operation of Division

Insert ", 1A" after "Schedule 1" in section 16 (1).

[19] Section 16 (2)

Insert "or critically endangered" after "endangered".

[20] Section 16 (3)

Insert after section 16 (2):

(3) A proposal that involves the alteration of the listing status of a species or ecological community (by moving the description of the species or ecological community from one Schedule to another or from one Part of a Schedule to another Part of the Schedule) may be dealt with under this Division as a composite proposal, whereby all aspects of the proposal

are dealt with together.

[21] Section 17 Scientific Committee responsible for lists

Insert ", 1A" after "Schedule 1" in section 17 (1).

[22] Section 17 (2)

Omit the subsection.

[23] Section 18 Who may initiate action for listing

Insert "or the NRC" after "Minister" in section 18 (2).

[24] Section 19 Making nomination for inclusion on, omission from or amendment of list

Insert ", 1A" after "Schedule 1" in section 19 (1) and (2) wherever occurring.

[25] Section 19 (6)

Insert after section 19 (5):

(6) The Scientific Committee is to give notice of a nomination to the Minister and the NRC within 14 days after the nomination is tabled at a meeting of the Committee.

[26] Section 21 Consideration of nomination by Scientific Committee

Omit section 21 (1). Insert instead:

(1) The Scientific Committee is to determine priorities for its consideration of nominations every 12 months and in determining those priorities is to have regard to:

- (a) the degree of threat, immediacy of threat, taxonomic distinctiveness and such other matters as the Scientific Committee considers relevant, and
- (b) any advice or recommendations of the Minister or the NRC concerning those priorities.

(1A) The NRC and the Minister may give advice or make recommendations to the Scientific Committee concerning priorities for the consideration of nominations by the Scientific Committee, and in giving that advice or making those recommendations the NRC and the Minister may consider State-wide issues of concern in biodiversity conservation.

[27] Section 21 (4)

Insert ", the NRC" after "Minister".

[28] Section 21 (5)

Insert ", 1A" after "Schedule 1".

[29] Section 22 Scientific Committee's preliminary determination

Insert after section 22 (6):

(7) The reasons for a preliminary determination are to include reference to such of the criteria prescribed by the regulations under sections 10-13 as may be relevant to the determination.

[30] Section 23 Scientific Committee's final determination

Omit "Schedule 1, 2 or 3, and must give reasons for the determination" from section 23 (1).

Insert instead "Schedule 1, 1A, 2 or 3 and must give reasons for its decision".

[31] Section 23 (1A)

Insert after section 23 (1):

(1A) The reasons for a determination are to include reference to such of the criteria prescribed by the regulations under sections 10-13 as may be relevant to the determination.

[32] Section 23 (2)

Insert "final" before "determination" where firstly occurring.

[33] Section 23 (3)-(6)

Insert after section 23 (2):

(3) Before making a final determination the Scientific Committee must give the Minister notice in writing of the proposed final determination and the reasons for it. The Minister then has 2 months to decide whether to refer the proposed final determination back to the Scientific Committee for further consideration under section 23A.

(4) The Scientific Committee is not to proceed to make the proposed final determination unless:

(a) the Minister has notified the Scientific Committee that the Minister has decided not to refer the proposed determination back to the Scientific Committee for further consideration, or

(b) the Minister has not referred the proposed final determination back to the Scientific Committee for further consideration under section 23A within 2 months after the Minister was given notice of the proposed final determination, or

(c) if the Minister has referred the proposed final determination back to the Scientific Committee for further consideration under section 23A within that 2 months, the Scientific Committee has decided to proceed with the final determination following that further consideration.

(5) The Minister may at the request of the Scientific Committee extend and further extend the period of 6 months under subsection (2), to a maximum period of 2 years.

(6) Failure to make a final determination within the period required by this section or to give notice to the Minister of a proposed final determination within the period required by this section does not affect the validity of the determination.

[34] Section 23A

Insert after section 23:

23A Minister's response to proposed final determination

(1) Within 2 months after receiving notice from the Scientific Committee of a proposed final determination, the Minister may:

(a) notify the Scientific Committee that the Minister has decided not to refer the proposed determination back to the Scientific Committee for further consideration, or

(b) refer the proposed final determination back to the Scientific Committee for further consideration.

(2) The Minister may only refer a matter back to the Scientific Committee for reasons of a scientific nature provided to the Scientific Committee. In the case of a nomination, the Scientific Committee is to notify the person who made the nomination that the matter has been referred back to the Scientific Committee and of the Minister's reasons for doing so.

(3) If a proposed final determination is referred back to the Scientific Committee for further consideration:

(a) the Scientific Committee may, after further considering it, decide to proceed with the final determination, to change the final determination or not to proceed with the final determination, and

(b) the Scientific Committee is to make that decision within 3 months, and

(c) the Minister cannot refer the matter back to the Scientific Committee

again after it has made that decision.

(4) Failure to make a decision within the period required by this section does not affect the validity of the decision.

[35] Section 24 Publication of final determination

Insert ", the NRC" after "Minister" in section 24 (1) (b).

[36] Section 24 (2A)

Insert after section 24 (2):

(2A) The reasons for a final determination are to include reference to such of the criteria prescribed by the regulations under sections 10-13 as may be relevant to the determination.

[37] Section 24 (3) (a)

Omit "National Parks and Wildlife Service". Insert instead "Department".

[38] Section 24 (4)

Insert after section 24 (3):

(4) The validity of a final determination cannot be questioned in any legal proceedings except those commenced in a court by any person within 6 months of the date of publication in the Gazette of notice of the making of the final determination.

[39] Section 25 Revision of Schedule on publication of final determination

Insert ", 1A" after "Schedule 1" wherever occurring.

[40] Section 25A

Insert after section 25:

25A Lists to be kept under review

(1) The Scientific Committee must keep the lists in Schedules 1, 1A, 2 and 3 under review and must, at least every 2 years, determine whether any changes to the lists are necessary.

(2) The NRC or the Minister may give advice or make recommendations to the Scientific Committee concerning priorities for the review of the lists in Schedules 1, 1A, 2 and 3 under this section, and the Scientific Committee is to have regard to any such advice or recommendations.

(3) The NRC or the Minister may give directions to the Scientific Committee requiring the Scientific Committee to undertake investigations for the purpose of identifying species, populations and communities that are potentially threatened species, populations and communities.

[41] Part 2, Division 4, heading

Insert " or critically endangered " after " endangered " in the heading to Division 4 of Part 2.

[42] Sections 26-28, 30 and 34

Insert "or 1A" after "Schedule 1" wherever occurring.

[43] Section 26, note, and sections 27 and 28

Insert "or critically endangered" after "endangered" wherever occurring.

[44] Section 36 Termination of provisional listing

Omit "Schedule 1 ceases". Insert instead "Schedule 1 or 1A ceases".

[45] Section 36

Omit "Schedule 1 or 2" wherever occurring.

Insert instead "Schedule 1, 1A or 2".

[46] Section 36A Minor amendments to Schedules

Omit "Schedule 1, 2 or 3" wherever occurring.

Insert instead "Schedule 1, 1A, 2 or 3".

[47] Section 36A (2) (b)

Omit "Part 1 of Schedule 1". Insert instead "Part 1 of Schedule 1 or 1A".

[48] Section 36B Publication of determination

Omit section 36B (1) (b) and (c).

[49] Section 36B (4)

Insert ", 1A" after "Schedule 1".

[50] Sections 36C Revision of Schedule on publication of determination

Insert ", 1A" after "Schedule 1".

[51] Part 3, heading

Omit the heading. Insert instead:

Part 3Â Critical habitat of endangered species, populations and ecological communities
and critically endangered species and ecological communities
Critical habitat of endangered species, populations and ecological communities and
critically endangered species and ecological communities

[52] Part 3, Introductory note

Omit "endangered species, populations and ecological communities (that is, those species, populations and ecological communities listed for the time being in Schedule 1)".

Insert instead "endangered species, populations and ecological communities, or critically endangered species and ecological communities (that is, those species, populations and ecological communities listed for the time being in Schedule 1 or 1A)".

[53] Part 3, Introductory note

Omit "of endangered populations and ecological communities".

[54] Sections 37 (1), 40 (1), 41 (1), 43 (a) and 47 (3)

Insert "or critically endangered species or ecological community" after "endangered species, population or ecological community" wherever occurring.

[55] Section 38 Director-General responsible for identifying critical habitat

Insert "or critically endangered species or ecological community" after "ecological community".

[56] Part 4 Recovery plans for threatened species, populations and ecological communities

Insert ", for critically endangered species and ecological communities," before "and for vulnerable species" in the Introductory note to Part 4.

[57] Section 56 Director-General to prepare recovery plans

Omit "is required to prepare" from section 56 (1).

Insert instead "may prepare".

[58] Section 56 (1)

Insert "and each critically endangered species and ecological community" after "and ecological community" in section 56 (1).

[59] Section 56 (1)

Omit ", as soon as practicable after it is listed in Schedule 1,".

[60] Section 56 (2)

Omit "must". Insert instead "may".

[61] Section 56 (4)

Insert "and may be made for part of a range of a species, population or ecological community" after "community".

[62] Section 56 (5)

Omit the subsection (including the note to the subsection).

[63] Section 58

Omit the section. Insert instead:

58 Priorities for recovery plans Priorities in the preparation of recovery plans are to be in accordance with the priorities for recovery established by the relevant Priorities Action Statement.

[64] Section 74 Director-General may prepare threat abatement plans

Omit section 74 (3) and (4).

[65] Section 76

Omit the section. Insert instead:

76 Priorities for threat abatement plans Priorities in the preparation of threat abatement plans are to be in accordance with the priorities for threat abatement established by the relevant Priorities Action Statement.

[66] Part 5A

Insert after Part 5:

Part 5A – Threatened Species Priorities Action Statement

90A What the Statement provides for A Threatened Species Priorities Action Statement (also called a Priorities Action Statement) is a statement that:

- (a) sets out the strategies ("**recovery and threat abatement strategies**") to be adopted for promoting the recovery of each threatened species, population and ecological community to a position of viability in nature and for managing each key threatening process as provided by section 74 (1), and
- (b) establishes relative priorities for the implementation of recovery and threat abatement strategies, and
- (c) establishes performance indicators to facilitate reporting on achievements in implementing recovery and threat abatement strategies and their effectiveness, and
- (d) contains a status report on each threatened species, where information is available, and
- (e) sets out clear timetables for recovery and threat abatement planning and

achievement.

90B Director-General to prepare and adopt Priorities Action Statement

- (1) The Director-General is to prepare and adopt a Priorities Action Statement for the purposes of this Act.
- (2) The Priorities Action Statement must be completed as soon as practicable and no later than 12 months after the date of assent to the *Threatened Species Legislation Amendment Act 2004*.
- (3) The Director-General is to review the Priorities Action Statement every 3 years and may make changes to the Priorities Action Statement pursuant to any such review by adopting amendments to the Statement.
- (4) In preparing or reviewing a Priorities Action Statement, the Director-General is to seek advice from the NRC, the Scientific Committee, BDAC, SEAC and such other State government agencies as the Director-General considers appropriate.

90C Publication of draft statement or amendments

- (1) Before adopting a Priorities Action Statement or any amendment to the statement, the Director-General must first prepare a draft of the statement or amendment and must then:
 - (a) publish notice of the preparation of the draft statement or amendment in a newspaper circulating generally throughout the State, and
 - (b) publish notice of the preparation of the draft statement or amendment on the website of the Department.
- (2) The notice must:
 - (a) state that the draft statement or amendment has been prepared, and
 - (b) specify the address of the place at which copies of the draft statement or amendment can be inspected, and
 - (c) invite persons to make written submissions to the Director-General about the draft statement or amendment, and
 - (d) specify the address of the place to which submissions about the draft statement or amendment may be forwarded and the date by which submissions must be made (being a date that is not less than 30 days after the date of publication of the notice under subsection (1) (a)).

90D Consideration of submissions by Director-General

- (1) The Director-General must consider all written submissions received by the Director-General on or before the date specified in the notice.
- (2) The Director-General may alter the draft statement or amendment to take account of those submissions.
- (3) The Director-General must adopt the Priorities Action Statement or amendment (with or without alterations) within 4 months after the end of the period allowed for the making of submissions about the draft statement or amendment.

90E Review to include report on achievements As part of each review of the Priorities Action Statement, the Director-General is to include in the Priorities Action Statement a report on achievements in implementing the strategies established by the Priorities Action Statement during the period to which the review applies.

[67] Section 113A

Omit the section. Insert instead:

113A Regulations

- (1) The regulations may provide that development or an activity of a specified type constitutes, or does not constitute, development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats.
- (2) Any such regulations have effect (despite the provisions of this Act or any other Act) for the purposes of the operation of:

- (a) Part 6 (Licensing) of this Act, and
- (b) Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* (including the operation of those Parts as applying under any other Act).
- (3) A regulation that provides that development or an activity of a specified type does not constitute development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats, is not to be made unless the Minister has certified in writing that the development or activity is of minimal environmental impact on threatened species, populations and ecological communities, and their habitats.

[68] Section 114 Director-General may make stop work order

Insert after section 114 (4) (a):

- (a1) clearing of native vegetation as authorised by a property vegetation plan approved under the *Native Vegetation Act 2003*, being clearing that had the benefit of biodiversity certification of the native vegetation reform package under Division 4 of Part 7 when the plan was approved, or

[69] Part 7, Divisions 4 and 5

Insert after Division 3 of Part 7:

Division 4 – Biodiversity certification of native vegetation reform package

126B Native vegetation reform package For the purposes of this Division, the "**native vegetation reform package**" is the package of reforms comprising the following:

- (a) the *Native Vegetation Act 2003* and the regulations under that Act,
- (b) State-wide standards and targets for natural resource management issues recommended under the *Natural Resources Commission Act 2003* and adopted by the Government,
- (c) catchment action plans under the *Catchment Management Authorities Act 2003*,
- (d) protocols and guidelines adopted or made under the regulations under the *Native Vegetation Act 2003*, the *Catchment Management Authorities Act 2003* and the *Natural Resources Commission Act 2003*.

126C Biodiversity certification of native vegetation reform package

- (1) The Minister may by order published in the Gazette confer biodiversity certification on the native vegetation reform package for the purposes of this Act.
- (2) The Minister may confer biodiversity certification even if the native vegetation reform package does not comprise all the elements of the package.
- (3) The Minister may, by order published in the Gazette, suspend biodiversity certification of the native vegetation reform package if the composition of the package changes after its certification (for instance by any amendment of the *Native Vegetation Act 2003* or regulations under that Act, or by the approval or amendment of a State-wide standard or target or of a catchment action plan). The Minister may by order published in the Gazette lift any suspension under this subsection.
- (4) The Minister may, in an order conferring biodiversity certification or in another order published in the Gazette, exclude from the certification of the native vegetation reform package any specified class of activity.
- (5) In deciding on any action under this section, the Minister is to have regard to the likely impact of the native vegetation reform package (or any relevant aspect of its operation) on the achievement of the objects of this Act.

126D Effect of biodiversity certification While biodiversity certification of the native vegetation reform package is in force, any activity on land within the area of operations of each catchment management authority has the benefit of that biodiversity certification (except any activity excluded from certification under section 126C (4)).

126E Suspension of certification in connection with implementation of package

(1) The Minister may by order published in the Gazette suspend biodiversity certification of the native vegetation reform package in its application to a particular catchment management authority if the Minister is of the opinion that the catchment management authority:

- (a) has failed to properly exercise its functions under the native vegetation reform package, or
- (b) has otherwise failed to exercise its functions in a manner that promotes the conservation of threatened species, populations and ecological communities.

(2) During the suspension of biodiversity certification of the native vegetation reform package in its application to a particular catchment management authority, land within the area of operations of the catchment management authority does not have the benefit of the biodiversity certification of the native vegetation reform package.

(3) The Minister is only entitled to form an opinion for the purposes of this section:

- (a) based on the outcomes of any audit undertaken by the NRC, or
- (b) based on the results of an investigation conducted by the Director-General, or
- (c) in such other circumstances as may be prescribed by the regulations.

126F Notification of certification, variation, suspension or revocation

(1) Notice of the grant of biodiversity certification under this Division or of any suspension of that certification under this Division is to be given within 14 days:

- (a) to the Director-General of the Department of Infrastructure, Planning and Natural Resources, and
- (b) on the website of the Department of Environment and Conservation.

(2) The Minister is to keep a register containing copies of each notice of the grant of biodiversity certification under this Division and of any suspension or revocation of that certification.

(3) The register is to be open for public inspection, without charge, during ordinary business hours, and copies of or extracts from the register are to be made available to the public on request, on payment of the fee fixed by the Minister.

Division 5 – Biodiversity certification of environmental planning instruments

126G Biodiversity certification

(1) The Minister may by order published in the Gazette confer biodiversity certification on an EPI if satisfied that the EPI, in addition to any other relevant measures to be taken, will lead to the overall improvement or maintenance of biodiversity values. Biodiversity values include threatened species, populations and ecological communities, and their habitats.

(2) In deciding whether to confer biodiversity certification on an EPI the Minister must also have regard to the following considerations:

- (a) the likely social and economic consequences of implementation of the EPI,
- (b) the most efficient and effective use of available resources for the conservation of threatened species, populations and ecological communities,
- (c) the principles of ecologically sustainable development,
- (d) conservation outcomes resulting from any reservation or proposed reservation of land under Part 4 of the NPW Act or the entering into of a conservation agreement relating to the land under that Act, or resulting from any other action to secure the protection of land for conservation purposes,

(e) conservation outcomes resulting from the operation outside the area of operation of the EPI of strategies, plans, agreements and other instruments (whether or not they are EPIs).

(3) In deciding any matter under this section the Minister is to have regard to the objects of this Act.

(4) An EPI cannot be biodiversity certified unless:

(a) notice is given of proposed biodiversity certification of the EPI in the course of the public exhibition of a draft of the EPI under section 66 of the *Environmental Planning and Assessment Act 1979* or by public exhibition following a procedure that substantially accords with the procedure for public exhibition required by that section, and

(b) copies of submissions made in response to an invitation for submissions in the course of that public exhibition have been provided to the Minister.

(5) The Minister may issue guidelines for the purpose of assisting in the preparation of EPIs for biodiversity certification.

126H Certification can be conditional

(1) Biodiversity certification of an EPI can be subject to conditions, including conditions that limit the certification to specified threatened species, populations and communities or to a specified part of the land to which the EPI applies.

(2) Unless limited by the conditions of certification, biodiversity certification of an EPI applies to the whole of the land to which the EPI applies, and to all threatened species, populations and ecological communities.

126I Effect of biodiversity certification

(1) Any development for which development consent is required under the provisions of a biodiversity certified EPI is, for the purposes of Part 4 of the *Environmental Planning and Assessment Act 1979* taken to be development that is not likely to significantly affect any threatened species, population or ecological community, or its habitat.

(2) An activity to which Part 5 of the *Environmental Planning and Assessment Act 1979* applies that a biodiversity certified EPI provides can be carried out without the need for development consent is, for the purposes of that Part, taken to be an activity that is not likely to significantly affect any threatened species, population or ecological community, or its habitat.

(3) This section applies only to development or an activity on land to which the certification of the EPI applies and only to threatened species, populations or ecological communities (and their habitat) to which the certification applies.

126J Period of certification and extension

(1) Biodiversity certification of an EPI remains in force for such period as the Minister determines and specifies in the certification. If no period is specified, biodiversity certification remains in force for 10 years.

(2) Prior to the expiration of biodiversity certification of an EPI, the Minister may by order published in the Gazette extend by a period of up to 10 years the period for which that certification remains in force, but only if the Minister has reviewed the EPI to take account of any new listing of a species, population or ecological community or the discovery of a species, population or ecological community not previously known in an area.

(3) The Minister must not extend the period of biodiversity certification of an EPI unless, prior to granting the extension, the Minister:

(a) by notice published in a newspaper circulating generally throughout the State, invites persons to make written submissions to the Minister on the proposed extension, and

(b) considers any written submissions received before the closing date

specified in the notice for the making of submissions (being a date that is not less than 30 days after the date the notice is first published under this subsection).

(4) This section does not prevent further biodiversity certification of an EPI under this Division.

126K Reassessment of biodiversity certification

(1) The Minister is to reassess the grant of biodiversity certification in respect of an EPI following any review of the EPI under the *Environmental Planning and Assessment Act 1979*, or any rezoning of land to which the EPI applies, to determine whether biodiversity certification should be maintained or modified.

(2) If a local council undertakes a review of a biodiversity certified EPI that applies to land in its area, the council is to notify the Minister of the commencement of that review, and the outcome of that review, as soon as practicable.

126L Suspension and revocation of certification The Minister may by order published in the Gazette suspend or revoke the certification of an EPI if the Minister is of the opinion that:

(a) the EPI fails (or will, as a result of any proposed amendment of the EPI, fail) to make appropriate provision for the conservation of threatened species, populations and ecological communities, or

(b) the consent authority under the EPI has failed to adequately comply with a direction by the Minister to review the EPI in response to any new listing of a species, population or ecological community or the discovery of a species, population or ecological community not previously known in an area.

126M Notification of certification, suspension or revocation

(1) Notice of the grant of biodiversity certification under this Division or of the extension, suspension or revocation of that certification is to be given within 21 days:

(a) to the Director-General of the Department of Infrastructure, Planning and Natural Resources, and

(b) on the website of the Department of Environment and Conservation, and

(c) to each local council that is the council of an area of which land to which the EPI applies forms part.

(2) The Minister is to keep a register containing copies of each notice of the grant of biodiversity certification under this Division and of any extension, suspension or revocation of that certification.

(3) The register is to be open for public inspection, without charge, during ordinary business hours, and copies of or extracts from the register are to be made available to the public on request, on payment of the fee fixed by the Minister.

126N Concurrence can be conditional on voluntary conservation action

(1) The Director-General may grant concurrence under section 79B or 112C of the *Environmental Planning and Assessment Act 1979* conditional on the taking of specified action ("**voluntary action**", as provided by subsection (2)) that the Director-General considers will significantly benefit threatened species conservation, but only if the Director-General is satisfied that the person who proposes to carry out the development or activity to which the concurrence relates has agreed to take the voluntary action and agrees to the imposition of the condition.

(2) The voluntary action that can be required by a condition imposed under this section is any one or more of the following:

(a) the reservation of land under Part 4 of the NPW Act or the entering into of a conservation agreement relating to the land under that Act,

(b) action to secure the protection of land for conservation purposes by a

method that the Director-General considers satisfactory,

(c) action to restore threatened species habitat on land referred to in paragraph (a) or (b),

(d) the contribution of money for a purpose referred to in paragraph (a)-(c).

(3) In determining whether to confer biodiversity certification on an EPI, the Minister is entitled to have regard to the conservation benefits that will result from the taking of action in accordance with a condition proposed to be imposed under this section (as if those benefits would result from the implementation of the EPI).

(4) When such a condition is imposed as a condition of concurrence in respect of development, the consent authority for the development must also impose the condition on its consent for the development.

(5) The annual report of the Department is to include an assessment of how any voluntary action taken pursuant to a condition imposed under this section has benefited or is likely to benefit the adversely affected threatened species, including details of how any land or money contributed pursuant to such a condition has benefited or is likely to benefit threatened species.

126O Director-General may accredit persons to prepare threatened species assessments and surveys

(1) The Director-General is to institute arrangements for the accreditation of suitably qualified and experienced persons to undertake and prepare surveys and assessments for use in connection with:

(a) biodiversity certification of EPIs under this Division, or

(b) any assessment of the matters referred to in section 5A (Significant effect on threatened species, populations or ecological communities, or their habitats) of the *Environmental Planning and Assessment Act 1979*.

(2) An applicant for accreditation must furnish the Director-General with such information as the Director-General requires to effectively determine the application and the application must be accompanied by the fee fixed by the Director-General for the consideration of the application.

(3) An accreditation is to be for the period (not exceeding 3 years) specified by the Director-General in the instrument of accreditation, and the accreditation (or any renewal of it) may be given subject to the conditions and restrictions (if any) specified in the instrument of accreditation.

(4) Without limiting subsection (3), an accreditation is to include conditions that require surveys and assessments to be undertaken and prepared in accordance with standards approved from time to time by the Director-General by order published in the Gazette.

(5) The Director-General may vary conditions or restrictions (if any) attaching to an accreditation and may suspend or cancel an accreditation.

[70] Section 128 Functions of Scientific Committee

Insert "or critically endangered" after "endangered" in section 128 (2) (c).

[71] Section 128 (2) (g)

Insert "and the NRC" after "Minister" where firstly occurring.

[72] Sections 137-139

Omit the sections.

[73] Part 9A

Insert after Part 9:

Part 9A – Advisory Councils

141A References to Minister and Director-General

(1) In this Part, a reference to the Minister includes a reference to the Minister administering the *Fisheries Management Act 1994* and a reference to the Director-General includes a reference to the Director-General of the Department of Primary Industries.

(2) If a provision of this Part (or applied by this Part) requires or authorises the Minister or the Director-General to take any action or decide any matter, the provision is taken only to require or authorise:

(a) the Minister administering this Act and the Minister administering the *Fisheries Management Act 1994*, or

(b) the Director-General and the Director-General of the Department of Primary Industries,

to take the action jointly or decide the matter jointly.

(3) However, any such action may be taken separately, or any such decision may be made separately, in respect of any matter if those Ministers or officers so agree.

141B Biological Diversity Advisory Council

(1) There is to be a Biological Diversity Advisory Council ("**BDAC**").

(2) The Minister is to determine by instrument in writing the membership and the terms and conditions of appointment of members of BDAC.

(3) The members of BDAC are to have expertise in one or more of the following areas:

(a) biological diversity,

(b) biological science,

(c) environmental science.

(4) BDAC may advise the Minister, the Director-General and the NRC on:

(a) likely impacts on biological diversity of actions to be taken under the Act following the listing of threatened species, populations or ecological communities or key threatening processes, and

(b) such other related matters as may be referred to BDAC by the Minister, the Director-General or the NRC.

141C Social and Economic Advisory Council

(1) There is to be a Social and Economic Advisory Council ("**SEAC**").

(2) The Minister is to determine by instrument in writing the membership and the terms and conditions of appointment of members of SEAC.

(3) The members of SEAC are to have expertise in one or more of the following areas:

(a) natural resource management,

(b) economics,

(c) social impact assessment,

(d) industry or agriculture sectors.

(4) SEAC may advise the Minister, the Director-General and the NRC on:

(a) likely social and economic impacts of actions to be taken under this Act following the listing of threatened species, populations or ecological communities or key threatening processes, and

(b) such other related matters as may be referred to SEAC by the Minister, the Director-General or the NRC.

141D Provisions relating to BDAC, SEAC and their members

(1) The provisions of sections 130 (Provisions relating to members of Scientific Committee), 131 (Chairperson and Deputy Chairperson), 132 (Disclosure of pecuniary interests), 133 (Procedure of Scientific Committee) and 134 (Transaction of business outside meeting or by telephone or other means) apply to and in respect

of BDAC and SEAC and the members of BDAC and SEAC as if references in those sections to the Scientific Committee were references to BDAC and SEAC.
(2) Despite subsection (1), the quorum for a meeting of BDAC or SEAC is a majority of the members of BDAC or SEAC.

[74] Section 142A

Insert after section 142:

142A Delegation The Minister or the Director-General may delegate to any member of staff of the Department any of the Minister's or Director-General's functions under this Act other than this power of delegation.

[75] Section 146 Decision not to disclose location of critical habitat

Insert "or critically endangered" after "endangered" in section 146 (2) (a) (i).

[76] Section 157

Omit the section. Insert instead:

157 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act are being fulfilled and whether the terms of the Act, and any environmental planning instruments granted biodiversity certification under Part 7, remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the *Threatened Species Legislation Amendment Act 2004*.

(3) The Minister is to make arrangements for public consultation with respect to the review.

(4) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

[77] Schedule 1A

Insert after Schedule 1:

Schedule 1A Critically endangered species and ecological communities

(Section 6)

Part 1 – Critically endangered species

Part 2 – Critically endangered ecological communities

[78] Schedule 2 Vulnerable species and ecological communities

Omit "Sections 7 and 7A". Insert instead "Section 7".

[79] Schedule 2, Part 2

Insert at the end of the Schedule:

Part 2Â Vulnerable ecological communities

Vulnerable ecological communities

[80] Schedule 7 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Threatened Species Legislation Amendment Act 2004, to the extent that it amends this Act

[81] Schedule 7, Part 5

Insert after Part 4:

Part 5 – Provisions consequent on Threatened Species Legislation Amendment Act 2004

11 Definition In this Part: "**2004 amending Act**" means the *Threatened Species Legislation Amendment Act 2004*.

12 Referral of proposed final determinations to Minister The amendments to section 23, and new section 23A, as enacted by the 2004 amending Act extend to a matter pending under section 23 and not finally determined before the commencement of this clause.

13 Threatened Species Priorities Action Statements The Director-General may exercise any function of the Director-General under Part 5A prior to the commencement of that Part, for the purpose of facilitating the adoption of a Threatened Species Priorities Action Statement on the commencement of that Part.

14 Biological Diversity Advisory Council The members of the Biological Diversity Advisory Council holding office immediately before the repeal of sections 137-139 cease to hold office as members of the Advisory Council on that repeal (but are eligible, if otherwise qualified, for re-appointment as members of BDAC).

Schedule 2 Amendment of Fisheries Management Act 1994 No 38

(Section 3)

[1] Section 220B Definitions

Insert in alphabetical order in section 220B (1):

"**BDAC**" means the Biological Diversity Advisory Council established under the *Threatened Species Conservation Act 1995*. "**catchment action plan**" or "**CAP**" means a catchment action plan approved under Part 4 of the *Catchment Management Authorities Act 2003*. "**critically endangered ecological community**" means an ecological community specified in Part 2 of Schedule 4A. "**critically endangered species**" means a species specified in Part 1 of Schedule 4A. "**critically endangered species and ecological communities**" means species and ecological communities specified in Schedule 4A and "**critically endangered species or ecological community**" means a species or ecological community respectively specified in that Schedule. "**Department**" means the Department of Primary Industries. "**environmental planning instrument**" or "**EPI**" means an environmental planning instrument under the *Environmental Planning and Assessment Act 1979*. "**NPW Act**" means the *National Parks and Wildlife Act 1974*. "**NRC**" means the Natural Resources Commission established under the *Natural Resources Commission Act 2003*. "**Priorities Action Statement**" means a Threatened Species Priorities Action Statement under Division 5A. "**SEAC**" means the Social and Economic Advisory Council established under the *Threatened Species Conservation Act 1995*. "**threatened ecological community**" means an ecological community specified in Part 3 of Schedule 4, Part 2 of Schedule 4A or Part 2 of Schedule 5. "**vulnerable ecological community**" means an ecological community specified in Part 2 of Schedule 5.

[2] Section 220B (1), definition of "threatened species"

Omit the definition. Insert instead:

"**threatened species**" means a species specified in Part 1 (Endangered species) or 4

(Species presumed extinct) of Schedule 4, Part 1 (Critically endangered species) of Schedule 4A or Part 1 (Vulnerable species) of Schedule 5.

[3] Section 220B (1), definition of "threatened species, populations and ecological communities"

Insert ", 4A" after "Schedules 4".

[4] Section 220B (1), definition of "threatened species, populations and ecological communities"

Omit "either of those Schedules". Insert instead "any of those Schedules".

[5] Section 220B (1), definition of "vulnerable species"

Insert "Part 1 of" before "Schedule 5".

[6] Section 220C Lists

Omit section 220C (5). Insert instead:

(4A) Critically endangered species Part 1 of Schedule 4A contains a list of critically endangered species for the purposes of this Part.

(4B) Critically endangered ecological communities Part 2 of Schedule 4A contains a list of critically endangered ecological communities for the purposes of this Part.

(5) Vulnerable species Part 1 of Schedule 5 contains a list of vulnerable species for the purposes of this Part.

(5A) Vulnerable ecological communities Part 2 of Schedule 5 contains a list of vulnerable ecological communities for the purposes of this Part.

[7] Section 220D Amendment of lists

Omit "Minister" wherever occurring in section 220D (1) and (2).

Insert instead "Fisheries Scientific Committee".

[8] Section 220D (1) and (2)

Insert "4A," after "Schedule 4," wherever occurring.

[9] Section 220D (3)

Omit the subsection. Insert instead:

(3) A new species, population, ecological community or threatening process may not be listed, nor any such listing changed or omitted, unless the requirements of Subdivision 2 have been complied with.

[10] Section 220E

Omit the section. Insert instead:

220E Identification of nationally threatened species and ecological communities

(1) A species or ecological community listed in Schedule 4, 4A or 5 that is also a listed threatened species or listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth is shown in Schedule 4, 4A or 5 to this Act marked with an asterisk to show its national status.

(2) As soon as practicable after a species or ecological community that is or was indigenous to New South Wales becomes a listed threatened species or listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, the Fisheries Scientific Committee is to consider whether, in accordance with this Division, the species or

ecological community should be listed in Schedule 4, 4A or 5 to this Act.

(3) If a species or ecological community ceases to be a listed threatened species or a listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth:

(a) Schedule 4, 4A or 5 to this Act may be amended to omit the asterisk showing its national status, and

(b) the Fisheries Scientific Committee is to consider, in accordance with this Division, whether the species or ecological community should be omitted from Schedule 4, 4A or 5 to this Act.

[11] Sections 220F-220FC

Omit section 220F. Insert instead:

220F Eligibility for listing of species

(1) A species is eligible to be listed as a "**species presumed extinct**" at a particular time if, in the opinion of the Fisheries Scientific Committee, it has not been recorded in its known or expected habitat in New South Wales, despite targeted surveys, over a time frame appropriate, in the opinion of the Fisheries Scientific Committee, to its life cycle and form.

(2) A species is eligible to be listed as a "**critically endangered species**" if, in the opinion of the Fisheries Scientific Committee, it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.

(3) A species is eligible to be listed as an "**endangered species**" if, in the opinion of the Fisheries Scientific Committee:

(a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as a critically endangered species.

(4) A species is eligible to be listed as a "**vulnerable species**" if, in the opinion of the Fisheries Scientific Committee:

(a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as an endangered or critically endangered species.

220FA Listing of populations

(1) A population is eligible to be listed as an "**endangered population**" if, in the opinion of the Fisheries Scientific Committee, it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations.

(2) A population is not eligible to be listed as an endangered population if it is a population of a species already listed in Schedule 4 or 4A.

220FB Listing of ecological communities

(1) An ecological community is eligible to be listed as a "**critically endangered ecological community**" if, in the opinion of the Fisheries Scientific Committee, it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.

(2) An ecological community is eligible to be listed as an "**endangered ecological community**" if, in the opinion of the Fisheries Scientific Committee:

(a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as a critically endangered ecological community.

(3) An ecological community is eligible to be listed as a "**vulnerable ecological community**" if, in the opinion of the Fisheries Scientific Committee:

(a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and

(b) it is not eligible to be listed as an endangered or critically endangered ecological community.

220FC Threatening processes eligible for listing as key threatening processes

(1) A threatening process is eligible to be listed as a "**key threatening process**" if, in the opinion of the Fisheries Scientific Committee:

(a) it adversely affects threatened species, populations or ecological communities, or

(b) it could cause species, populations or ecological communities that are not threatened to become threatened.

(2) The regulations may prescribe criteria for the determination of matters under this section.

220FD Regulations prescribing criteria under this Part A regulation that prescribes criteria for the purposes of section 220F, 220FA, 220FB or 220FC is not to be made unless the Minister certifies in writing that:

(a) the criteria are based on scientific principles only, and

(b) any criteria for listing under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth were given due consideration before the regulation was made.

[12] Section 220G

Omit the section. Insert instead:

220G Fisheries Scientific Committee responsible for lists The Fisheries Scientific Committee is responsible for determining whether any species, populations, ecological communities or threatening processes should be listed in Schedule 4, 4A, 5 or 6.

[13] Section 220H

Omit the section. Insert instead:

220H Who may initiate action for listing

(1) The Fisheries Scientific Committee may make a determination for the purposes of this Subdivision on its own initiative.

(2) The Fisheries Scientific Committee may also make a determination:

(a) following a request by the Minister or the NRC, or

(b) on a nomination, made in accordance with this Division, of any other person.

(3) A proposal that involves the alteration of the listing status of a species or ecological community (by moving the description of the species or ecological community from one Schedule to another or from one Part of a Schedule to another Part of the Schedule) may be dealt with under this Subdivision as a composite proposal, whereby all aspects of the proposal are dealt with together.

[14] Section 220I How nominations made

Insert ", 4A" after "Schedule 4" in section 220I (1).

[15] Section 220I (5)

Insert after section 220I (4):

(5) The Fisheries Scientific Committee is to give notice of a nomination to the Minister and the NRC within 14 days after the nomination is made.

[16] Section 220J Consideration of nomination by Fisheries Scientific Committee

Omit section 220J (1). Insert instead:

(1) The Fisheries Scientific Committee is to determine priorities for its consideration of nominations every 12 months and in determining those priorities is to have regard to:

- (a) the degree of threat, immediacy of threat, taxonomic distinctiveness and such other matters as the Fisheries Scientific Committee considers relevant, and
- (b) any advice or recommendations of the Minister or the NRC concerning those priorities.

(1A) The NRC and the Minister may give advice or make recommendations to the Fisheries Scientific Committee concerning priorities for the consideration of nominations by the Fisheries Scientific Committee, and in giving that advice or making those recommendations the NRC and the Minister may consider State-wide issues of concern in biodiversity conservation.

[17] Section 220J (3) (a)

Omit "recommend". Insert instead "make".

[18] Section 220J (4)

Insert ", the NRC" after "Minister".

[19] Section 220K Notification and consultation with respect to proposed determination of Fisheries Scientific Committee

Omit "recommendation" wherever occurring.

Insert instead "determination".

[20] Section 220K

Insert ", 4A" after "Schedule 4".

[21] Sections 220L-220MA

Omit sections 220L and 220M. Insert instead:

220L Fisheries Scientific Committee's final determination

(1) The Fisheries Scientific Committee must either accept or reject a proposal for the amendment of Schedule 4, 4A, 5 or 6, and must give reasons for the determination.

(2) The reasons for a determination are to include reference to such of the criteria prescribed by the regulations under sections 220F-220FC as may be relevant to the determination.

(3) In a case involving a nomination, the Fisheries Scientific Committee must make a final determination within 6 months after the end of the period allowed for public comment on the proposed determination of the nomination under section 220K (as provided under section 284).

(4) Before making a final determination the Fisheries Scientific Committee must give the Minister notice in writing of the proposed final determination. The Minister then has 2 months to decide whether to refer the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M.

(5) The Fisheries Scientific Committee is not to proceed to make the proposed final determination unless:

- (a) the Minister has notified the Fisheries Scientific Committee that the Minister has decided not to refer the proposed determination back to the Fisheries Scientific Committee for further consideration, or
 - (b) the Minister has not referred the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M within 2 months after the Minister was given notice of the proposed final determination, or
 - (c) if the Minister has referred the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M within that 2 months, the Fisheries Scientific Committee has decided to proceed with the final determination following that further consideration.
- (6) The Minister may at the request of the Fisheries Scientific Committee extend and further extend the period of 6 months under subsection (3), to a maximum period of 2 years.
- (7) Failure to make a final determination within the period required by this section or to give notice to the Minister of a proposed final determination within the period required by this section does not affect the validity of the determination.

220M Minister's response to proposed final determination

- (1) Within 2 months after receiving notice from the Fisheries Scientific Committee of a proposed final determination, the Minister may:
- (a) notify the Fisheries Scientific Committee that the Minister has decided not to refer the proposed determination back to the Fisheries Scientific Committee for further consideration, or
 - (b) refer the proposed final determination back to the Fisheries Scientific Committee for further consideration.
- (2) The Minister may only refer a matter back to the Fisheries Scientific Committee for reasons of a scientific nature provided to the Fisheries Scientific Committee. In the case of a nomination, the Fisheries Scientific Committee is to notify the person who made the nomination that the matter has been referred back to the Fisheries Scientific Committee and of the Minister's reasons for doing so.
- (3) If a proposed final determination is referred back to the Fisheries Scientific Committee for further consideration:
- (a) the Fisheries Scientific Committee may, after further considering it, decide to proceed with the final determination, to change the final determination or not to proceed with the final determination, and
 - (b) the Fisheries Scientific Committee is to make that decision within 3 months, and
 - (c) the Minister cannot refer the matter back to the Fisheries Scientific Committee again after it has made that decision.
- (4) Failure to make a decision within the period required by this section does not affect the validity of the decision.

220MA Publication of final determination

- (1) On making a final determination, the Fisheries Scientific Committee must, as soon as practicable:
- (a) make an order under section 220D giving effect to the determination, and
 - (b) in a case involving a nomination, notify the person who made the nomination of the determination, and
 - (c) notify the Minister, the NRC and the Director-General of the determination, and
 - (d) publish notice of the determination in a newspaper circulating generally throughout the State and, if the determination is likely to affect a particular

area or areas (other than the State as a whole), in a newspaper circulating generally in that area or areas, and

(e) publish notice of the making of the determination in the Gazette.

(2) The notice must specify the manner in which members of the public may obtain a copy of the determination and the reasons for it.

(3) The reasons for a final determination are to include reference to such of the criteria prescribed by the regulations under sections 220F-220FC as may be relevant to the determination.

(4) Copies of the final determination and the reasons for it are to be made available to members of the public (free of charge) as follows:

(a) by publication on the internet site of the Department,

(b) in response to a request made by contacting an office of the Department in a manner specified in the notice of the determination,

(c) in response to a request made in person at an office of the Department at an address specified in the notice of the determination.

(5) The validity of a final determination cannot be questioned in any legal proceedings except those commenced in a court by any person within 3 months of the date of publication in the Gazette of notice of the making of the final determination.

[22] Section 220N Provisional listing

Omit section 220N (2). Insert instead:

(2) The Fisheries Scientific Committee may make a determination for the provisional listing of any such endangered species without complying with sections 220K, 220L (3)-(6) and 220M. The other provisions of this Subdivision apply to and in respect of any such determination.

(2A) The Fisheries Scientific Committee must make a determination about a nomination within 6 months after it is made or, if additional information has been requested, after that information has been provided or the period specified for its provision has expired. Failure to make a determination within that period does not affect the validity of the determination.

[23] Section 220NA

Insert after section 220N:

220NA Lists to be kept under review

(1) The Fisheries Scientific Committee must keep the lists in Schedules 4, 4A, 5 and 6 under review and must, at least every 2 years, determine whether any changes to the lists are necessary.

(2) The NRC or the Minister may give advice or make recommendations to the Fisheries Scientific Committee concerning priorities for the review of the lists in Schedules 4, 4A, 5 and 6 under this section, and the Fisheries Scientific Committee is to have regard to any such advice or recommendations.

(3) The NRC or the Minister may give directions to the Fisheries Scientific Committee requiring the Fisheries Scientific Committee to undertake investigations for the purpose of identifying species, populations and communities that are potentially threatened species, populations and communities.

[24] Part 7A, Division 3, heading

Omit the heading. Insert instead:

Division 3Â Critical habitat of endangered species, populations and ecological communities and critically endangered species and ecological communities
Critical habitat of endangered species, populations and ecological communities and critically endangered species and ecological communities

[25] Sections 220P (1), 220T (1), 220Y (2) (a)

Insert "or critically endangered species or ecological community" after "endangered species, population or ecological community" wherever occurring.

[26] Section 220Q Identification of critical habitat

Insert "and each critically endangered species and ecological community" after "ecological community" in section 220Q (1).

[27] Section 220ZD Damage to habitat of threatened species, population or ecological community

Insert at the end of section 220ZD:

(2) In proceedings for an offence under this section in respect of an act or an omission of a person that causes damage to any habitat (other than critical habitat) of a threatened species, population or ecological community, it is to be conclusively presumed that the person knew that the land concerned was habitat of that kind if it is established that:

- (a) the act or omission occurred in the course of the carrying out of development or an activity for which development consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, or an approval to which Part 5 of that Act applies, was required but not obtained, or
- (b) the act or omission constituted a failure to comply with any such development consent or approval.

[28] Section 220ZF Defences

Insert after section 220ZF (1) (b):

(b1) was authorised by a property vegetation plan approved under the *Native Vegetation Act 2003*, being an act that had the benefit of biodiversity certification of the native vegetation reform package under Division 10 when the plan was approved, or

[29] Section 220ZF (1) (e)

Omit "agricultural or".

[30] Section 220ZFA

Insert after section 220ZF:

220ZFA Further defences

(1) It is a defence to a prosecution for an offence against this Division if the accused proves that the act constituting the alleged offence was any of the following activities:

- (a) clearing of native vegetation that constitutes a routine agricultural management activity,
- (b) a routine farming practice activity (other than clearing of native vegetation),
- (c) an activity that is permitted under any of the following provisions of the *Native Vegetation Act 2003*:
 - (i) section 19 (Clearing of non-protected regrowth permitted),
 - (ii) section 23 (Continuation of existing farming activities),
 - (iii) section 24 (Sustainable grazing),
- (d) any other activity prescribed by the regulations for the purposes of this section.

(2) Each of the following is a "**routine agricultural management activity**" for the purposes of this section:

- (a) the construction, operation and maintenance of rural infrastructure:

- (i) including (subject to the regulations) dams, permanent fences, buildings, windmills, bores, air strips (in the Western Division), stockyards, and farm roads, but
 - (ii) not including rural infrastructure in areas zoned as rural-residential under environmental planning instruments or on small holdings (as defined in the regulations),
 - (b) the removal of noxious weeds under the *Noxious Weeds Act 1993*,
 - (c) the control of noxious animals under the *Rural Lands Protection Act 1998*,
 - (d) the collection of firewood (except for commercial purposes),
 - (e) the harvesting or other clearing of native vegetation planted for commercial purposes,
 - (f) the lopping of native vegetation for stock fodder (including uprooting mulga in the Western Division in areas officially declared to be drought affected),
 - (g) traditional Aboriginal cultural activities (except commercial activities),
 - (h) the maintenance of public utilities (such as those associated with the transmission of electricity, the supply of water, the supply of gas and electronic communication),
 - (i) any activity reasonably considered necessary to remove or reduce an imminent risk of serious personal injury or damage to property.
- (3) This section does not authorise the doing of an act:
- (a) if it exceeds the minimum extent reasonably necessary for carrying out the routine agricultural management activity or routine farming practice activity, or
 - (b) if it is done for a work, building or structure before the grant of any statutory approval or other authority required for the work, building or structure.
- (4) This section does not apply to land described or referred to in Part 3 (Urban areas) of Schedule 1 to the *Native Vegetation Act 2003*.
- (5) The regulations may make provision for or with respect to:
- (a) extending, limiting or varying the activities referred to in subsection (1) (and that subsection is to be construed accordingly), or
 - (b) excluding any specified land or class of land from the operation of subsection (1), or
 - (c) including any specified land or class of land in the operation of subsection (1) that would otherwise be excluded from its operation by subsection (4).
- (6) Until regulations under subsection (5) otherwise provide, any regulations in force under section 11 (2) of the *Native Vegetation Act 2003* apply for the purposes of extending, limiting or varying the activities referred to in subsection (2) in the same way as those regulations apply for the purposes of extending, limiting or varying the activities referred to in section 11 (1) of that Act.

[31] Section 220ZI Director-General to prepare recovery plans for threatened species, populations and ecological communities

Omit "must prepare" from section 220ZI (1).

Insert instead "may prepare".

[32] Section 220ZI (1) (a)

Insert "or critically endangered" after "endangered".

[33] Section 220ZI (1)

Omit "as soon as practicable after it is listed,".

[34] Section 220ZI (2)

Insert "and may be made for part of a range of a species, population or ecological community," after "community" where firstly occurring.

[35] Section 220ZJ Director-General to prepare threat abatement plans

Omit "must prepare" from section 220ZJ (1).

Insert instead "may prepare".

[36] Section 220ZK

Omit the section. Insert instead:

220ZK Priorities for recovery or threat abatement plans Priorities in the preparation of recovery plans or threat abatement plans are to be in accordance with the priorities for recovery or threat abatement established by the relevant Priorities Action Statement.

[37] Section 220ZL Deadlines for preparation of recovery or threat abatement plans

Omit the section.

[38] Section 220ZO Public and other consultation concerning draft recovery or threat abatement plan

Omit section 220ZO (3). Insert instead:

(3) If the Director-General considers that a public authority should be responsible for the implementation of a measure to be included in a plan:

- (a) the Director-General must consult with the chief executive officer of the public authority before completing the preparation of the plan, and
- (b) a measure must not be included in a plan for implementation by a public authority unless the chief executive officer of the public authority approves of the inclusion of the measure.

[39] Part 7A, Division 5A

Insert after Division 5 of Part 7A:

Division 5A – Threatened Species Priorities Action Statements

220ZVA What the Statement provides for A Threatened Species Priorities Action Statement (also called a Priorities Action Statement) is a statement that:

- (a) sets out the strategies ("**recovery and threat abatement strategies**") to be adopted for promoting the recovery of each threatened species, population and ecological community to a position of viability in nature and for managing each key threatening process as provided by section 220ZJ (1), and
- (b) establishes relative priorities for the implementation of recovery and threat abatement strategies, and
- (c) establishes performance indicators to facilitate reporting on achievements in implementing recovery and threat abatement strategies and their effectiveness, and
- (d) contains a status report on each threatened species, where information is available, and
- (e) sets out clear timetables for recovery and threat abatement planning and achievement.

220ZVB Director-General to prepare and adopt Priorities Action Statement

- (1) The Director-General is to prepare and adopt a Priorities Action Statement for

the purposes of this Part.

(2) The Priorities Action Statement must be completed as soon as practicable and no later than 12 months after the date of assent to the *Threatened Species Legislation Amendment Act 2004*.

(3) The Director-General is to review the Priorities Action Statement every 3 years and may make changes to the Priorities Action Statement pursuant to any such review by adopting amendments to the Statement.

(4) In preparing or reviewing a Priorities Action Statement, the Director-General is to seek advice from the NRC, the Fisheries Scientific Committee, BDAC, SEAC and such other State government agencies as the Director-General considers appropriate.

220ZVC Public consultation on draft statement or amendments Before adopting a Priorities Action Statement or any amendment to the statement, the Director-General must first prepare a draft of the statement or amendment and give the public an opportunity to make submissions on the draft statement or amendment.

220ZVD Consideration of submissions by Director-General

(1) The Director-General must consider all written submissions received by the Director-General on or before the date specified in the notice.

(2) The Director-General may alter the draft statement or amendment to take account of those submissions.

(3) The Director-General must adopt the Priorities Action Statement or amendment (with or without alterations) within 4 months after the end of the period allowed for the public comment on the draft statement or amendment.

220ZVE Review to include report on achievements As part of each review of the Priorities Action Statement, the Director-General is to include in the Priorities Action Statement a report on achievements in implementing the strategies established by the Priorities Action Statement during the period to which the review applies.

[40] Section 221NA

Insert after section 221N:

221NA Regulations

(1) The regulations may provide that development or an activity of a specified type constitutes, or does not constitute, development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats.

(2) Any such regulation has effect (despite the provisions of this Act or any other Act) for the purposes of the operation of:

(a) Division 6 (Licensing and Ministerial orders) of Part 7A of this Act, and

(b) Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* (including the operation of those Parts as applying under any other Act).

(3) A regulation that provides that development or an activity of a specified type does not constitute development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats, is not to be made unless the Minister has certified in writing that the development or activity is of minimal environmental impact on threatened species, populations and ecological communities, and their habitats.

[41] Section 221ZB Functions of Fisheries Scientific Committee

Insert "or critically endangered" after "endangered" in section 221ZB (2) (b).

[42] Section 221ZB (2) (e)

Insert "and the NRC" after "Minister" where firstly occurring.

[43] Part 7A, Divisions 10 and 11

Insert after Division 9 of Part 7A:

Division 10 – Biodiversity certification of native vegetation reform package

221ZF Native vegetation reform package For the purposes of this Division, the "**native vegetation reform package**" is the package of reforms comprising the following:

- (a) the *Native Vegetation Act 2003* and the regulations under that Act,
- (b) State-wide standards and targets for natural resource management issues recommended under the *Natural Resources Commission Act 2003* and adopted by the Government,
- (c) catchment action plans under the *Catchment Management Authorities Act 2003*,
- (d) protocols and guidelines adopted or made under the regulations under the *Native Vegetation Act 2003*, the *Catchment Management Authorities Act 2003* and the *Natural Resources Commission Act 2003*.

221ZG Biodiversity certification of native vegetation reform package

- (1) The Minister may by order published in the Gazette confer biodiversity certification on the native vegetation reform package for the purposes of this Part.
- (2) The Minister may confer biodiversity certification even if the native vegetation reform package does not comprise all the elements of the package.
- (3) The Minister may, by order published in the Gazette, suspend biodiversity certification of the native vegetation reform package if the composition of the package changes after its certification (for instance by any amendment of the *Native Vegetation Act 2003* or regulations under that Act, or by the approval or amendment of a State-wide standard or target or of a catchment action plan). The Minister may by order published in the Gazette lift any suspension under this subsection.
- (4) The Minister may, in an order conferring biodiversity certification or in another order published in the Gazette, exclude from the certification of the native vegetation reform package any specified class of activity.
- (5) In deciding on any action under this section, the Minister is to have regard to the likely impact of the native vegetation reform package (or any relevant aspect of its operation) on the achievement of the objects of this Part.

221ZH Effect of biodiversity certification While biodiversity certification of the native vegetation reform package is in force, any activity on land within the area of operations of each catchment management authority has the benefit of that biodiversity certification (except any activity excluded from certification under section 221ZG (4)).

221ZI Suspension of certification in connection with implementation of package

- (1) The Minister may by order published in the Gazette suspend biodiversity certification of the native vegetation reform package in its application to a particular catchment management authority if the Minister is of the opinion that the catchment management authority:
 - (a) has failed to properly exercise its functions under the native vegetation reform package, or
 - (b) has otherwise failed to exercise its functions in a manner that promotes the conservation of threatened species, populations and ecological communities.
- (2) During the suspension of biodiversity certification of the native vegetation reform package in its application to a particular catchment management authority, land within the area of operations of the catchment management authority does not have the benefit of the biodiversity certification of the native vegetation reform package.
- (3) The Minister is only entitled to form an opinion for the purposes of this section:
 - (a) based on the outcomes of any audit undertaken by the NRC, or

(b) based on the results of an investigation conducted by the Director-General, or

(c) in such other circumstances as may be prescribed by the regulations.

221ZJ Notification of certification, variation, suspension or revocation

(1) Notice of the grant of biodiversity certification under this Division or of any suspension of that certification under this Division is to be given within 14 days:

(a) to the Director-General of the Department of Infrastructure, Planning and Natural Resources, and

(b) on the website of the Department of Primary Industries.

(2) The Minister is to keep a register containing copies of each notice of the grant of biodiversity certification under this Division and of any suspension or revocation of that certification.

(3) The register is to be open for public inspection, without charge, during ordinary business hours, and copies of or extracts from the register are to be made available to the public on request, on payment of the fee fixed by the Minister.

Division 11 – Biodiversity certification of environmental planning instruments

221ZK Biodiversity certification

(1) The Minister may by order published in the Gazette confer biodiversity certification on an EPI if satisfied that the EPI, in addition to any other relevant measures to be taken, will lead to the overall improvement or maintenance of biodiversity values. Biodiversity values include threatened species, populations and ecological communities and their habitats.

(2) In deciding whether to confer biodiversity certification on an EPI the Minister must also have regard to the following considerations:

(a) the likely social and economic consequences of implementation of the EPI,

(b) the most efficient and effective use of available resources for the conservation of threatened species, populations and ecological communities,

(c) the principles of ecologically sustainable development,

(d) conservation outcomes resulting from any reservation or proposed reservation of land under Part 4 of the NPW Act or the entering into of a conservation agreement relating to the land under that Act, or resulting from any other action to secure the protection of land for conservation purposes,

(e) conservation outcomes resulting from the operation outside the area of operation of the EPI of strategies, plans, agreements and other instruments (whether or not they are EPIs).

(3) In deciding any matter under this section the Minister is to have regard to the objects of this Part.

(4) An EPI cannot be biodiversity certified unless:

(a) notice is given of proposed biodiversity certification of the EPI in the course of the public exhibition of a draft of the EPI under section 66 of the *Environmental Planning and Assessment Act 1979* or by public exhibition following a procedure that substantially accords with the procedure for public exhibition required by that section, and

(b) copies of submissions made in response to an invitation for submissions in the course of that public exhibition have been provided to the Minister.

(5) The Minister may issue guidelines for the purpose of assisting in the preparation of EPIs for biodiversity certification.

221ZL Certification can be conditional

(1) Biodiversity certification of an EPI can be subject to conditions, including

conditions that limit the certification to specified threatened species, populations and communities or to a specified part of the land to which the EPI applies.

(2) Unless limited by the conditions of certification, biodiversity certification of an EPI applies to the whole of the land to which the EPI applies, and to all threatened species, populations and ecological communities.

221ZM Effect of biodiversity certification

(1) Any development for which development consent is required under the provisions of a biodiversity certified EPI is, for the purposes of Part 4 of the *Environmental Planning and Assessment Act 1979* taken to be development that is not likely to significantly affect any threatened species, population or ecological community, or its habitat.

(2) An activity to which Part 5 of the *Environmental Planning and Assessment Act 1979* applies that a biodiversity certified EPI provides can be carried out without the need for development consent is, for the purposes of that Part, taken to be an activity that is not likely to significantly affect any threatened species, population or ecological community, or its habitat.

(3) This section applies only to development or an activity on land to which the certification of the EPI applies and only to threatened species, populations or ecological communities (and their habitat) to which the certification applies.

221ZN Period of certification and extension

(1) Biodiversity certification of an EPI remains in force for such period as the Minister determines and specifies in the certification. If no period is specified, biodiversity certification remains in force for 10 years.

(2) Prior to the expiration of biodiversity certification of an EPI, the Minister may by order published in the Gazette extend by a period of up to 10 years the period for which that certification remains in force, but only if the Minister has reviewed the EPI to take account of any new listing of a species, population or ecological community or the discovery of a species, population or ecological community not previously known in an area.

(3) The Minister must not extend the period of biodiversity certification of an EPI unless, prior to granting the extension, the Minister:

(a) by notice published in a newspaper circulating generally throughout the State, invites persons to make written submissions to the Minister on the proposed extension, and

(b) considers any written submissions received before the closing date specified in the notice for the making of submissions (being a date that is not less than 30 days after the date the notice is first published under this subsection).

(4) This section does not prevent further biodiversity certification of an EPI under this Division.

221ZO Reassessment of biodiversity certification

(1) The Minister is to reassess the grant of biodiversity certification in respect of an EPI following any review of the EPI under the *Environmental Planning and Assessment Act 1979*, or any rezoning of land to which the EPI applies, to determine whether biodiversity certification should be maintained or modified.

(2) If a local council undertakes a review of a biodiversity certified EPI that applies to land in its area, the council is to notify the Minister of the commencement of that review, and the outcome of that review, as soon as practicable.

221ZP Suspension and revocation of certification The Minister may by order published in the Gazette suspend or revoke the certification of an EPI if the Minister is of the opinion that:

(a) the EPI fails (or will, as a result of any proposed amendment of the EPI, fail) to

make appropriate provision for the conservation of threatened species, populations and ecological communities, or

(b) the consent authority under the EPI has failed to adequately comply with a direction by the Minister to review the EPI in response to any new listing of a species, population or ecological community or the discovery of a species, population or ecological community not previously known in an area.

221ZQ Notification of certification, suspension or revocation

(1) Notice of the grant of biodiversity certification under this Division or of the extension, suspension or revocation of that certification is to be given within 21 days:

(a) to the Director-General of the Department of Infrastructure, Planning and Natural Resources, and

(b) on the website of the Department of Primary Industries, and

(c) to each local council that is the council of an area of which land to which the EPI applies forms part.

(2) The Minister is to keep a register containing copies of each notice of the grant of biodiversity certification under this Division and of any extension, suspension or revocation of that certification.

(3) The register is to be open for public inspection, without charge, during ordinary business hours, and copies of or extracts from the register are to be made available to the public on request, on payment of the fee fixed by the Minister.

221ZR Concurrence can be conditional on voluntary conservation action

(1) The Director-General may grant concurrence under section 79B or 112C of the *Environmental Planning and Assessment Act 1979* conditional on the taking of specified action ("**voluntary action**", as provided by subsection (2)) that the Director-General considers will significantly benefit threatened species conservation, but only if the Director-General is satisfied that the person who proposes to carry out the development or activity to which the concurrence relates has agreed to take the voluntary action and agrees to the imposition of the condition.

(2) The voluntary action that can be required by a condition imposed under this section is any one or more of the following:

(a) the reservation of land under Part 4 of the NPW Act or the entering into of a conservation agreement relating to the land under that Act,

(b) action to secure the protection of land for conservation purposes by a method that the Director-General considers satisfactory,

(c) action to restore threatened species habitat on land referred to in paragraph (a) or (b),

(d) the contribution of money for a purpose referred to in paragraph (a)-(c).

(3) In determining whether to confer biodiversity certification on an EPI, the Minister is entitled to have regard to the conservation benefits that will result from the taking of action in accordance with a condition proposed to be imposed under this section (as if those benefits would result from the implementation of the EPI).

(4) When such a condition is imposed as a condition of concurrence in respect of development, the consent authority for the development must also impose the condition on its consent for the development.

(5) The annual report of the Department is to include an assessment of how any voluntary action taken pursuant to a condition imposed under this section has benefited or is likely to benefit the adversely affected threatened species, including details of how any land or money contributed pursuant to such a condition has benefited or is likely to benefit threatened species.

221ZS Director-General may accredit persons to prepare assessments and surveys

(1) The Director-General is to institute arrangements for the accreditation of suitably qualified and experienced persons to undertake and prepare surveys and assessments for use in connection with:

- (a) biodiversity certification of EPIs under this Division, or
- (b) any assessment of the matters referred to in section 5A (Significant effect on threatened species, populations or ecological communities, or their habitats) of the *Environmental Planning and Assessment Act 1979*.

(2) An applicant for accreditation must furnish the Director-General with such information as the Director-General requires to effectively determine the application and the application must be accompanied by the fee fixed by the Director-General for the consideration of the application.

(3) An accreditation is to be for the period (not exceeding 3 years) specified by the Director-General in the instrument of accreditation, and the accreditation (or any renewal of it) may be given subject to the conditions and restrictions (if any) specified in the instrument of accreditation.

(4) Without limiting subsection (3), an accreditation is to include conditions that require surveys and assessments to be undertaken and prepared in accordance with standards approved from time to time by the Director-General by order published in the Gazette.

(5) The Director-General may vary conditions or restrictions (if any) attaching to an accreditation and may suspend or cancel an accreditation.

[44] Section 284 Public consultation procedure

Omit "recommendation" from section 284 (1) (f).

Insert instead "determination".

[45] Section 284 (1) (h)

Insert after section 284 (1) (g):

(h) a draft Priorities Action Statement or amendment of such a Statement under Division 5A of Part 7A.

[46] Section 290

Omit the section. Insert instead:

290 Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act are being fulfilled and whether the terms of the Act, and any environmental planning instruments granted biodiversity certification under Division 11 of Part 7A, remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the *Threatened Species Legislation Amendment Act 2004*.

(3) The Minister is to make arrangements for public consultation with respect to the review.

(4) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

[47] Schedule 4A

Insert after Schedule 4:

Schedule 4A Critically endangered species and ecological communities

(Section 220C)

Part 1 – Critically endangered species

Part 2 – Critically endangered ecological communities

[48] Schedule 5, heading

Omit the heading and section reference. Insert instead:

Schedule 5 Vulnerable species and ecological communities

(Section 220C)

Part 1 – Vulnerable species

[49] Schedule 5

Insert at the end of the Schedule:

Part 2Â Vulnerable ecological communities

Vulnerable ecological communities

[50] Schedule 7 Savings, transitional and other provisions

Insert at the end of clause 2 (1):

Threatened Species Legislation Amendment Act 2004, to the extent that it amends this Act

[51] Schedule 7

Insert after clause 17B:

17C Referral of proposed final determinations to Minister Sections 220L and 220M, as substituted by the *Threatened Species Legislation Amendment Act 2004* extend to a matter pending under section 220L and not finally determined before the commencement of this clause.

17D Threatened Species Priorities Action Statements The Director-General may exercise any function of the Director-General under Division 5A of Part 7A prior to the commencement of that Division, for the purpose of facilitating the adoption of a Threatened Species Priorities Action Statement on the commencement of that Division.

Schedule 3 Amendment of other threatened species legislation

(Section 3)

3.1 – National Parks and Wildlife Act 1974 No 80

[1] (Repealed)

[2] Section 5 (1)

Omit the definitions of "endangered ecological community", "endangered population" and "endangered species".

Insert instead:

"endangered ecological community" means an endangered or critically endangered ecological community within the meaning of the *Threatened Species Conservation Act 1995*. "endangered population" means an endangered population within the meaning of the *Threatened Species Conservation Act 1995*. "endangered species" means an

endangered or critically endangered species within the meaning of the *Threatened Species Conservation Act 1995*.

[3] Section 98 Harming protected fauna, other than threatened species, endangered populations or endangered ecological communities

Insert after section 98 (5):

(6) A person is not to be convicted of an offence arising under subsection (2) if the person proves that the act constituting the offence was done in the course of carrying out an activity that would constitute a defence under section 118G (Defences) to a prosecution for an offence under Part 8A.

[4] Section 118A Harming or picking threatened species, endangered populations or endangered ecological communities

Insert after section 118A (3) (a1):

(a2) was authorised by a property vegetation plan approved under the *Native Vegetation Act 2003*, being an act that had the benefit of biodiversity certification of the native vegetation reform package under Division 4 of Part 7 of the *Threatened Species Conservation Act 1995* when the plan was approved, or

[5] Section 118D Damage habitat of threatened species, endangered population or endangered ecological community

Insert after section 118D (2) (a1):

(a2) was authorised by a property vegetation plan approved under the *Native Vegetation Act 2003*, being an act that had the benefit of biodiversity certification of the native vegetation reform package under Division 4 of Part 7 of the *Threatened Species Conservation Act 1995* when the plan was approved, or

[6] Section 118D (4)

Insert after section 118D (3):

(4) In proceedings for an offence under this section in respect of an act or an omission of a person that causes damage to any habitat (other than critical habitat) of a threatened species, an endangered population or an endangered ecological community, it is to be conclusively presumed that the person knew that the land concerned was habitat of that kind if it is established that:

(a) the act or omission occurred in the course of the carrying out of development or an activity for which development consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, or an approval to which Part 5 of that Act applies, was required but not obtained, or

(b) the act or omission constituted a failure to comply with any such development consent or approval.

[7] Section 118G

Insert after section 118F:

118G Defences

(1) It is a defence to a prosecution for an offence under this Part if the accused proves that the act constituting the alleged offence was any of the following activities:

(a) clearing of native vegetation that constitutes a routine agricultural management activity,

(b) a routine farming practice activity (other than clearing of native vegetation),

(c) an activity that is permitted under any of the following provisions of the

Native Vegetation Act 2003:

- (i) section 19 (Clearing of non-protected regrowth permitted),
 - (ii) section 23 (Continuation of existing farming activities),
 - (iii) 24 (Sustainable grazing),
 - (d) any other activity prescribed by the regulations for the purposes of this section.
- (2) Each of the following is a "**routine agricultural management activity**" for the purposes of this section:
- (a) the construction, operation and maintenance of rural infrastructure:
 - (i) including (subject to the regulations) dams, permanent fences, buildings, windmills, bores, air strips (in the Western Division), stockyards, and farm roads, but
 - (ii) not including rural infrastructure in areas zoned as rural-residential under environmental planning instruments or on small holdings (as defined in the regulations),
 - (b) the removal of noxious weeds under the *Noxious Weeds Act 1993*,
 - (c) the control of noxious animals under the *Rural Lands Protection Act 1998*,
 - (d) the collection of firewood (except for commercial purposes),
 - (e) the harvesting or other clearing of native vegetation planted for commercial purposes,
 - (f) the lopping of native vegetation for stock fodder (including uprooting mulga in the Western Division in areas officially declared to be drought affected),
 - (g) traditional Aboriginal cultural activities (except commercial activities),
 - (h) the maintenance of public utilities (such as those associated with the transmission of electricity, the supply of water, the supply of gas and electronic communication),
 - (i) any activity reasonably considered necessary to remove or reduce an imminent risk of serious personal injury or damage to property.
- (3) This section does not authorise the doing of an act:
- (a) if it exceeds the minimum extent reasonably necessary for carrying out the routine agricultural management activity or routine farming practice activity, or
 - (b) if it is done for a work, building or structure before the grant of any statutory approval or other authority required for the work, building or structure.
- (4) This section does not apply to land described or referred to in Part 3 (Urban areas) of Schedule 1 to the *Native Vegetation Act 2003*.
- (5) The regulations may make provision for or with respect to:
- (a) extending, limiting or varying the activities referred to in subsection (1) (and that subsection is to be construed accordingly), or
 - (b) excluding any specified land or class of land from the operation of subsection (1), or
 - (c) including any specified land or class of land in the operation of subsection (1) that would otherwise be excluded from its operation by subsection (4).
- (6) Until regulations under subsection (5) otherwise provide, any regulations in force under section 11 (2) of the *Native Vegetation Act 2003* apply for the purposes of extending, limiting or varying the activities referred to in subsection (2) in the same way as those regulations apply for the purposes of extending, limiting or varying the activities referred to in section 11 (1) of that Act.

[8] (Repealed)

[9] Sections 159A and 159B

Insert after section 159:

159A Liability of landholder for certain harming and picking offences In any criminal proceedings for an offence under section 98 or Part 8A, the landholder of any land on which the offence is alleged to have occurred is taken to have carried out the activity constituting the alleged offence unless it is established that:

(a) the activity was carried out by another person, and

(b) the landholder did not cause or permit the other person to carry out the activity.

This section does not prevent proceedings being taken against the person who actually carried out the activity.

159B Causing or permitting certain harming and picking offences A person who causes or permits, by act or omission, another person to commit an offence under section 98 or a provision of Part 8A is guilty of an offence under the provision and is liable on conviction to the same penalty applicable to an offence under that provision.

[10]-[17] (Repealed)

3.2 – (Repealed)

3.3 – Native Vegetation Act 2003 No 103

Section 14 Granting of development consent

Insert after section 14 (3):

(4) If the clearing of any native vegetation has the benefit of biodiversity certification under Division 4 of Part 7 of the *Threatened Species Conservation Act 1995* and also the benefit of biodiversity certification under Part 7A of the *Fisheries Management Act 1994*:

(a) an application for development consent for clearing is not required to be accompanied by a species impact statement or statements (as would otherwise be required under section 78A of the EPA Act), and

(b) the Minister is not required to consult with the Minister administering the *Threatened Species Conservation Act 1995* and the Minister administering the *Fisheries Management Act 1994* (as would otherwise be required under section 79B of the EPA Act).

3.4 – Natural Resources Commission Act 2003 No 102

Section 16A

Insert after section 16:

16A Assistance from Scientific Committee The Commission may seek and obtain the advice of:

(a) the Scientific Committee under the *Threatened Species Conservation Act 1995* on matters of a scientific nature relating to threatened species, populations and communities, such as the setting of state-wide and regional standards or targets for biodiversity conservation, and

(b) the Biological Diversity Advisory Council under that Act on matters of biological diversity, and

(c) the Social and Economic Advisory Council under that Act on matters relating to the social and economic impact of natural resource management.

3.5 – Threatened Species Conservation Amendment Act 2002 No 78

[1] Schedule 1 [2]

Omit the item.

[2] Schedule 1 [7]

Omit the item.

[3] Schedule 1 [10]

Omit the item.

[4] Schedule 1 [18]

Omit the item.

[5] Schedule 1 [80]

Omit the item.

Historical notes

The following abbreviations are used in the Historical notes:

Am	amended	No	number	Schs	Schedules
Cl	clause	p	page	Sec	section
ClI	clauses	pp	pages	Secs	sections
Div	Division	Reg	Regulation	Subdiv	Subdivision
Divs	Divisions	Regs	Regulations	Subdivs	Subdivisions
GG	Government Gazette	Rep	repealed	Subst	substituted
Ins	inserted	Sch	Schedule		

Table of amending instruments *Threatened Species Legislation Amendment Act 2004 No 88*. Second reading speech made: Legislative Assembly, 1.9.2004; Legislative Council, 26.10.2004. Assented to 30.11.2004. Date of commencement, Sch 3.1 [1] [8] and [10]-[17] and 3.2 excepted: not in force; date of commencement of Sch 3.1 [1] [8] and [10]-[17] and 3.2, assent, sec 2 (2). This Act has been amended as follows:

2005	No 64	<i>Statute Law (Miscellaneous Provisions) Act 2005</i> . Assented to 1.7.2005. Date of commencement of Sch 1.44, assent, sec 2 (2); date of commencement of Sch 3, assent, sec 2 (1).
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Table of amendments

Sch 1	Am 2005 No 64, Sch 1.44 [1] [2].
Sch 3	Am 2005 No 64, Sch 3.