Threatened Species & Ecological Communities

Last updated: March 2014

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- Sydney: 02 9262 6989
- Northern Rivers: 1800 626 239
- Rest of NSW: 1800 626 239

**NSW Bilateral Agreement relating to environmental impact assessment**

The Australian and NSW governments have signed a bilateral assessment agreement\(^2\) which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

In practice, the proponent will refer projects to the Australian Government, who will determine whether the project is a controlled action, and then notify the NSW Government that a referral has been made. The NSW Government will then assess the project, and as part of its usual State processes (e.g. development assessment) it will undertake an assessment for the Australian Government using its own assessment processes under the bilateral agreement.\(^2\)

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The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.³ Read EDO NSW’s law reform submission on the draft bilateral agreement for more information.⁴

This Fact sheet does not deal with Commonwealth threatened species legislation in detail. See our Fact Sheet on Commonwealth threatened species law for more information.

Overview

According to the International Union for Conservation of Nature (IUCN) Red List of Threatened Species, Australia now has one of the highest rates of species extinction of any developed nation.

There are both national and State laws protecting threatened species.

Commonwealth threatened species law

Species and ecological communities which are threatened on a national level are protected under the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

A threatened species or ecological community may be protected under both NSW law and Commonwealth law at the same time if the species is considered to be threatened nationally. For example, the Grey-headed flying-fox is listed as a vulnerable species under the Threatened Species Conservation Act 1995 (NSW) and is also listed as a vulnerable species under the EPBC Act.

If you are concerned about a particular species, you should check both the Commonwealth threatened species database⁵ and the NSW threatened species database.⁶

The EPBC Act protects:

- Fauna and flora on land controlled or owned by the Commonwealth,⁷

- Fauna and flora that may be harmed by the activities of the Commonwealth or a Commonwealth agency,⁸ and

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⁴ [http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1229/attachments/original/1387505167/131218_ANEDO_submission_on_the_Cth-NSW_Assessment_Bilateral_Agreement_WEB.pdf?1387505167)
⁷ Environment Protection and Biodiversity Conservation Act 1999 (Cth), ss. 26-27A.
- Nationally listed threatened species or communities which might be significantly impacted by an activity or development.\(^9\)

**Which government department is responsible?**

The Australian Environment Minister and the Australian Environment Department are responsible for the EPBC Act.

If you are concerned about possible breach of national threatened species law, you can report the incident to the Australian Environment Department by calling the Compliance and Enforcement Branch on 1800 110 395 or by email to compliance@environment.gov.au.

This Fact sheet does not deal with Commonwealth threatened species legislation in detail. See our Fact Sheet on Commonwealth threatened species law for more information.

**NSW threatened species laws**

In NSW, threatened species are protected under the following Acts which operate in conjunction with each other:

- The *Threatened Species Conservation Act 1995 (NSW)* (TSC Act) deals with the listing of species, the declaration of critical habitat, recovery plans, threat abatement plans, licensing, biodiversity certification and BioBanking;

- The *National Parks and Wildlife Act 1974 (NSW)* (NPW Act) contains additional licencing provisions, and provisions for criminal offences; and

- The *Environmental Planning and Assessment Act 1979 (NSW)* (EP&A Act) imposes obligations on developers and consent authorities to assess and consider the impacts of proposed development on threatened species during the development assessment process (e.g. by requiring a species impact statement in some circumstances).

- There is a separate protection framework for threatened fish (both saltwater and freshwater) and their habitat, and threatened marine vegetation, under the *Fisheries Management Act 1994 (NSW)*.

There are many native species of flora (plants) and fauna (animals) which, although not threatened, still have some degree of legal protection. These are protected under the NPW Act. For more information, see our Fact sheet on Protecting native animals and plants.

\(^8\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s. 28.

\(^9\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss. 18, 18A.
Habitat loss through land clearing and development is one of the key threatening processes leading to loss of biodiversity in NSW. Land clearing in general is regulated under the **Native Vegetation Act 2003 (NSW)**. For more information, see our [Fact Sheet on Clearing Vegetation](#).

**Which government department is responsible?**

The NSW Environment Minister and the NSW [Office of Environment and Heritage (OEH)](#) are responsible for protecting threatened species in NSW. If you are concerned about a possible breach of NSW threatened species law, you can report the incident to OEH by phoning 131 555 or by sending an email to [info@environment.nsw.gov.au](mailto:info@environment.nsw.gov.au). You should receive an incident report number and OEH should follow the matter up. If you would like assistance with this, you could [call the EDO NSW Environmental Law Advice Line](#).

**Listing threatened species**

The [Threatened Species Conservation Act 1995](#) is the main law protecting threatened species in NSW. The Act and the [Threatened Species Conservation Regulation 2010 (NSW)](#) contain a comprehensive framework for listing threatened species.

**Eligibility for listing**

In NSW the following may be listed under the [Threatened Species Conservation Act](#):  

- Individual species,  
- Populations, and  
- Ecological communities.

They may be listed once they reach a particular level of endangerment (e.g. vulnerable, endangered, critically endangered). The listings are collectively known as ‘threatened species, populations and ecological communities’, and are often simply referred to as ‘threatened species’.

**Individual species**

Individual species may be listed as:

- Presumed extinct: not recorded in its known or expected habitat within a determined time frame\(^{10}\)

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\(^{10}\) [Threatened Species Conservation Act 1995 (NSW), s. 6(4), 10(1), listed in Sch 1, Part 4.](#)
• Critically endangered: facing an extremely high risk of extinction in NSW in the immediate future

• Endangered: facing a very high risk of extinction in the near future

• Vulnerable: facing a high risk of extinction in the medium-term future

**Populations**

Individual populations, or pockets, of species may be listed as an ‘endangered population’. A population is eligible to be listed if it is facing a very high risk of extinction in New South Wales in the near future. The population cannot be listed if the species is already listed as endangered, critically endangered or presumed extinct. Examples of endangered populations include the:

• Emu population in the NSW North Coast bioregion and the Port Stephens area,

• Gang-gang Cockatoo population in the Hornsby and Ku-ring-gai areas,

• Little Penguin in the Manly Point Area,

• Long-nosed Bandicoot at North Head,

• Koalas at Hawks Nest and Tea Gardens, and

• Koalas at Pittwater Local Government Area.

**Ecological communities**

Ecological communities may be listed as:

• Critically endangered ecological community: facing an extremely high risk of extinction in the immediate future,

• Endangered ecological community: facing a very high risk of extinction in the near future, or

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11 Threatened Species Conservation Act 1995 (NSW), s. 6(4A), 10(2), listed in Sch 1A.
12 Threatened Species Conservation Act 1995 (NSW), ss. 6 (1), 10(3), listed in Sch 1, Part 1.
14 Threatened Species Conservation Act 1995 (NSW), s. 6(2), Sch 1, Part 2.
15 Threatened Species Conservation Act 1995 (NSW), s. 11(1).
16 Threatened Species Conservation Act 1995 (NSW), s. 11(2).
17 Threatened Species Conservation Act 1995 (NSW), Sch 1, Part 2
18 Threatened Species Conservation Act 1995 (NSW), ss. 6(4B), 12(1), listed in Sch 1A, Part 2.
19 Threatened Species Conservation Act 1995 (NSW), ss. 6(3), 12(2), Sch 1, Part 3.
Vulnerable ecological community: facing a high risk of extinction in the medium-term.\(^{20}\)

**Procedure for listing**

**Who may initiate action for listing?**

Any person can nominate a species, population or ecological community for listing under the *Threatened Species Conservation Act 1995* (NSW).\(^{21}\) The **NSW Scientific Committee** may also list a species, population or ecological community on its own initiative.

If you wish to nominate a species, you will need detailed evidence to support your nomination. There are some conservation groups who are experienced in preparing nominations for threatened species. If you think a particular species, population or ecological community should be listed, and you want help, you could contact:

- **Humane Society International**: (02) 9973 1728 or Toll free 1800 333 737, Email: admin@hsi.org.au
- **Nature Conservation Council of NSW**: (02) 9516 1488

**NSW Scientific Committee**

The **Scientific Committee** is responsible for determining whether a particular species, population or ecological community is to be included on or omitted from the list of threatened species.\(^{22}\)

The process is as follows:\(^{23}\)

- After the Committee has considered a proposal, it must make a preliminary determination as to whether or not the proposal should be supported,

- In a case involving a nomination, the Committee must then make a final determination within 6 months of calling for submissions on its preliminary determination,

- Before making a final determination, the Committee must refer the proposed nomination to the Environment Minister. The Environment Minister may only refer the proposed determination back to the Committee for further consideration on scientific grounds.

\(^{20}\) *Threatened Species Conservation Act 1995* (NSW), ss. 7(2), 12(3), listed in Sch 2, Part 2.

\(^{21}\) *Threatened Species Conservation Act 1995* (NSW), ss. 19(1), (2).

\(^{22}\) *Threatened Species Conservation Act 1995* (NSW), ss. 17, 128.

\(^{23}\) *Threatened Species Conservation Act 1995* (NSW), ss. 22, 23, 23A.
Final determinations are published in the NSW Government Gazette. The validity of a final determination can only be challenged in the Land and Environment Court within 6 months of the determination appearing in the Gazette.\textsuperscript{24}

**Emergency listings**

The Scientific Committee may list a species on an emergency basis by giving it a provisional listing.\textsuperscript{25}

A species may be provisionally listed as endangered or critically endangered if, although not previously known to have existed in NSW, it is believed on current knowledge to be indigenous to NSW, or if it was presumed extinct but has been rediscovered.\textsuperscript{26} Anyone can nominate a species to be listed provisionally.\textsuperscript{27}

**What are the implications of listing?**

Once a species, population or ecological community has been listed, it may trigger the following actions:

- The Chief Executive of OEH may prepare a recovery plan for the species, population or ecological community;\textsuperscript{28}

- If the species, population or ecological community is endangered or critically endangered, the NPWS must identify its critical habitat which may then be declared as such by the Environment Minister;\textsuperscript{29}

- A person who harms (animals) or picks (plants) that are a threatened species or an endangered population or ecological community will commit an offence unless they have a licence or other form or authorisation;\textsuperscript{30}

- Developments which are likely to significantly affect the threatened species or its habitat will require a species impact statement.\textsuperscript{31}

**Critical habitat**

Once a species, population or ecological community is listed as endangered or critically endangered, the NPWS must take steps to identify the habitat that is critical to its survival.

\textsuperscript{24} Threatened Species Conservation Act 1995 (NSW), s. 24(4).

\textsuperscript{25} Threatened Species Conservation Act 1995 (NSW), Part 2 Div 4.

\textsuperscript{26} Threatened Species Conservation Act 1995 (NSW), s. 28.

\textsuperscript{27} Threatened Species Conservation Act 1995 (NSW), s. 30(1).

\textsuperscript{28} Threatened Species Conservation Act 1995 (NSW), s. 56.

\textsuperscript{29} Threatened Species Conservation Act 1995 (NSW), s. 40.

\textsuperscript{30} National Parks and Wildlife Act 1974 (NSW), s. 118A.

\textsuperscript{31} Environmental Planning and Assessment Act 1979 (NSW), ss. 78A, 115N.
The Environment Minister is responsible for declaring critical habitat, on advice from the OEH. A declaration of critical habitat and a map showing its location must be published in the NSW Government Gazette and copies given to all affected landholders, public authorities and mortgagees. The Chief Executive of the OEH must keep a public register of all critical habitat.

If an area of land is declared as critical habitat, it means that:

- Planning authorities (such as local councils) must have regard to the register of critical habitat when deciding whether to grant development consent;
- Public authorities must consider the habitat when using land that it owns or controls;
- An application for a licence to carry out an activity on the land must be accompanied by a species impact statement; and
- A development application relating to that land must be accompanied by a species impact statement.

Critical habitat declarations are recorded on OEH’s critical habitat register.

Long-term planning tools to protect threatened species

Recovery plans

Once a species is listed as threatened, the Chief Executive of OEH may prepare a recovery plan for it, although this is not mandatory. Recovery plans may be prepared for all categories of threatened species, populations and ecological communities, other than those presumed extinct.

A recovery plan must identify critical habitat for threatened species and the processes which are threatening the species (e.g. land clearing, predation by foxes), and state what can be done to ensure the recovery of the species.

Ministers and public authorities (including local councils) must take any action available to them to implement a recovery plan and must not make decisions that

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34 Threatened Species Conservation Act 1995 (NSW), s. 55.
35 Threatened Species Conservation Act 1995 (NSW), s. 50(b); Environmental Planning and Assessment Act 1979, s. 5B.
36 Threatened Species Conservation Act 1995 (NSW), s. 50.
37 Threatened Species Conservation Act 1995 (NSW), s. 92(2).
38 Environmental Planning and Assessment Act 1979 (NSW), s. 78A(8)(b).
39 Threatened Species Conservation Act 1995 (NSW), s. 56.
40 Threatened Species Conservation Act 1995 (NSW), s. 59.
are inconsistent with a recovery plan. Public authorities who intend to depart from a recovery plan must notify the OEH.

There are over 80 recovery plans for species listed as 'endangered', and over 15 for species listed as 'vulnerable'.

**Key threatening processes**

**Key threatening processes** may be listed by the Scientific Committee. A process can be listed if it could adversely affect, or cause a species, population or ecological community which is not presently threatened to become threatened. Any person may nominate a threatening process for inclusion on the list. Nominations must be made in writing to the Chair of the Scientific Committee. There is a form for nominations on OEH's website.

Once a key threatening process is listed, it may trigger the need for a threat abatement plan.

There are over 30 key threatening process listed. These include things such as:

- habitat alteration due to subsidence caused by longwall mining,
- alteration to the natural flows of rivers and wetlands,
- climate change,
- bush rock removal,
- clearing native vegetation,
- loss of hollow-bearing trees, and
- removal of dead wood and dead trees.

**Threat abatement plans**

The listing of a key threatening process triggers the need for the Chief Executive to consider preparing a threat abatement plan, although preparing a plan is not mandatory. The plan should set out how the OEH proposes to reduce or eliminate the threat, identify the people or public authorities responsible for

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41 Threatened Species Conservation Act 1995 (NSW), s. 69.
42 Threatened Species Conservation Act 1995 (NSW), s. 71.
43 They are listed in Schedule 3 of the Threatened Species Conservation Act 1995 (NSW).
44 Threatened Species Conservation Act 1995 (NSW), s. 13.
45 Threatened Species Conservation Act 1995 (NSW), s. 19(3).
48 Threatened Species Conservation Act 1995 (NSW), s. 74.
49 Threatened Species Conservation Act 1995 (NSW), s. 74.
implementing the plan, and give a proposed timetable.\textsuperscript{50} There are three threat abatement plans in NSW.\textsuperscript{51}

Ministers and public authorities must take any action available to them to implement the plan.\textsuperscript{52} Consent authorities must have regard to threat abatement plans when considering a development application\textsuperscript{53} or when a determining authority is considering an approval.\textsuperscript{54}

**NSW Threatened Species Priority Action Statement**

The Chief Executive of the OEH is required to prepare and adopt a Threatened Species Priorities Action Statement.\textsuperscript{55} In accordance with this obligation, a Priorities Action Statement has been developed which outlines strategies to promote the recovery of each threatened species, population and ecological community and manage key threatening processes.

The Priorities Action Statement identifies which recovery and threat abatement plans the OEH will prepare. The Priorities Action Statement must be reviewed every three years.\textsuperscript{56}

**Harming threatened species**

As a general rule, actions that are likely to result in the harming or picking of threatened species must either be licenced or be authorised under planning laws.

**Licences to harm or pick threatened species**

Licences regarding threatened species are issued under the TSC Act.\textsuperscript{57} It is also possible to obtain a general licence under the NPW Act\textsuperscript{58} to harm or pick threatened species, but such a licence may only be issued in strict circumstances for the welfare of an animal or if there is a threat to life or property.\textsuperscript{59}

**Public register**

The OEH is required to keep a public register of all licence applications and licences.\textsuperscript{60}

\textsuperscript{50} Threatened Species Conservation Act 1995 (NSW), ss. 74(1), 77.
\textsuperscript{51} \url{http://www.environment.nsw.gov.au/threatenedspecies/ThreatAbatementPlans.htm}
\textsuperscript{52} Threatened Species Conservation Act 1995 (NSW), s. 86.
\textsuperscript{53} Environmental Planning and Assessment Act 1979 (NSW), Part 4.
\textsuperscript{54} Environmental Planning and Assessment Act 1979 (NSW), Part 5.
\textsuperscript{55} Threatened Species Conservation Act 1995 (NSW), ss. 90A-90E.
\textsuperscript{56} Threatened Species Conservation Act 1995 (NSW), s. 90B(3).
\textsuperscript{57} Threatened Species Conservation Act 1995 (NSW), s. 91.
\textsuperscript{58} National Parks and Wildlife Act 1974 (NSW), s. 120.
\textsuperscript{59} Threatened Species Conservation Act 1995 (NSW), s. 91(2).
\textsuperscript{60} Threatened Species Conservation Act 1995 (NSW), ss. 96, 104; \url{http://www.environment.nsw.gov.au/threatenedspecies/S91TscaRegisterBydate.htm}
Application process

Applications for licences under the TSC Act are made to the Chief Executive of the OEH, who is responsible for issuing licences.61 If the activity to be licenced will take place on land that is critical habitat, the application must be accompanied by a species impact statement.62 If a species impact statement is not compulsory, the Chief Executive may decide that one is necessary if the action is likely to significantly affect threatened species.63

Opportunity for public comment

If the licence application is accompanied by a species impact statement or has been required by the Chief Executive, the Chief Executive must notify the licence application in a State-based newspaper.64 Any person can comment on the application within 28 days of the notification.

Appeals

An applicant for a licence may appeal to the Land and Environment Court against a refusal, licence conditions, or variation/cancellation of a licence.65 Any person can appeal against the granting of a licence if the licence was accompanied by a species impact statement and that person made a written submission while the application was on public exhibition.66

Appeals must be brought within 28 days.67 The licence cannot be used until the appeal period has expired, or if an appeal has been lodged, until the appeal is finally determined.68 If the Chief Executive fails to grant, but does not refuse the licence application within 120 days of the application, the licence application is deemed to have been accepted unless an extension has been granted.69

Threatened species and development

Threatened species laws do not protect threatened species absolutely. Rather, the laws set up administrative procedures to guide decision-making where threatened species are concerned.

For example, under the EP&A Act (the primary legislation controlling development in NSW), a consent authority may grant development consent which will adversely affect threatened species.

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61 Threatened Species Conservation Act 1995 (NSW), ss. 92(1), 99.
62 Threatened Species Conservation Act 1995 (NSW), s. 92(2).
63 Threatened Species Conservation Act 1995 (NSW), ss. 94, 94A.
64 Threatened Species Conservation Act 1995 (NSW), s. 96(5)
65 Threatened Species Conservation Act 1995 (NSW), s. 106(1);
66 Threatened Species Conservation Act 1995 (NSW), ss. 106(1), 96(5)
68 Threatened Species Conservation Act 1995 (NSW), s. 108.
69 Threatened Species Conservation Act 1995 (NSW), s. 107, 99(2).
There are three ways that this can happen:

- The development takes place on land that has been granted biodiversity certification;\(^{70}\)
- The developer prepares a species impact statement which accompanies the development application;\(^{71}\) or
- The developer participates in the BioBanking Scheme.\(^{72}\)

Each of these options is exclusive of the other. For example, if a development is proceeding under the BioBanking Scheme, a species impact statement will not be needed.

See below for a full explanation of each option.

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**Cumberland Plain Woodland pushed closer to extinction by clearing plan**

A decision by Penrith City Council to approve the clearing of 300 hectares of vegetation from the Australian Defence Industries site (ADI site) near St Marys in western Sydney has pushed one of the largest fragments of the threatened Cumberland Plain Woodland further towards extinction.

Only one month before the council granted the approval, the NSW Scientific Committee made a preliminary decision upgrading Cumberland Plain Woodland’s status from endangered to critically endangered.

Cumberland Plain Woodland provides crucial habitat for a wide range of bird and mammal species and it is only found in the Hawkesbury/Nepean and Sydney Metro catchment areas. The ADI site forms part of an important conservation corridor in Sydney’s west. The primary threat facing the Woodland is currently clearing for urban or rural development and the subsequent impacts of fragmentation.

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**Biodiversity certification**

The TSC Act allows for the biodiversity certification of specified land.\(^{73}\) There are three types of biodiversity certification:

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\(^{72}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79C, *Threatened Species Conservation Act 1995* (NSW), Part 7A.

\(^{73}\) *Threatened Species Conservation Act 1995* (NSW), ss. 126G-126N.
• Certification of land;

• Certification of environmental planning instruments (LEPs and SEPPs). This has now been phased out. However, there are a few existing environmental planning instruments that are subject to biodiversity certification because they were certified before the law changed;\textsuperscript{74} and

• Certification of the Native Vegetation Reform Package (including property vegetation plans). See our Fact Sheet on Clearing Vegetation.\textsuperscript{95}

What is biodiversity certification?

Biodiversity certification is a system that maps the biodiversity values of an area, and identifies spaces for development along with spaces of conservation value that will be used to offset the impacts of developments within the area.

What is the effect of biodiversity certification?

The effect of biodiversity certification is that developments that fit within the certified area will not need to be accompanied by a species impact statement. Once an area has biodiversity certification, any development is automatically assumed not to have a significant impact on threatened species, populations or ecological communities, thereby avoiding the need for a species impact statement.\textsuperscript{76}

However, a licence to kill or harm threatened species may still be required if a development does not need development consent, but will still affect threatened species or their habitat.

What is the process for granting biodiversity certification?

Any planning authority (e.g. a local council or the Minister for Planning) can apply to the NSW Environment Minister\textsuperscript{77} for biodiversity certification of an area.\textsuperscript{78} A biodiversity certification strategy must be submitted with the application. The biodiversity strategy must include information about the land proposed for biodiversity certification, the proposed conservation measures, and the people who will be responsible for implementing those conservation measures.\textsuperscript{79}

Applicants must publish a notice of the application for biodiversity certification in a newspaper circulating throughout the State, as well as on the applicant’s

\textsuperscript{74} Threatened Species Conservation Act 1995 (NSW), ss. 126G-126N.
\textsuperscript{76} Threatened Species Conservation Act 1995 (NSW), s. 126J.
\textsuperscript{78} Threatened Species Conservation Act 1995 (NSW), s. 126(1), (2).
\textsuperscript{79} Threatened Species Conservation Act 1995 (NSW), s. 126K, 126M.
website, inviting the public to comment on the application. The public must be given at least 30 days from the date of the notification to comment on the application.

**Granting biodiversity certification**

The Environment Minister can only grant biodiversity certification over land if the Minister is satisfied that granting biodiversity certification will maintain or improve biodiversity values. The Minister determines this by applying the Biodiversity Certification Assessment Methodology. The Minister must refuse biodiversity certification if it does not improve or maintain biodiversity values.

**Biodiversity Certification Assessment Methodology**

The methodology is used to determine whether biodiversity certification will improve or maintain biodiversity values. The methodology assesses the loss of biodiversity values on land proposed for biodiversity certification and the impact, or likely impact, of proposed conservation measures on land proposed for biodiversity conservation (including conservation measures that are proposed to be implemented in the future).

**Certification of EPIs phased out**

Environmental planning instruments (EPIs) are no longer able to be granted biodiversity certification. However, prior to February 2011, biodiversity certification could be conferred on EPIs. There are a number of EPIs that had biodiversity certification conferred under these arrangements, and this certification for these EPIs is still in force.

**Species impact statements**

Developments which are proposed for land which is critical habitat, or which is likely to significantly affect threatened species, populations or ecological communities, must be accompanied by a species impact statement (SIS). A SIS is not required if the land has biodiversity certification, or if a BioBanking statement has been issued for the development.

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80 Threatened Species Conservation Act 1995 (NSW), s. 126O, 126P.
82 Threatened Species Conservation Act 1995 (NSW), s. 126R.
84 Threatened Species Conservation Act 1995 (NSW), Sch. 7.
86 Environmental Planning and Assessment Act 1979 (NSW), s. 79C.
Where a species impact statement is required, the process is as follows:

- The developer must submit a SIS with their development application,\(^{87}\)
- In deciding whether to grant consent, a consent authority must take into account the likely impacts of the development on the natural environment, including threatened species and their habitat,\(^{88}\)
- Development consent cannot be granted without the concurrence of the OEH or, if a Minister is the consent authority, unless that Minister has consulted with the Environment Minister.\(^{89}\)

Planning authorities must have regard to the register of critical habitat when deciding whether to grant consent\(^{90}\) and to recovery plans,\(^{91}\) threat abatement plans and key threatening processes.\(^{92}\)

**7-part test**

In deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, the consent authority must apply a 7-part test.\(^{93}\) The test looks at whether a viable local population of the species is likely to be placed at risk of extinction, whether habitat will be removed or modified, and whether habitat is likely to become fragmented or isolated from other areas.

**Concurrence of Environment Minister**

In deciding whether or not to grant concurrence, the Chief Executive of the OEH or the Environment Minister must consider a range of listed factors, including the principles of ecologically sustainable development.\(^{94}\) The Environment Minister may either grant concurrence subject to conditions, or refuse concurrence.\(^{95}\) The conditions of concurrence must be included in the development consent.\(^{96}\)

By agreement with the developer, the Chief Executive may make concurrence conditional on the developer taking certain voluntary conservation actions regarding threatened species, and those conditions become a binding part of the development consent.\(^{97}\) For example, the Chief Executive may require the developer to dedicate land to be used as a national park or nature reserve, enter

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\(^{87}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 78A(8)(b).
\(^{88}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79C(1)(b), (e).
\(^{89}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(3), (5).
\(^{90}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 5B.
\(^{91}\) *Threatened Species Conservation Act 1995* (NSW), s. 69.
\(^{92}\) *Environmental Planning and Assessment Act 1979* (NSW), ss. 5A(2)(f), (g).
\(^{93}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 5A(2).
\(^{94}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(5).
\(^{95}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(8).
\(^{96}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(9).
\(^{97}\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(8A).
into a conservation agreement, restore threatened species habitat, or donate money to protect threatened species.\(^8\)

**The BioBanking Scheme**

**How does the BioBanking Scheme work?**

Under the BioBanking Scheme, an owner of land containing threatened species or habitat for threatened species may have their land approved as a biobank site and can enter into a biobanking agreement with the Environment Minister for which biodiversity credits are issued in return for the landowner agreeing to protect threatened vegetation and threatened species.\(^9\)

A developer can apply to the Chief Executive of the OEH for a biobanking statement which will state how many biodiversity credits, and what type, the developer must buy (and retire) in order to offset the impacts of their development on threatened species.\(^10\) A BioBanking statement can be obtained for most development that requires development consent under the EP&A Act.\(^11\)

Participation in the Scheme is voluntary. A developer can choose to obtain a BioBanking statement in order to avoid the need to carry out a species impact statement.\(^12\) The conditions of a BioBanking statement must be incorporated into the conditions of the development consent.\(^13\) A BioBanking statement expires after two years unless it is acted upon.\(^14\) The Chief Executive must keep a public register of all BioBanking statements.\(^15\)

**BioBanking Assessment Methodology**

The Minister has published a very detailed methodology setting out how the likely impacts of a development are to be assessed, and how the credits required to be purchased are to be calculated, and how the offset rules will work.

For more information on BioBanking see:

- Our [Fact Sheet on BioBanking](#)
- Our [Fact Sheet on Conserving private land](#)
- [OEH website on BioBanking](#)

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\(^8\) *Environmental Planning and Assessment Act 1979* (NSW), s. 79B(8A).

\(^9\) *Threatened Species Conservation Act 1995* (NSW), s. 127D.

\(^10\) *Threatened Species Conservation Act 1995* (NSW), Part 7A.

\(^11\) *Threatened Species Conservation Act 1995* (NSW), s. 127ZJ.

\(^12\) *Threatened Species Conservation Act 1995* (NSW), ss. 127ZO, 127ZP.

\(^13\) *Threatened Species Conservation Act 1995* (NSW), s. 127ZQ(2).

\(^14\) *Threatened Species Conservation Act 1995* (NSW), s. 127ZQ(4).

\(^15\) *Threatened Species Conservation Act 1995* (NSW), s. 127ZZD.
Offences

The criminal offences relating to threatened species are set out in the *National Parks and Wildlife Act 1974*,\(^\text{106}\) not the *Threatened Species Conservation Act 1995*.

Although these offences may be enforced through either civil proceedings, or criminal proceedings, most breaches are prosecuted as criminal matters.

The OEH is responsible for bringing criminal prosecutions for threatened species and communities listed in NSW.\(^\text{107}\)

*Threatened animals and their habitat*

It is an offence to harm any animal that is a threatened species.\(^\text{108}\) This includes harm which is caused by any substance (e.g. poison), animal (e.g. dog), firearm, net, trap or hunting device. The maximum penalty for harm to an endangered species, population or ecological community is $220,000 and/or two years imprisonment. For harm to a vulnerable species, it is $55,000 and/or one year imprisonment.

In many cases, however, it is the habitat rather than the individual animal itself which is harmed or damaged. It is therefore also an offence to damage the habitat of a threatened species, endangered population or endangered ecological community if the person knows that the land concerned is habitat of that kind.\(^\text{109}\) The maximum penalty is $110,000, and/or one year imprisonment.

It is also an offence to damage critical habitat. The maximum penalty is $220,000 and/or two years imprisonment.\(^\text{110}\) If a map showing the location of critical has been published in the Gazette, then the prosecution does not need to prove that the person knew it was declared critical habitat (they are assumed to have known).\(^\text{111}\)

It is an offence to buy, sell or have in one’s possession (e.g. in a vehicle, house, apartment or field) any animal that is listed as a threatened species or which is part of an endangered population. The maximum penalty for an *endangered* species is $220,000 and/or two years imprisonment. For a *vulnerable* species, it is $55,000 and/or one year imprisonment.\(^\text{112}\)

\(^{106}\) *National Parks and Wildlife Act 1974* (NSW), Part 15

\(^{107}\) *National Parks and Wildlife Act 1974* (NSW), s.191.

\(^{108}\) *National Parks and Wildlife Act 1974* (NSW), s. 118A(1).

\(^{109}\) *National Parks and Wildlife Act 1974* (NSW), s. 118D(1).

\(^{110}\) *National Parks and Wildlife Act 1974* (NSW), s. 118C(1).

\(^{111}\) *National Parks and Wildlife Act 1974* (NSW), s. 118C(2).

\(^{112}\) *National Parks and Wildlife Act 1974* (NSW), s. 118B(1)(b).
*Threatened plants*

It is an offence to *pick* any plant that is listed as a threatened species, or that is part of an endangered population or endangered ecological community.\(^{113}\) The maximum penalty for an *endangered* species, population or ecological community is $220,000 and/or two years imprisonment. For *vulnerable* species, it is $55,000 and/or one year imprisonment.

‘Pick’ includes gathering, cutting, poisoning, digging up, crushing or injuring the plant or any part of the plant.\(^{114}\) For example, slashing a paddock which contains threatened plants would constitute ‘picking’.

It is an offence to buy, sell or have in one’s possession (e.g. in a vehicle, house, apartment or field) any plant that is listed as a threatened species. The maximum penalty for an *endangered* species is $220,000 and/or two years imprisonment. For *vulnerable* species it is $55,000 and/or one year imprisonment.\(^{115}\) This provision does not apply to a landowner or lessee if the plant is naturally occurring on their land.\(^{116}\)

### Case study: Man fined $180,000 for clearing part of an endangered ecological community\(^{117}\)

The Southern Highlands Shale Woodland is listed as an endangered ecological community in NSW. Mr Williams owned land in the Southern Highlands on which the listed Shale Woodland grew. Over two separate periods, he arranged for trees of the woodland to be cleared or cut down. The clearing occurred while Mr Williams’ application for development consent to subdivide the land was being considered by the local council.

Mr Williams was prosecuted by the NSW Government and pleaded guilty to three charges of ‘picking’ plants of an endangered ecological community. The Land and Environment Court found that the clearing was premeditated and deliberate, and that it was done to remove an impediment to the subdivision being approved. The Court fined Mr Williams a total of $180,000 and also ordered him to pay the prosecutor’s costs.

### Defences

There are a range of defences that a person can call on if they are charged with an offence relating to threatened species. In short, if the offending activity was in

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\(^{113}\) National Parks and Wildlife Act 1974 (NSW), s. 118A(2).

\(^{114}\) National Parks and Wildlife Act 1974 (NSW), s. 5.

\(^{115}\) National Parks and Wildlife Act 1974 (NSW), s. 118B(1).

\(^{116}\) National Parks and Wildlife Act 1974 (NSW), s. 118B(3).

some way authorised (e.g. by a licence or development consent), there is not an offence.

The specific defences which are available differ for each offence, and all of the defences are not covered in this Fact Sheet. However, some of the more typical defences are described below.

**Licences**

It is a defence to a prosecution for an offence if the person had a licence to harm or pick the threatened species and they were complying with that licence.\(^{118}\)

**Lawful development**

It is a defence if the work which harmed the threatened species was essential for the carrying out of a development or activity authorised under the EP&A Act.\(^{119}\)

To have the benefit of this defence, the work must have been carried out in accordance with the relevant approval and its conditions. For example, if a person clears land in excess of that which is permitted under a development consent, then they cannot point to the development consent as a defence if they have cleared the habitat of a threatened species.

**Routine agricultural and farming activities**

It is a defence if the person can prove that they were carrying out work which was reasonably necessary for:\(^{120}\)

- clearing native vegetation for a routine agricultural management activity (RAMA);
- a routine farming activity (which does not include clearing native vegetation); or
- an activity which is permitted under the Native Vegetation Act 2003 (NSW), such as clearing non-protected regrowth, continuing an existing farming activity or engaging in sustainable grazing.

Routine agricultural management activities include things such as:\(^{121}\)

- constructing dams, fences, stockyards and farm roads;
- removing noxious weeds;
- controlling noxious animals;

\(^{118}\) National Parks and Wildlife Act 1974 (NSW), s. 118A(3).
\(^{119}\) National Parks and Wildlife Act 1974 (NSW), s. 118A(3)(b).
\(^{120}\) National Parks and Wildlife Act 1974 (NSW), ss. 118G(1), (3).
\(^{121}\) National Parks and Wildlife Act 1974 (NSW), s. 118G(2)
• collecting firewood (but not for commercial purposes);
• lopping native vegetation for stock fodder; and
• traditional Aboriginal cultural activities (but not commercial activities).

However, if the work requires some form of approval (such as development consent), the person must wait for the approval to be issued before carrying out the clearing.\(^\text{122}\)

**Property vegetation plans**

It is a defence if the act complained of was authorised by a property vegetation plan approved under the *Native Vegetation Act 2003* (but only if that plan had biodiversity certification).\(^\text{123}\)

**Property management plans**

The Chief Executive of the OEH may approve a property management plan which has been prepared by a landholder.\(^\text{124}\) A property management plan may authorise the landowner, or others, to take certain actions (e.g. to authorise Aboriginal persons to harm animals or pick plants).

It is a defence to a threatened species offence if the person was carrying out the activity concerned in accordance with an approved property management plan.\(^\text{125}\)

**Conservation agreements**

It is a defence to a threatened species offence if the activity was carried out under a conservation agreement.\(^\text{126}\)

**Enforcement**

The OEH is responsible for enforcing the provisions of the *Threatened Species Conservation Act 1995* and *National Parks and Wildlife Act 1974*. The legislation may be enforced through criminal prosecutions, although OEH may consider using its other enforcement powers before commencing a prosecution. These include the use of penalty notices, warning letters, stop work orders and interim protection orders.

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\(^{122}\) *National Parks and Wildlife Act 1974* (NSW), s. 118G(3)(b).
\(^{124}\) *Threatened Species Conservation Act 1995* (NSW), s. 113B(1).
\(^{125}\) *Threatened Species Conservation Act 1974* (NSW), s. 113B(6).
If you think that someone has unlawfully interfered with a threatened species, population or ecological community, you should report it to the OEH on its Environment Line (toll free) 131 555 (24 hours).

**Stop work orders**

The Chief Executive may issue a stop work order if they are of the opinion that an activity is being, or is about to be carried out, that is likely to:

- Harm threatened animals, populations or ecological communities or pick threatened plants, populations or ecological communities;
- Damage critical habitat; or
- Damage the habitat of threatened species, populations or ecological communities.

Stop work orders cannot be issued for certain authorised or essential acts, such as acts authorised by a licence, development consent, property vegetation plan or firefighting under the *Rural Fires Act 1997 (NSW)*.128

Stop work orders may be issued for up to 40 days,129 but may be extended for a further period or periods of 40 days.130 The Chief Executive of the OEH is not required to notify anybody before making a stop work order.131 If the Chief Executive is of the opinion that satisfactory arrangements cannot be made to modify the offending action to protect the threatened species, population or ecological community, the Chief Executive must recommend that the Environment Minister make an interim protection order.132

A person against whom a stop work order is made may appeal against the order to the Environment Minister.133 There is no further (merit) appeal against a stop work order unless the order is converted to an interim protection order.

**Interim protection orders**

The Environment Minister may make an interim protection order over land containing threatened species, populations or ecological communities, or critical habitat, but only after receiving a recommendation to do so from the Chief Executive.134 An interim protection order may contain terms relating to the preservation, protection and maintenance of the land, its fauna, plants,
threatened species, populations, ecological communities and critical habitat as well as any Aboriginal object or places subject to the order.\textsuperscript{135}

The Minister does not need to give anyone notice before making an interim protection order.\textsuperscript{136} An interim protection order has effect for such period as is specified in the order, being not longer than 2 years, unless revoked beforehand.\textsuperscript{137} The Chief Executive must keep a public register of all interim protection orders.\textsuperscript{138} Current interim protection orders may be found on the NSW Government Gazette.

An owner or occupier of land subject to an interim protection order may appeal against the order to the Land and Environment Court within 60 days of receiving the order.\textsuperscript{139}

It is an offence not to comply with an interim protection order. The maximum penalty for a corporation is $1.1 million, or for an individual, $110,000 and increases every day the order is not complied with.\textsuperscript{140}

**Criminal prosecutions**

**Who may bring proceedings?**

Only the Chief Executive of the OEH or a person authorised by the Chief Executive can commence criminal proceedings.\textsuperscript{141} In practice, this is usually an officer within the OEH or a police officer.

**Sentencing options**

The Land and Environment Court may impose significant fines and terms of imprisonment on offenders.

**Civil remedies**

The Land and Environment Court may grant an injunction to stop an activity that is causing harm to a threatened species or its habitat. It may also make an order to remedy or restrain a breach of the *Threatened Species Conservation Act* or a declaration that a provision has been breached.

**Who may bring proceedings?**

\begin{itemize}
  \item \textsuperscript{135} National Parks and Wildlife Act 1974 (NSW), s. 91B.
  \item \textsuperscript{136} National Parks and Wildlife Act 1974 (NSW), s. 91C.
  \item \textsuperscript{137} National Parks and Wildlife Act 1974 (NSW), ss. 91D, 91E.
  \item \textsuperscript{138} National Parks and Wildlife Act 1974 (NSW), s. 91I.
  \item \textsuperscript{139} National Parks and Wildlife Act 1974 (NSW), s. 91H; Land and Environment Court Act 1979 (NSW), s. 20(1)(cf); Land and Environment Court Rules 2007 (NSW), Rule 7.1.
  \item \textsuperscript{140} National Parks and Wildlife Act 1974 (NSW), s. 91G.
  \item \textsuperscript{141} National Parks and Wildlife Act 1974 (NSW), s. 191.
\end{itemize}
Any person may bring proceedings to remedy or restrain a breach of the Threatened Species Conservation Act or a breach of the National Parks and Wildlife Act. \(^{142}\)

**Threatened fish and marine vegetation**

In NSW, the protection of marine species is dealt with outside the general threatened species laws. Threatened species of fresh and saltwater fish and marine vegetation are protected under the Fisheries Management Act 1994 (NSW). The Minister for Primary Industries and the Primary Industries Division of the Department of Trade and Investment are responsible for the protection of threatened marine species and marine vegetation.

**How are fish listed as threatened?**

Any person can nominate a new species for listing. \(^{143}\) The categories of threatened species, populations and ecological communities are the same as those under the TSC Act. \(^{144}\)

The Fisheries Scientific Committee is responsible for determining which fish species, populations, ecological communities or threatening processes should be listed. \(^{145}\) The Minister can either accept the Committee’s nomination or refer it back to the Committee for scientific reasons. \(^{146}\)

Habitat that is critical to the survival of endangered or critically endangered marine species may be declared as critical habitat. \(^{147}\) The Fisheries Management Act 1994 (NSW) establishes a number of offences, including harming any listed marine species or damaging its habitat. \(^{148}\)

**Threatened fish and development**

As with ground dwelling threatened species, development application which is likely to significantly affect a threatened species of fish will require a species impact statement to accompany the development application. The concurrence of the Minister for Primary Industries will be required. \(^{149}\)

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\(^{142}\) Threatened Species Conservation Act 1995 (NSW), s. 141F; National Parks and Wildlife Act 1974 (NSW), s. 193.

\(^{143}\) Fisheries Management Act 1994 (NSW), s. 220H(2)(b).

\(^{144}\) Fisheries Management Act 1994 (NSW), s. 220F.

\(^{145}\) Fisheries Management Act 1994 (NSW), s. 220G.

\(^{146}\) Fisheries Management Act 1994 (NSW), s. 220M.

\(^{147}\) Fisheries Management Act 1994 (NSW), s. 220P.

\(^{148}\) Fisheries Management Act 1994 (NSW),DIV 4.

\(^{149}\) Environmental Planning and Assessment Act 1979 (NSW), s. 5C(2)(b).
Key threatening processes for fish

Processes which threaten the survival of species may be listed under the *Fisheries Management Act*.\(^{150}\) 8 are listed, including degradation of native riparian vegetation along New South Wales water courses, hook and line fishing in areas important for the survival of threatened fish species, human-caused climate change and the shark meshing program in NSW waters.

Licences

Licences concerning threatened fish species and marine vegetation are issued by the Primary Industries Division of the Department of Trade and Investment.

**Case Study: Man fined for killing endangered grey nurse shark**

A recreational fisher from Lake Munmorah who killed an endangered grey nurse shark was fined $2,000 for the offence. The man pleaded guilty in Forster Local Court for taking the 1.7m long female shark off Hastings Point in June 2006.

Grey nurse sharks were listed as an endangered species in 2001 under the *Fisheries Management Act 1994* (NSW), after first being declared threatened in 1984.

As the proceedings were dealt with in the Local Court, the maximum fine available was $10,000. If proceedings had been commenced in the Supreme Court or the Land and Environment Court, a much larger penalty would have been possible (up to $220,000 or two years imprisonment).\(^{151}\)

Glossary

**Key to terms used in this Fact Sheet**

**Chief Executive** means the Chief Executive of the NSW Office of Environment and Heritage

**EP&A Act** means the *Environmental Planning and Assessment Act 1979* (NSW)

**EPI** means an environmental planning instrument, which is a local environmental plan or a State environmental planning policy

**EPBC Act** means the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

\(^{150}\) *Fisheries Management Act 1994* (NSW), Sch. 6.

Environment Minister means the NSW Minister for the Environment

Australian Environment Department means the Australian Department of the Environment

LEP means a local environmental plan

IUCN means the International Union for Conservation of Nature

NPW Act means the National Parks and Wildlife Act 1974 (NSW)

NPWS means the NSW National Parks and Wildlife Service

OEH means the NSW Office of Environment and Heritage

SIS means a species impact statement

TSC Act means the Threatened Species Conservation Act 1995 (NSW)

Threatened species offences means those offences regarding threatened species, populations and ecological communities set out in Part 8A of the NPW Act

Useful websites

- NSW Department of Environment – nature conservation
- Nature Conservation Council
- World Wide Fund for Nature

Useful legal texts
