

Declaration of critical habitat for the Endangered population of Little Penguins at Manly



Photo N. Klomp

(pursuant to s.44 of the *Threatened Species Conservation Act 1995*)

September 2002

(updated June 2003 following amendment to the
Threatened Species Conservation Regulation 2002)

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Forward

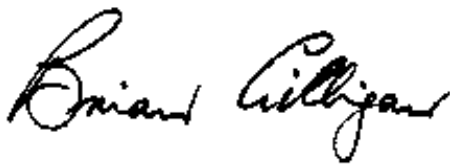
The conservation of threatened species, populations and ecological communities is crucial for the maintenance of this State's unique biodiversity. In NSW, the *Threatened Species Conservation (TSC) Act* 1995 provides the framework to conserve and recover threatened species, populations and ecological communities.

The TSC Act includes provision for the identification and declaration by the Minister of habitat that is critical to the survival of endangered species, populations and ecological communities (that is, those species, populations and ecological communities listed in Schedule 1 of the Act as endangered). The TSC Act includes specific requirements concerning the habitat eligible to be declared to be critical habitat, the process for identification of critical habitat, and the matters to which the Minister must have regard when considering a recommendation for critical habitat. This report satisfies these provisions.

The Little Penguin (*Eudyptula minor*) colony at North Sydney Harbour is the only known breeding colony on mainland NSW. On 31 January 1997, the NSW Scientific Committee made a final determination to list this colony as an Endangered Population on Schedule 1 of the *Threatened Species Conservation (TSC) Act* 1995. In the 2001/02 breeding season there were only 75 breeding pairs of Little Penguins recorded.

This report describes our current understanding of the Little Penguin population, documents the critical significance of the areas around Manly Point and from Collins Beach to Cannae Point for the survival of the colony, and includes an assessment of the social and economic consequences of this declaration of critical habitat.

This critical habitat declaration will make a significant contribution to the conservation and recovery of the Little Penguin colony at Manly and its habitat.



Brian Gilligan
Director-General



Bob Debus
Minister for the Environment

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1 Introduction

The Little Penguin (*Eudyptula minor*) colony at North Sydney Harbour is the only known breeding colony on mainland NSW. On 31 January 1997, the NSW Scientific Committee made a final determination to list this colony as an Endangered Population on Schedule 1 of the Threatened Species Conservation (TSC) Act 1995.

The penguins nest in rock falls and rocky shorelines on both reserved and unreserved land around Manly Point and in Sydney Harbour National Park. Threats to the population include predation by dogs, cats and foxes, loss of suitable breeding habitat and disturbance around nest sites. In the 2001/02 breeding season there were 75 breeding pairs of Little Penguins recorded.

A recovery plan has been prepared for this population and was approved in October 2000 (NPWS 2000). Action 15.3.3 of the Recovery Plan states that the NPWS will “*investigate the feasibility of declaring critical habitat for the population*”. During the development of the areas identified as critical habitat, several options were considered and discussed (Recommendation for the Identification of Little Penguin critical Habitat for the Endangered Population of Little Penguins at Manly, NPWS April 2002a). The public exhibition of these options and the subsequent consultation process raised a number of issues that have been considered in the final identification of critical habitat.

The recommendation for critical habitat has been prepared in accordance with Section 43 of the TSC Act and has been publicly notified and exhibited in accordance with Section 41 of the Act. This document should be read in conjunction with the Threatened Species Conservation Regulation 2002 and its regulatory impact statement (Hassall Pty Ltd 2002). A summary of the ecology and management issues relevant to Little Penguins at Manly is provided in Appendix 1 and the Recovery Plan (NPWS 2000).

The declaration of critical habitat provides for the ongoing recovery of the Little Penguin population and allows for targeted regulation of activities that continue to threaten its conservation.

2 Legislative Context

The declaration of critical habitat serves primarily as a guide for planning under Part 3 of the *Environmental Planning and Assessment Act 1979* (the EP&A Act) and as a trigger which ensures a rigorous assessment of all activities and development proposals (sensu the EP&A Act), and any other action that has the potential to damage critical habitat.

The implications of the declaration of an area as critical habitat under NSW legislation are summarised in Appendix 2 and specified in Section 4 of this report for those Public Authorities affected by this declaration.

It is important to note that the declaration of critical habitat does not necessarily prohibit activities in declared areas. The TSC Act, however, does authorise the making of regulations that may prohibit or regulate certain actions on declared critical habitat. The types of actions that are subject to regulations are identified in Section 3 of this report.

2.1 The process of making a declaration

This recommendation for the declaration of critical habitat has been prepared in accordance with Sections 42 and 43 of the TSC Act. This involved a public exhibition, consultation and submission period (Section 2.2) which raised issues to be considered in the finalisation of the critical habitat recommendation and associated regulations.

Sections 43-48 of the TSC Act describe the manner in which the recommendation is forwarded to the Minister for the Environment and the process by which the Minister considers the recommendation to declare the area as critical habitat.

2.2 Consultation process

In preparing this report the NPWS has undertaken a series of formal and informal consultations on behalf of the Director-General.

In 1998 a Little Penguin Recovery Team was established. The identification of critical habitat was discussed at Recovery Team Meetings 6, 7 and 8 on 23 October 2000, 11 July 2001 and 25 September 2001 respectively. The team consists of experts, government and agency representatives and a community representative from the Manly Environment Centre.

The NPWS wrote to the Scientific Committee on 16 September 2001 in accordance with s.39(1) of the TSC Act regarding the identification of critical habitat. A response was received on 3 December 2001 raising the following points which were considered in the preparation of this recommendation:

- Areas identified as critical habitat should consider resources used by the population within a catchment context, not just the area that the population occupies
- The importance of adjacent habitat to areas occupied by endangered populations

The NPWS prepared a recommendation for the identification of critical habitat, (including draft regulations and Regulatory Impact Statement), which was placed on public exhibition from 19 April to 14 June 2002, in accordance with Section 41 of the TSC Act.

As part of the consultation process, the NPWS held a number of public meetings including, a public workshop on 14 May 2002 (55 participants) and two meetings for affected property owners on 30 April 2002 (6 participants) and 22 May 2002 (12 participants). The NPWS has also consulted with the Metropolitan and Districts Professional Fisherman's Association, the Friends of Quarantine Station, the Waterways Authority Policy and Advisory Group and the Anglers Action Group.

A total of 105 submissions, including that of the Scientific Committee, were made in response to the public exhibition. Of the 105 parties sending submissions, 77 (73%) supported the recommendation for delineation of critical habitat to protect the Manly Little Penguin population. A total of 23 (22%) respondents opposed the recommendation. Five submissions (5%) took an overall neutral or non-committal stance. Further details can be found in the Little Penguin critical habitat Submission Report (NPWS 2002b).

3 Subject area of critical habitat declaration

Figure 1 shows the critical habitat for the endangered population of Little Penguins at Manly. The area has been identified based upon the biological requirements of the population and the potential impacts of known and/or suspected threats. This area has taken into account many comments raised throughout the public exhibition and consultation period. The Little Penguin critical habitat Submission Summery Report (NPWS 2002b) details the issues raised during the submission period and the NPWS response to these issues. The exhibited critical habitat recommendation (NPWS 2002a) also describes options considered in the process.

The declared critical habitat area includes known nesting burrows, possible foraging habitat (seagrass beds within Spring Cove) and identifies potential nesting areas (Dobroyd Head, Cannae Point, and parts of Little Manly Point). Critical habitat Area A starts from the eastern side of Little Manly Point and includes Collins, Store and Quarantine Beaches to the northern side of Cannae Point. Area B starts from the foreshore area at 11A Oyama Avenue, winds around Manly Point to 26 Addison Road. Potential habitat has been identified on Dobroyd Head, the southern side Cannae Point and the east and west sides of Little Manly Point.

Terrestrial areas of critical habitat include known and potential rocky foreshore nesting areas, typically situated in the first 50m from the water. In Area A, the terrestrial critical habitat boundary in Sydney Harbour National Park includes ridgetop habitat where penguins currently nest and areas of other potential 'ridgetop' nesting habitat. In Area B, the land side of the critical habitat boundary includes the area from the mean high watermark, up the rocky foreshore slope to the beginning of the 'ridgetop' in residential areas (ie the rocky foreshore upslope to the boundary of the backyard is included as critical habitat, but the backyard and residential area is not included, Figure 1).

The critical habitat includes aquatic areas (extending 50m out from the mean high water (MHW) mark) to facilitate un-restricted access for penguins to current and potential nesting areas. Parts of this zone include seagrass areas which are likely to be important foraging areas, especially during the rearing of chicks when Little Penguins are known to forage closer to nesting areas (Dan and Cullen 1989).

It is considered that the protection and maintenance of these areas in North Harbour, as identified above and in Figure 1 are essential to the population's survival and therefore constitutes critical habitat for this population. The threats outlined in Appendix 1 of this report continue to threaten the quality of the habitat features essential to the population and the declaration of these features as critical habitat should facilitate the continuing management and mitigation of these threats.

In accordance with Section 51 of the TSC Act 1995 the following regulations have been made to accompany this critical habitat declaration (Threatened Species Conservation Regulation 2002).

Area A regulations:

Regulations to prohibit activities

- No anchoring or mooring a vessel in such a way that it is within critical habitat Zone A (50m out from the MHW mark) during the Little Penguin breeding season (July 1 to 28 Feb.).

- No watercraft access (other than a non-motorised tender) in critical habitat Area A between sunset and sunrise during the Little Penguin breeding season (July 1 to 28 Feb.).
- No Companion Animals (except for Assistance animals) in critical habitat.
- No Fishing in critical habitat between sunset and sunrise during the Little Penguin breeding season (July 1 to 28 Feb.).
- No tampering with or damaging Little Penguin nest boxes, nesting burrows, moulting penguins or approaching within 5m of a Little Penguin on land.

Area B regulations

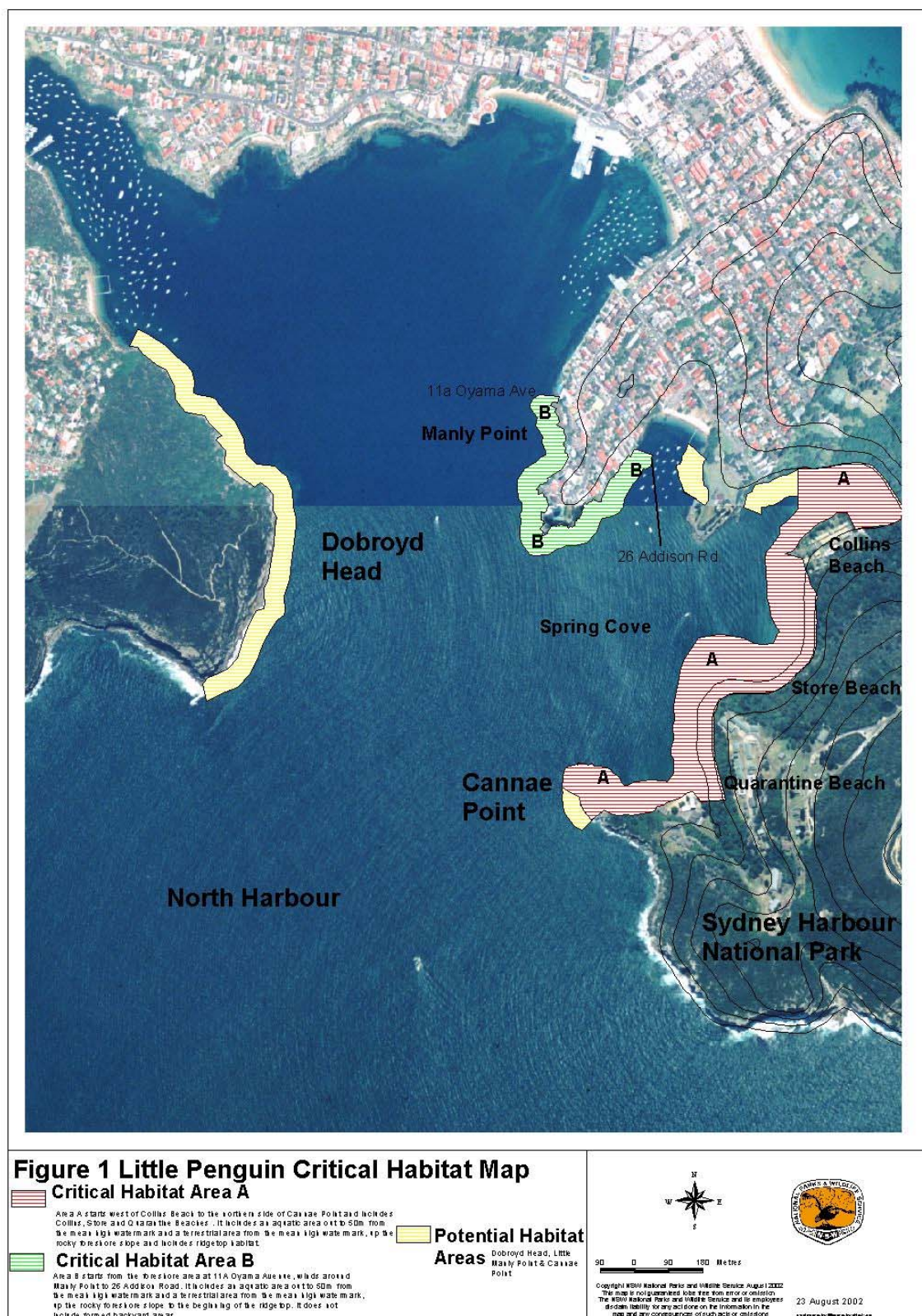
- No Companion Animals (except for Assistance animals) in critical habitat (residential backyards excluded).
- No Fishing in critical habitat between sunset and sunrise during the Little Penguin breeding season (July 1 to 28 Feb.).
- No tampering with or damaging Little Penguin nest boxes, nesting burrows, moulting penguins or approaching within 5m of a Little Penguin on land

There are no regulations that apply to potential habitat areas.

Signage to designate Critical Habitat

Signs have been placed at all access points around the declared critical habitat (Manly Point, Collins Beach, Store Beach, Quarantine Beach and Cannae Point) and foreshore access points (Oyama, Addison, Collins Beach)(Appendix 3a and b & c).

Buoy markers will be installed on the aquatic boundary during each breeding season (1 July to 28 Feb inclusive). These buoys will be removed outside of each breeding season.



4 Social and Economic Consequences of the Declaration of Critical Habitat

The TSC Act (Section 40(2)) specifies that the Director-General of National Parks and Wildlife must consider the likely social and economic consequences of making a recommendation for declaration of critical habitat by the Minister for the Environment.

In addition, Section 44(1)(a) specifies that the Minister must have regard to the likely social and economic consequences of a declaration of critical habitat and, further, the likely consequences for landholders of, or other persons having an interest in, or on lawful uses of, the land (s44(1)(b)). The Minister must also consider whether, consistent with the principles of ecologically sustainable development, the recommendation might be amended to avoid or lessen any adverse consequences of the making of a declaration of critical habitat.

The Director-General and the Minister must therefore be able to demonstrate that they have attempted to identify and consider all relevant economic and social consequences of the declaration of critical habitat. The first stage is to identify the issues, and secondly to consider the likely social and economic consequences of these issues. Finally, for those consequences determined to be significant and adverse, the Director-General must consider if there are ways to minimise these consequences.

To assist this process, all the legislative and administrative issues associated with the declaration of critical habitat have been identified within this document. For each issue the likely social and economic consequences have been identified as they relate to the declaration of critical habitat for the endangered population of Little Penguins.

4.1 Legislative and administrative consequences of declaring critical habitat

Local Environmental Plan, Regional Environmental Plan or State Environmental Planning Policy.

If land declared as critical habitat is land to which a Local Environmental Plan, Regional Environmental Plan or State Environmental Planning Policy applies, the plan must be amended by the relevant Council, and the Department of Urban Affairs and Planning in a manner that identifies the land that is declared as critical habitat.

Manly Council will be required to amend their Local Environmental Plan. PlanningNSW will be required to amend Sydney Regional Environmental Plan 23- Sydney and Middle Harbours and its Development Control Plans (22 & 23, and SEPP 56 (Sydney Harbour Foreshores and Tributaries).

Developments or activities requiring consent or approval under the Environmental Planning and Assessment Act 1979.

Developments or activities which require consent or approval under the EP&A Act which are proposed on land that is, or is part of, critical habitat, automatically require the preparation of a

species impact statement (SIS) and the concurrence of the Director-General of National Parks and Wildlife or in some cases, consultation with the Minister for the Environment.

It should be noted that the standard assessment processes under Part 4 & 5 of the EP&A Act (where an area is not declared as critical habitat) require a SIS and the concurrence of the D-G or the Minister of the Environment if a development or activity is likely to have a significant impact on an endangered species, population, or ecological community. It should also be noted that, according to s111(4) of the TSC Act, despite anything in the TSC Act or the EP&A Act (including critical habitat) the Director-General may, having regard to the circumstances of a particular case, dispense with the requirements for a SIS in the particular case if the Director-General is satisfied that the impact of the activity concerned will be trivial or negligible.

An economic consequence, which would be borne by the proponent of a proposed development or activity would be the cost and time associated with the preparation and processing of a SIS for any proposed development or activity on the site (where the impact is not trivial or negligible). This cost would vary depending on the nature of the particular development

Consent or determining authority

When a consent or determining authority is deciding whether a proposed development or activity is likely to have a significant effect on threatened species, populations or ecological communities or their habitats, it must consider whether critical habitat will be affected by the proposal. Manly Council, NSW Fisheries, the Waterways Authority and the NPWS are the consent and determining authorities for developments or activities proposed on the critical habitat.

Register of critical habitat

All consent authorities must have regard to the register of critical habitat kept by the Director-General when exercising their functions under the EP&A Act.

This register will be maintained by the NPWS Head Office and will include printed and electronic copies of critical habitat assessment reports, declarations, maps of critical habitat and other relevant material. A list of areas declared as critical habitat will be maintained on the NPWS internet website.

Section 91 Licence

A SIS must be submitted with the licence application for actions which require licensing under section 91 of the TSC Act, and which are proposed for land that is, or is part of, critical habitat. It should be noted that the standard assessment processes under section 91 of the TSC Act (where an area is not declared as critical habitat) require a SIS if an action is likely to have a significant impact on an endangered species, population, or ecological community. It should also be noted that, according to s111(4) of the TSC Act, despite anything in the TSC Act or the EP&A Act (including critical habitat) the Director-General may, having regard to the circumstances of a particular case, dispense with the requirements for a SIS in the particular case if the Director-General is satisfied that the impact of the activity concerned will be trivial or negligible.

The NPWS will undertake scientific research and management within the area identified as critical habitat, but these actions will only be undertaken if there is likely to be no adverse impacts on the critical habitat.

Public authorities

Public authorities must have regard to critical habitat if the land it owns or controls contains critical habitat. The public authority must also have regard to critical habitat when exercising its functions in relation to the land.

The relevant public authorities in relation to this declaration are the NPWS, Manly Council and the Waterways Authority.

Regulations

Regulations may be made to prohibit or regulate the carrying out of specified actions on specified critical habitat.

A regulation has been prepared to accompany this critical habitat declaration and a Regulatory Impact Statement (RIS) (Hassall Pty Ltd 2002) has also been prepared. The RIS provides a full analysis of the economic impacts of the declaration and proposed regulations to landowners and commercial private users of the area.

Restoration of critical habitat

Section 118E of the NPW Act specifies that the Court may order the offender to restore critical habitat or habitat of endangered species, populations or ecological communities. There is no additional economic consequence for any individual/s who are ordered to restore critical habitat, as restoration of habitat can currently be ordered where any individual/s damages the habitat of endangered species, populations, or ecological communities.

Damage to critical habitat

Section 118C (1) of the NPW Act states that “a person must not, by an act or an omission, do anything that causes damage to any critical habitat”. In respect to damaging critical habitat without a defence to a prosecution, the penalty is 2000 penalty units (\$220,000) or two years imprisonment or both. Section 118D (1) of the NPW Act states that “a person must not, by an act or an omission, do anything that causes damage to any habitat (other than a critical habitat) of a threatened species, population or ecological community if the person knows that the land concerned is habitat of that kind”. In respect to damaging habitat of a threatened species, population or ecological community without a defence to a prosecution, the penalty is 1000 penalty units (\$110,000) or one year imprisonment or both for damage to the habitat of a threatened species. The economic consequence of declaring critical habitat in this regard is to increase the penalty from 1000 penalty units (\$110,000) or one year imprisonment or both to 2000 penalty units (\$220,000) or two years imprisonment or both.

4.2 Social consequences

The main social impacts of this declaration will effect the local residential community and recreational users around Manly and North Harbour. The RIS (Hassall Pty Ltd 2002) contains further details on the social and economic impacts of the critical habitat declaration.

Negative social impacts may include public dissatisfaction with regulations which limit previously unregulated activities such as foreshore access, boat anchoring near penguin nesting sites and the exercising of domestic dogs (The public foreshore of critical habitat Area B is also an area nominated by Manly Council to be a Wildlife Protection Area excluding dogs and cats under the Companion Animals Act).

Public consultation with local user groups has shown a high level of reluctance by the groups to accept regulations or restrictions without strong scientific evidence of current impacts. There is a strong sense that the Spring Cove area is a “blue” park and any further restriction on uses in the area would not be favourably received.

4.3 Economic consequences

The main economic consequence for the NPWS is the resourcing of the implementation and enforcement of the critical habitat declaration and associated regulations. The enforcement of the regulations has been estimated to cost the NPWS up to \$50,000 per year in salaries and up to \$65,160 in capital costs. The installation of marker buoys in Spring Cove will cost approximately \$17,000. Ongoing maintenance of the buoys will cost \$5,000 per year, NPWS boat operation will cost \$28,160. Appropriate signage and education material will cost approximately \$15,000.

The RIS (Hassall Pty Ltd 2002) provides further detail on the economic implications to boating and fishing activities in Spring Cove and residential property values at Manly Point.

5 Value of declaration to the conservation of the species

The declaration of critical habitat for the endangered population of Little Penguins at Manly is considered to be justified for the following reasons:

1. The population is extremely small and is unlikely to survive in the long-term if threats continue,
2. The population occurs in a region which is under continual development and recreational pressure and adequate environmental assessment is essential for the population’s survival,
3. Threats such as disturbance around nest sites and predation by both companion animals and feral pests continue to impact on the population; and
4. Whilst the declaration of critical habitat for an endangered population does not afford direct additional protection or ensure appropriate ecological management, it does ensure that the possible effects of any development proposals are carefully considered, both for areas currently occupied and those areas of suitable habitat where the objective of the recovery plan proposes to increase the population through the establishment of nesting habitat in more secure areas like Sydney Harbour National Park.

While this report has been drafted to utilise, as much as possible, existing regulations (Current NSW Waterways Authority anchoring restriction in Spring Cove, proposed Manly Council Wildlife Protection Areas) additional regulations, as outlined in Section 3, will be needed to effectively implement this recommendation. It should be noted that the areas identified by the declaration and the associated regulations are likely to have social and economic impacts on users and economic impacts for agencies implementing and enforcing the regulations, as presented in Section 4 and the RIS (Hassall Pty Ltd 2002).

The declaration of critical habitat ensures the assessment of both on-site and off-site activities likely to have an adverse impact on the area critical to the survival of the population, whilst at the same time minimising unnecessary assessment.

6 Preparation Details

This report was prepared by Phil Glass and Robert Humphries, Threatened Species Unit, Central Directorate.