Threatened Species Conservation Act Statutory Review

Background Paper
Minister’s foreword

Biodiversity provides us with important economic benefits and is also a defining feature of our nation and heritage. It helps us to access clean water and air, healthy soils, food and medicinal resources; to resist disease; and to adaptively respond to threats such as climate change. Nature’s plants and animals are an intrinsic part of our land and culture and we have a responsibility and a strong interest in their conservation. Key industries, including agriculture, fisheries, biotechnology and tourism, depend on it.

Loss of biodiversity and the degradation of ecosystems are occurring globally and locally. Over 20% of the world’s mammal, reptile, bird, amphibian and fish species assessed so far have been found to be threatened with extinction.

Slowing the rate of species loss is not a simple task. In this International Year of Biodiversity, we can reflect on our achievements and renew commitments to protect biodiversity. As a state rich in natural diversity, New South Wales has a significant role to play.

Positive moves to reduce the current loss of biodiversity have been made: legislation has been passed to end broad-scale land clearing and ensure that urban planning is environmentally sound and improves or maintains biodiversity values; the area protected by national parks has been greatly expanded; and local action by community groups and individuals continues to make significant contributions.

Now we have the opportunity to think about how to deliver the best framework for conserving biodiversity for present and future generations. To this end, I encourage you to consider the role of the Threatened Species Conservation Act and contribute your ideas on how we can ensure our legislation continues to lead the way in addressing the conservation and sustainable use of biodiversity.

FRANK SARTOR
Minister for Climate Change and the Environment
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Making a submission

Submissions should be made in writing. Questions have been provided in this paper to help form the basis of submissions. However these questions are not intended to limit the scope of submissions and the Department of Environment, Climate Change and Water (DECCW) welcomes comments on any other aspect of the Threatened Species Conservation Act.

Send your submission by the closing date of **Wednesday 17 November 2010** as follows:

- by **email** to tscact.review@environment.nsw.gov.au

- by **mail** to –
  
  Threatened Species Conservation Act review
  
  Director, Landscapes and Ecosystems Conservation Branch
  
  Department of Environment, Climate Change and Water
  
  PO Box A290, Sydney South NSW 1232

Those submissions received will be used to prepare a report on the outcomes of the review which will be tabled in the NSW Parliament.

All submissions received are a matter of public record and will be available for public inspection on request to DECCW. Your comments on this background paper may contain information that is defined as ‘personal’ information under the NSW *Privacy and Personal Information Protection Act 1998*.

The submission of personal information with your comments is voluntary.
1. Introduction

Purpose of the review

This review is an opportunity to examine the Threatened Species Conservation Act 1995 (TSC Act) and develop options for enhancing the regulatory framework for conserving threatened species, populations and ecological communities of animals and plants, and their habitats in New South Wales.

Section 157 of the Act requires the Minister for Climate Change and the Environment to review the Act five years after the assent of the Threatened Species Legislation Amendment Act 2004 which occurred on 30 November 2004. The aim of the review is to determine whether:

- the policy objectives of the Act are being fulfilled
- the terms of the Act remain appropriate for securing those objectives.

Scope of the review

The review does not examine the Threatened Species Conservation Regulation 2010, the Threatened Species Conservation (Biodiversity Banking) Regulation 2008, the BioBanking Assessment Methodology or the Threatened Species Priorities Action Statement. These components of the Act are all subject to separate review processes.

About this background paper

The purpose of this paper is to encourage ideas and submissions from stakeholders about how the Act can be improved and modernised. The paper:

- explains the purpose and the process for the review
- provides an historical overview of the Act
- explains the overall scope of the TSC Act and its role in natural resource management, wildlife management and the land-use planning system
- explains key parts of the Act, including the listing process, habitat protection, threatened species recovery, regulation of impacts, strategic planning and BioBanking.

This background paper does not contain specific detail about every statutory provision of the TSC Act and is designed, along with the question boxes, to highlight some of the issues you may wish to consider. The paper and questions do not limit the scope of submissions and the Department of Environment, Climate Change and Water (DECCW) welcomes comments on any aspect of the Act.
2. The challenge

The term ‘biological diversity’ (or ‘biodiversity’ for short) encompasses the variability among living organisms including genetic diversity within species, the diversity between species and the diversity of ecosystems.

Biodiversity is the foundation of life on Earth. It is essential for our existence and contributes to the healthy ecosystems, clean air, water and healthy soils that support human life.

Jurisdictions both in Australia and internationally are committed to addressing the loss of biodiversity and promoting the sustainable use of biological resources through the implementation of effective legislation and strategies.

Without appropriate tools for managing and protecting biodiversity, important components may be lost while others are placed at risk of extinction. This erodes the ability of ecosystems to function, jeopardising the processes that all living organisms rely on for survival.

**NSW and Australian biodiversity facts**

Native vegetation provides habitat for our biodiversity and threatened species. In NSW 9% of the state’s native vegetation cover is considered to be in its original condition, 26% is significantly degraded and 52% modified, while the remainder (13%) has been replaced by non-native species.

More than 650 species of terrestrial animals have been introduced to Australia since 1788 and 29 of these are considered to pose a threat to biodiversity.

An analysis of 1650 weed species in NSW found that over 300 are likely to have significant impacts on biodiversity.

In September 2010, the NSW Scientific Committee estimated that 73 species of the state’s animals and plants were presumed extinct and 882 were under threat as follows:

- 51 were critically endangered
- 426 were endangered
- 405 were vulnerable.

Forty-three NSW populations were considered to be endangered and 95 ecological communities have been assessed as threatened.

Almost 13% of the total number of plant species in NSW is threatened and 33 species are presumed extinct.

At the national level, nearly one-fifth of Australia’s mammal species are presumed extinct, while 65% of birds have a moderate or greater risk of extinction.

The main threats to biodiversity are loss and degradation of habitat, introduction of invasive species, diseases, over-exploitation and climate change.
3. History and purpose of the TSC Act

**Objects of the Act**

The *Threatened Species Conservation Act 1995* (TSC Act) deals with the conservation of threatened species, populations and ecological communities of animals and plants. It replaced the *Endangered Fauna (Interim Protection) Act 1991*.

Compared with previous endangered species legislation, the TSC Act provides for:

- broader protection for threatened species and their habitats by extending the listing process to cover plants, invertebrates and ecological communities
- a stronger commitment to targeted recovery and threat abatement
- a market-based mechanism to encourage private sector conservation and offset development impacts
- biodiversity consideration at the early strategic stage of land-use planning and better integration with development control processes
- more effective enforcement provisions.

**Threatened species conservation framework**

The TSC Act is enabling legislation that works in conjunction with a broader legislative framework governing land-use planning, natural resource management and wildlife protection in NSW. Threatened species are protected and managed across a range of land tenures and within the wider context of land-use planning and development. Key Acts making up this framework include the:

- *Environmental Planning and Assessment Act 1979*
- *Native Vegetation Act 2003*

**Reforms to threatened species legislation**

The TSC Act came into force on 1 January 1996. Since then there have been major reforms in the way we manage natural resources and undertake planning processes. To reflect these reforms, the TSC Act has been updated by the following legislation:

- *Threatened Species Conservation Amendment Act 2002*
- *Threatened Species Legislation Amendment Act 2004*
- *Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006*
- *Threatened Species Conservation Amendment (Biodiversity Certification) Act 2010*. 

The objects of the TSC Act are:

(a) to conserve biological diversity and promote ecologically sustainable development, and

(b) to prevent the extinction and promote the recovery of threatened species, populations and ecological communities, and

(c) to protect the critical habitat of those threatened species, populations and ecological communities that are endangered, and

(d) to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities, and

(e) to ensure that the impact of any action affecting threatened species, populations and ecological communities is properly assessed, and

(f) to encourage the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management.

Source: Section 3, TSC Act
**Q1. Are the objects of the TSC Act still relevant?**

**Ecologically sustainable development**

The TSC Act integrates the principles of ecologically sustainable development in various decision-making processes, including recovery and threat abatement planning, identification and declaration of critical habitat, and licensing.

**Principles of ecologically sustainable development**

For the purposes of the TSC Act, ecologically sustainable development has the same meaning as under section 6(2) of the *Protection of the Environment Administration Act 1991*, which is as follows:

Ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

   In the application of the precautionary principle, public and private decisions should be guided by:

   (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

   (ii) an assessment of the risk-weighted consequences of various options,

(b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:

   (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

   (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

   (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

*Source: Section 6(2), Protection of the Environment Administration Act 1991*

**Q2. Does the inclusion of ecologically sustainable development in the objects of the TSC Act assist in achieving the integration of economic and environmental considerations in decision-making processes under the Act?**
4. Listing threatened species

The TSC Act allows for the listing of:
- species
- populations
- ecological communities
- key threatening processes.

The Act places a strong emphasis on an independent and scientifically based listing process. The process by which species, populations and ecological communities are listed is the foundation of threatened species legislation. Once listed, species receive a full range of regulatory protection.

Who decides a species is ‘threatened’?

A body of scientific experts, the NSW Scientific Committee, decides which species, populations, ecological communities and threatening processes should be listed.

The Committee is an independent body made up of 11 scientists from tertiary institutions, the Australian Museum Trust, Royal Botanic Gardens and Domain Trust, Ecological Society of Australia, the Entomological Society of Australia, CSIRO and Government. Members are appointed by the Minister for Climate Change and the Environment.

The Committee uses the best available scientific information relevant to assessing a species’ risk of extinction.

The Threatened Species Conservation Regulation 2010 prescribes the criteria the Committee must consider in making its decision. These are based on national practice and the International Union for Conservation of Nature’s (IUCN) ‘Red List’ criteria.

Threatened species in Australia

There is also a committee that assesses the conservation status of species and communities at a national level: the Threatened Species Scientific Committee (TSSC). The TSSC is made up of experts from across Australia who assess the status of species and recommend appropriate national status designations to the Australian Government Minister responsible for the Environment Protection and Biodiversity Conservation Act 1999 (Cwlth).

When the TSSC adds a new species or community to the national list, the NSW Scientific Committee is required to consider whether the species or community should also be listed under the TSC Act.

The NSW Scientific Committee’s responsibilities include:

- To determine:
  - which species are to be listed under this Act as threatened species,
  - which populations are to be listed under this Act as endangered populations and to advise the Director-General on the identification of their critical habitat,
  - which ecological communities are to be listed under this Act as endangered, critically endangered or vulnerable ecological communities and to advise the Director-General on the identification of their critical habitat,
  - which threatening processes are to be listed under this Act as key threatening processes
- To review draft joint management agreements and the performance of parties under executed joint management agreements
- To advise the Director-General on the exercise of the Director-General’s functions under this Act
- To advise the Minister and the NRC [Natural Resources Commission] on any matter that is referred to the Committee by the Minister or that the Committee considers appropriate.

Source: Section 128A, TSC Act
What does ‘threatened’ mean?

A species of animal or plant can be listed under the TSC Act as:

- **presumed extinct** if it has not been recorded in its known or expected habitat, despite targeted surveys, over a time frame appropriate to its life cycle
- **critically endangered** if it is facing an extremely high risk of extinction in NSW in the immediate future
- **endangered** if it is facing a very high risk of extinction in NSW in the near future
- **vulnerable** if it is facing a high risk of extinction in NSW in the medium-term future.

A population can be listed as an endangered population under the TSC Act, if it is facing a very high risk of extinction in NSW in the near future, and is not of a species that is already listed as either critically endangered or endangered.

Examples of endangered populations include the:

- emu population in the NSW North Coast Bioregion and Port Stephens local government area
- little penguin population in the Manly Point area
- long-nosed bandicoot population at North Head
- koala populations at Hawks Nest and Tea Gardens.

An ecological community can be listed as:

- **critically endangered** if it is facing an extremely high risk of extinction in NSW in the immediate future
- **endangered** if it is facing a very high risk of extinction in NSW in the near future
- **vulnerable** if it is facing a high risk of extinction in NSW in the medium-term future.

Examples of threatened ecological communities include:

- Blue Gum High Forest in the Sydney Basin Bioregion
- the shorebird community occurring on the relict tidal delta sands at Taren Point
- Lower Hunter Valley Dry Rainforest in the Sydney Basin and NSW North Coast bioregions.

Collectively the categories presumed extinct, critically endangered, endangered and vulnerable are referred to as ‘threatened’.

Steps in the listing process

Listing involves a strict legal process. It starts with a nomination – able to be made by anyone – calling for the addition or removal of a species, population, ecological community or key threatening process from the schedules of the Act.
The nomination is then considered by the NSW Scientific Committee. The Committee determines whether the nomination is valid and assesses whether the species, population, ecological community or process satisfies one or more of the criteria for listing.

The Committee then prepares a preliminary determination, stating whether or not the nomination satisfies the listing criteria. The preliminary determination is released for comment from the general public.

Following exhibition of the preliminary determination, the Committee reconsiders the nomination in light of any further evidence provided during the public comment period and makes a proposed final determination.

This is forwarded to the Minister for Climate Change and the Environment who may refer the determination back to the Committee for further consideration on scientific grounds.

The Committee then makes its final determination which cannot be vetoed by the Minister. If a listing (or delisting) proceeds it is formalised by publication in the *NSW Government Gazette*.

**Q3.** At what steps in the listing process should public comment be sought?

**Q4.** Are there opportunities to improve coordination and/or reduce duplication between the Commonwealth and NSW listing regimes?
5. Habitat protection

The loss of habitat is one of the most significant threats to biodiversity. Habitat allows a species to survive and reproduce by providing food, water and shelter. Fragmentation and degradation diminish the effectiveness of habitat to support species. To conserve biodiversity and reverse its decline, it is important to protect the habitat of those species, populations and ecological communities most at risk of extinction.

The TSC Act aims to protect habitat by:

- protecting critical habitat
- managing key threatening processes (see Section 6)
- regulating actions that impact on threatened species (see Section 7).

Identification and declaration of critical habitat

‘Critical habitat’ is described as all or any part of land that is critical to the survival of an endangered species, population or ecological community or a critically endangered species or ecological community.

When identifying and declaring critical habitat, the Director-General of DECCW consults with the NSW Scientific Committee, any affected landholders and public authorities. The Director-General and the Minister for Climate Change and the Environment also consider the likely social and economic consequences of making a declaration.

The declaration of critical habitat triggers an automatic impact assessment process if development is proposed on that land. Damaging critical habitat attracts heavy penalties.

To date, critical habitat has been declared for the following species and endangered population:

- Gould’s petrel
- Mitchell’s rainforest snail in Stotts Island Nature Reserve
- the Wollemi pine
- the little penguin population in North Sydney Harbour.

Gould’s petrel

Gould’s petrel (Pterodroma leucoptera leucoptera) is Australia’s rarest endemic seabird. The species has one significant breeding locality at Cabbage Tree Island off the NSW coast at Port Stephens. In November 2006, Cabbage Tree Island was declared to be critical habitat for the species.

Following a successful recovery and breeding program, elimination of rabbits from the island and management of other threats, including predation by pied currawong and the Australian raven and entanglement in the sticky fruits of the birdlime tree, the number of breeding pairs of petrel has increased.

In 2009, Gould’s petrel was taken off the endangered species list and is now considered to be vulnerable.

Q5. Is the current way of identifying critical habitat or other important habitat efficient and effective?
6. Threatened species recovery and threat management

Threatened species recovery refers to actions aimed at preventing further loss of a species and removing or reducing threats. Successful recovery means that a wild species will continue to survive in its natural habitat over the long term.

With an increasing number of threatened species and emerging threats such as climate change, managing the threat may be an efficient method of undertaking actions that benefit a number of species.

Priorities for species recovery

The Threatened Species Priorities Action Statement (PAS), prepared under Part 5A of the TSC Act, is the primary mechanism that sets out the actions to be adopted for the recovery of each threatened species.

The Act retains the ability to prepare single and multi-species recovery plans and threat abatement plans. The PAS provides flexibility to pursue ecosystem or broad landscape approaches to conservation and reserves single-species management for those species requiring intensive management responses, such as captive breeding or targeted predator control.

Northern Rivers Regional Biodiversity Management Plan

The Northern Rivers Region is a biologically rich part of Australia which occupies 6.3% of NSW. The region supports over 40% of the state’s threatened species, including around 70% of the frogs, 75% of the birds, 60% of the mammals and 40% of the plants under threat.

The Department of Environment, Climate Change and Water (DECCW) has prepared a draft Biodiversity Management Plan for the region. The plan identifies the threats operating across the region and recommends a range of actions to help maintain and protect biodiversity. The planning process not only includes threatened species but considers all native vegetation and ecosystems across the various land tenures within the Northern Rivers Catchment Management Authority (CMA) area.

Developed in consultation with the CMA, the Nature Conservation Trust, Commonwealth and State Government agencies, local councils, local Aboriginal land councils and community groups, the plan brings together government and non-government organisations to protect biodiversity.

Managing key threatening processes

A ‘threatening process’ is an action that threatens or has the capability to threaten the survival or evolutionary development of a species, population or ecological community. Some threatening processes (such as predation and disease) have adverse impacts on species directly while others (such as climate change and the removal of bushrock) alter their habitat and make it unsuitable for survival.

Many threatening processes affect the survival of species. The most significant of these are identified by the NSW Scientific Committee and listed as key threatening processes. At September 2010, 34 key threatening processes had been listed including:

- clearing of native vegetation
- alteration to the natural flow regimes of rivers and streams and their floodplains and wetlands
- infection of frogs by amphibian chytrid fungus
● predation by the European red fox

● invasion, establishment and spread of lantana

A full list of key threatening processes can be viewed at www.environment.nsw.gov.au/threatenedspecies/KeyThreateningProcessesByDoctype.htm

In developing an appropriate response to key threatening processes, the TSC Act, through the PAS, recognises that some processes are effectively dealt with by government policy or legislation, or by education and community involvement programs, rather than managed under a specific threat abatement plan.

**Saving the corroboree frog**

The southern corroboree frog is listed as critically endangered and has been the focus of an intensive recovery program since the early 1990s. Like many frogs around the world, the disease chytridiomycosis caused by amphibian chytrid fungus is the main reason for the decline of the species.

Efforts to control the spread of the fungus in wild populations have led to a strengthening of site hygiene protocols and increased monitoring and research.

Due to the precarious state of the corroboree frog in the wild, a captive breeding program has been in place since 1997. Animals have been kept in captivity at Taronga Zoo, the Amphibian Research Centre, Zoos Victoria and Tidbinbilla Nature Reserve.

This is a long-term program. In future, it is hoped to reintroduce the frogs back into the wild to help prevent wild populations becoming extinct.

**Q6. Are the powers under the Act effective for improving recovery on a landscape basis?**

**Q7. Are there opportunities to improve the way recovery efforts for species, populations and ecological communities are prioritised?**

**Q8. Is the framework for addressing key threatening processes effective? What improvements could be made?**
7. Regulating actions that impact threatened species

The listing of a species automatically triggers a number of prohibition and regulatory provisions. It is an offence to harm or pick a threatened species, population or ecological community, or damage its habitat without appropriate approval. In specified situations the action may be exempt from the requirement to obtain approval.

Regulation of actions with potentially harmful impacts on threatened species is governed by a number of pieces of legislation depending on the type of action, as described below.

**Threatened Species Conservation Act 1995**

*Licences and certificates* – Section 91 licences and certificates issued under Section 94 of the TSC Act authorise people to engage in an activity that may not otherwise be allowed under the Act. These approvals may authorise actions that are likely to:

- harm an animal that is from a threatened species or is part of a threatened population or ecological community
- pick any plant that is from a threatened species or is part of a threatened population or ecological community
- damage critical habitat
- damage habitat of a threatened species, population or ecological community.

*Joint Management Agreements* – The Director General of DECCW may enter into an agreement with one or more public authorities for the management, control, regulation or restriction of an action that is jeopardising the survival of a threatened species, population or ecological community.

**Joint Management Agreement for the NSW Shark Meshing (Bather Protection) Program**

Under the state’s Shark Meshing (Bather Protection) Program, Industry & Investment NSW nets 51 ocean beaches from Newcastle to Wollongong between 1 September and 30 April each year to protect public safety.

To minimise the impact of the program on marine mammals, birds and reptiles, Industry & Investment and DECCW have entered into a Joint Management Agreement.

The agreement and associated management plan outline specific measures that must be taken, including restrictions on where the program operates and timing; specifications to fishing gear including frequency of use and net setting protocols; release protocols; and monitoring and reporting requirements.
National Parks and Wildlife Act 1974

Under the provisions of the National Parks and Wildlife Act, approval for actions affecting threatened species may be granted where the action:

- is for scientific, educational or conservation purposes
- involves buying, selling or possessing threatened species
- is necessary for the welfare of an animal
- aims to protect life or property.

Exemptions

There are a number of actions that may affect threatened species that do not require approval. These include:

(a) actions that involve clearing of native vegetation that constitutes a routine agricultural management activity,
(b) an action that is a routine farming practice (other than clearing of native vegetation)
(c) an activity permitted under any of the following provisions of the Native Vegetation Act:
   (i) section 19 (Clearing of non-protected regrowth permitted),
   (ii) section 23 (Continuation of existing farming activities),
   (iii) 24 (Sustainable grazing)
(d) an action that was authorised by a property vegetation plan approved under the Native Vegetation Act
(e) an action that was essential for the carrying out of:
   (i) development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act, or
   (ii) an activity by a determining authority within the meaning of Part 5 of that Act if the determining authority has complied with that Part, or
   (iii) an activity in accordance with an approval of a determining authority within the meaning of Part 5 of that Act if the determining authority has complied with that Part, or
   (iv) a project approved under Part 3A of that Act
(f) an action that was authorised by, and done in accordance with, a conservation agreement entered into under Part 4 of the National Parks and Wildlife Act
(g) an action that was authorised by, and done in accordance with, a joint management agreement
(h) an action that was authorised to be done by or under the State Emergency and Rescue Management Act 1989 or the State Emergency Service Act 1989 and was reasonably necessary in order to avoid a threat to life or property.

Source: Part 8A, NPW Act

Native Vegetation Act 2003

Threatened species may be affected by clearing activities approved under the Native Vegetation Act.

The Act provides a regulatory regime that helps to protect the habitat of threatened species and biodiversity values by banning broadscale land clearing unless it improves or maintains environmental outcomes. A landholder wanting to clear native vegetation will require approval through either a development consent or a property vegetation plan, unless it is a permitted clearing activity or otherwise exempt from the operation of the Act.

The assessment processes established under the Act ensures that the impacts of clearing activities on threatened species are properly assessed and mitigated.

A separate licence under the TSC Act is not required for an action that was authorised by a property vegetation plan.
Environmental Planning and Assessment Act 1979

The Environmental Planning and Assessment Act is the principal legislation regulating land-use planning and development in NSW. The Act establishes a regulatory regime for assessing the impacts of development on threatened species.

Developments and activities proposed under Parts 4 and 5 of the Act which are on land that is critical habitat, or which are likely to significantly affect threatened species, must have a species impact statement and require the concurrence of the Director General of DECCW.

In deciding whether there is likely to be a significant effect on a threatened species, the matters specified in section 5A of the Act (the ‘7-part test’) must be taken into account.

Environment Protection and Biodiversity Conservation Act 1999 (Cwlth)

Administered by the Australian Department of Sustainability, Environment, Water, Population and Communities, the Environment Protection and Biodiversity Conservation Act provides for the protection of matters of national environmental significance. The Act contains provisions for the protection of nationally listed threatened species and ecological communities through:

- development controls, which stipulate that actions likely to have a significant impact on a threatened species or ecological community listed under the Act require approval by the Federal Environment Minister in addition to any relevant state approvals
- preparation of conservation advice and/or national recovery plans
- identification of key threatening processes and preparation of threat abatement plans.

The ‘7-part test’

(a) in the case of a threatened species, whether the action proposed is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction,

(b) in the case of an endangered population, whether the action proposed is likely to have an adverse effect on the life cycle of the species that constitutes the endangered population such that a viable local population of the species is likely to be placed at risk of extinction,

(c) in the case of an endangered ecological community or critically endangered ecological community, whether the action proposed:
   (i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or
   (ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction,

(d) in relation to the habitat of a threatened species, population or ecological community:
   (i) the extent to which habitat is likely to be removed or modified as a result of the action proposed, and
   (ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and
   (iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species, population or ecological community in the locality,

(e) whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan,

(f) whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process.

Source: Section 5A, EP&A Act
Some animal and plant species and ecological communities that occur in NSW may also be listed as threatened under the Act. These species and communities are protected under both State and national laws. Examples include:

- green and golden bell frog
- grassland earless dragon
- spotted-tailed quoll
- regent honeyeater
- Mitchell’s rainforest snail
- Illawarra greenhood orchid
- Cumberland Plain woodland.

Q9. Should listings in different categories trigger different regulatory responses?
Q10. How should the TSC Act interact with state laws on land-use planning, development control and natural resource management?
Q11. Does the '7-part test' operate effectively in practice? If you think that there should be changes to the test, what should they be?
Q12. What opportunities exist to improve interactions between NSW and Commonwealth legislation relating to threatened species protection?
8. Strategic planning for biodiversity conservation

Promoting biodiversity conservation in a state with a growing population’s increasing demands for urban expansion and associated infrastructure is a significant challenge.

The biodiversity certification provisions established under Part 7AA of the TSC Act seek to protect biodiversity on a landscape scale by delivering land-use planning and conservation outcomes that will endure for the long term.

Amendments to the TSC Act in June 2010 strengthened the legal framework for biodiversity certification. The amendments established new arrangements for the biodiversity certification of land, including improved enforcement and compliance. The amendments retained the high environmental standard that biodiversity values must be improved or maintained. Improving or maintaining biodiversity values means avoiding areas of high biodiversity conservation value and offsetting impacts in other areas. Impact and offset requirements are measured using an Assessment Methodology.


Biodiversity certification of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006

In December 2007, biodiversity certification was conferred on the State Environmental Planning Policy (Sydney Region Growth Centres) 2006. The SEPP establishes the broad framework for development of two designated growth centres in north-west and south-west Sydney. It will see the development of an estimated $7.5 billion of infrastructure, including roads, rail, bus networks, educational and health services, linked to the staged release of land for new homes over the next 30 years.

Almost 2000 hectares of significant high quality native vegetation will be protected in the growth centres. The establishment of a $530-million Conservation Fund will see further protection of high conservation value areas both within and outside the growth centres.

Established as part of the biodiversity certification process, the Growth Centres Biodiversity Offset Program aims to permanently protect some of the best remaining bushland in western Sydney and surrounding regions. Through the program, DECCW has purchased a significant new public reserve at Cranebrook in western Sydney. The 181-hectare property is of high conservation value which supports a diverse range of native flora and fauna species and their associated habitats.

The program has also funded the state’s first BioBanking conservation site at Douglas Park in south-west Sydney (see Section 9 for more details).

Q13. Does the TSC Act provide adequate incentive for strategic planning?
Q14. What opportunities exist to improve coordination of strategic processes under NSW and Commonwealth legislation?
9. BioBanking

The Biodiversity Banking and Offsets Scheme (‘BioBanking’) ensures that any development approved under the scheme improves or maintains biodiversity values. BioBanking provides a market-based approach under which biodiversity is valued and developers can fulfil offsetting obligations by buying ‘credits’ from landowners managing their land for conservation. The scheme provides the potential for lower cost, high value protection of biodiversity with the opportunity for land managers to achieve ongoing funding for biodiversity protection on their land.

The scheme requires developments to meet the highest environmental standard to protect biodiversity by ensuring they improve or maintain biodiversity values. It backs this up through a robust and transparent assessment process.

Embedded within the BioBanking Assessment Methodology is a hierarchy for minimising environmental harm:

- firstly – avoid
- then – mitigate
- finally – offset.

Under the scheme, areas of high conservation value are identified as ‘red flag areas’ and must be avoided. Impacts in other areas that cannot be avoided or mitigated must be offset.

A separate DECCW program – LandAlive – assists Aboriginal communities to consider biobanking opportunities on their land. LandAlive offers assistance to map and assess the biodiversity of Aboriginal-owned land, advice on participating in the BioBanking Scheme and assistance in developing land management plans.

For more on how the BioBanking Scheme operates go to www.environment.nsw.gov.au/biobanking/

First BioBanking Agreement

An 80-hectare site at Douglas Park in south-west Sydney is the first area to be covered by a biobanking agreement under the BioBanking Scheme. More than 85% of the property, owned by the Missionaries of the Sacred Heart, is covered by two threatened ecological communities: Cumberland Plain Woodland (36 ha) and Shale Sandstone Transition Forest (33 ha).

Securing this land is a major part in conservation efforts to recover these ecological communities with less than 1% of the pre-1750 area of each community currently in formal conservation reserves.

The site is also home to a number of threatened species including Cumberland land snail, grey-headed flying-fox, large-eared pied bat and little lorikeet.

Q15. Do you have comments on the operation of the BioBanking Scheme including how it engages with both landholders and developers?
10. Biodiversity Strategy

The need for shared responsibility, coordination and partnerships among all levels of
government, conservation groups, industry, and the broader community is vital if we are
going to reverse the current trend in biodiversity loss.

The preparation of a NSW Biodiversity Strategy is a statutory requirement under Part 9 of the
TSC Act. The Act gives joint responsibility to the Directors-General administering the TSC
Act and the Fisheries Management Act 1994 to prepare or review the Biodiversity Strategy.

NSW published a Biodiversity Strategy in 1999 which created a framework for government
agencies, local communities, researchers and industry to work together to reverse the trend in
biodiversity loss. However, biodiversity continues to decline and emerging threats require us
to reconsider how and where we focus our conservation efforts.

A new Biodiversity Strategy for NSW

Consultation on a new approach to the NSW Biodiversity Strategy occurred during 2009. Key
issues and themes that have been identified for future strategies include:

- encouraging investment in biodiversity conservation through prioritisation
- supporting whole-of-landscape approaches to planning for biodiversity and integration into
the planning system
- improving partnerships and engagement to deliver biodiversity outcomes
- building healthier ecosystems through active management of threats
- promoting biodiversity outcomes as integral to sustainable production environments.

Q16. What are the most important things for future biodiversity strategies to focus on?
Q17. How can a Biodiversity Strategy empower others to act beyond the regulatory minimum
established by the TSC Act?
11. Advisory councils

Part 9A of the TSC Act provides for the establishment of a Biological Diversity Advisory Council and a Social and Economic Advisory Council.

The Act sets out the expertise required by members of each council and provides for the Minister to determine the membership and terms and conditions of appointment of members of the councils.

The Biological Diversity Advisory Council and Social and Economic Advisory Council are not currently operational.

The NSW Government has established a number of other bodies to advise on specific matters including the:

- Natural Resources Advisory Council
- BioBanking Ministerial Reference Group
- NSW Climate Change Council
- NSW Council on Environmental Education

**Biological Diversity Advisory Council**

The Biological Diversity Advisory Council has the following functions:

- provide advice to the Minister, the Director-General and the Natural Resources Commission on 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
- provide advice on any other matter referred to it by the Minister, the Director-General and the Natural Resources Commission.

*Source: Section 141B, TSC Act*

**Social and Economic Advisory Council**

The Social and Economic Advisory Council has the following functions:

- provide advice to the Minister, the Director-General and the Natural Resources Commission on 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
- provide advice on any other matter referred to it by the Minister, the Director-General and the Natural Resources Commission.

*Source: Section 141C, TSC Act*

**Q18.** Given the existence of various other advisory bodies, are the roles of the Biological Diversity Advisory Council and Social and Economic Advisory Council still relevant?