



New South Wales

# Biodiversity Conservation Bill 2016

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.  
The *Local Land Services Amendment Bill 2016* is cognate with this Bill.

## Overview of Bill

The purpose of this Bill is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development.

This Bill, together with the cognate *Local Land Services Amendment Bill 2016*, is proposed to be enacted in response to the Final Report of the Independent Biodiversity Legislation Review Panel provided to the Minister for the Environment on 18 December 2014. Public consultation drafts were released on 3 May 2016 with a range of explanatory and other related material that can be accessed at [www.landmanagement.nsw.gov.au](http://www.landmanagement.nsw.gov.au). This Bill and the cognate Bill have been revised following consideration of submissions made in response to the consultation drafts.

This Bill repeals the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001* and the provisions relating to animals and plants in the *National Parks and Wildlife Act 1974*. The *Local Land Services Amendment Bill 2016* repeals the *Native Vegetation Act 2003*.

## Outline of provisions

### Part 1 Preliminary

**Part 1** contains preliminary provisions, including specifying particular aspects of the purpose of the proposed Act, such as conserving biodiversity at bioregional and State scales, maintaining the diversity and quality of ecosystems and enhancing their capacity to adapt to change and provide for the needs of future generations, improving, sharing and using knowledge (including local and

traditional Aboriginal ecological knowledge) about biodiversity conservation, supporting biodiversity conservation in the context of a changing climate and supporting, collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions.

**Part 1** provides that the proposed Act does not apply to fish and marine vegetation and contains definitions of terms used in the proposed Act. **Biodiversity** is defined as the variety of living animal and plant life from all sources, and so as to include diversity within and between species and diversity of ecosystems, and **biodiversity values** is defined to mean vegetation integrity, habitat suitability and additional biodiversity values prescribed by the regulations. **Protected animals** and **protected plants** are defined as the native species listed in the relevant Schedules to the proposed Act (some but not all threatened species are also protected animals or plants).

## Part 2 Protection of animals and plants

**Division 1** makes it an offence for a person to:

- (a) harm animals of a threatened species or part of a threatened ecological community or that are protected animals, or
- (b) pick plants of a threatened species or part of a threatened ecological community or that are protected plants, or
- (c) damage a declared area of outstanding biodiversity value or knowingly damage the habitat of a threatened species or threatened ecological community, or
- (d) buy, sell, trade, import or export native (or threatened species of) animals or plants, or
- (e) liberate animals in New South Wales without authority.

The Division sets out the maximum penalty for each such offence. Proposed Part 13 provides for the civil enforcement of the requirements established by the proposed Division.

**Division 1** also enables the regulations to make provision for the protection, care or preservation of marine mammals, including prohibiting or regulating approaching a marine mammal any closer than the prescribed distance or interfering with marine mammals.

**Division 2** establishes defences to prosecutions for any of the offences under Division 1, including that the act that constitutes the offence is authorised under certain other legislation (such as planning legislation and legislation authorising the clearing of native vegetation), is authorised by the regulations (including codes of practice) or is authorised by a biodiversity conservation licence.

**Division 3** provides for the Environment Agency Head to grant biodiversity conservation licences that authorise the doing of an act that would otherwise constitute an offence under the proposed Act.

**Division 4** continues the existing provision that a protected animal is, until lawfully captured or killed, deemed to be the property of the Crown. The Division also provides that the regulations may amend or substitute Schedule 5 (Protected animals) or Schedule 6 (Protected plants) or make provision about the regulation or welfare of protected animals or the regulation of protected plants.

## Part 3 Areas of outstanding biodiversity value

**Part 3** provides for the Minister to declare any area to be an area of outstanding biodiversity value if the Minister is of the opinion that the area is important at a state, national or global scale, and makes a significant contribution to the persistence of multiple species or at least one threatened species or ecological community, of irreplaceable biological distinctiveness, of ecological processes or ecological integrity or of outstanding ecological value for education or scientific research.

The proposed Part also specifies the procedural requirements before a declaration is made (including requirements about public consultation), the requirements following the declaration, and the procedure for the amendment or revocation of declarations. It provides that the regulations

may make provision for or with respect to the protection of declared areas of outstanding biodiversity value.

## **Part 4 Threatened species and threatened ecological communities**

**Division 1** provides a definition of *listing*.

**Division 2** provides for the identification and classification of species and ecological communities as critically endangered, endangered or vulnerable, specifies the eligibility criteria for their listing in Schedule 1, 2 or 3 to the proposed Act and provides for the regulations to prescribe further criteria.

**Division 3** describes the procedure by which the species and ecological communities may be added to or omitted from the lists in Schedule 1, 2 or 3 (including for public participation in that procedure). The procedure involves the making of a determination by the Scientific Committee on the Committee's own initiative, following a request from the Minister, following a nomination by any person or following an assessment by the Commonwealth or another State or Territory under a common assessment method agreed between the jurisdictions.

**Division 4** describes the procedure by which species may be provisionally listed by the Scientific Committee as endangered or critically endangered, on an emergency basis, before the formal listing process described in Division 3 has been undertaken or completed.

**Division 5** describes the eligibility criteria for the listing by the Scientific Committee of key threatening processes in Schedule 4 and applies the procedure set out in Division 3 to the listing of those threatening processes.

**Division 6** requires the Environment Agency Head to establish a Biodiversity Conservation Program the objectives of which are to maximise the long-term security of threatened species and threatened ecological communities in nature, and to minimise the impacts of key threatening processes on biodiversity and ecological integrity.

**Division 7** establishes the Threatened Species Scientific Committee, and describes its functions and membership.

## **Part 5 Investment Strategy and private land conservation agreements**

**Division 1** requires the Minister to make and publish a Biodiversity Conservation Investment Strategy, in particular for the purpose of guiding the Government and the Biodiversity Conservation Trust in prioritising investment in biodiversity conservation. As part of the Strategy, the Minister is to map all public and private land areas in the State whose biodiversity is protected by legislation or agreements and to make the map publicly available.

**Division 2** provides that the Minister may (in connection with the biodiversity offsets scheme) enter into a biodiversity stewardship agreement relating to land with all the owners of the land for the purpose of establishing a biodiversity stewardship site (biodiversity credits are thereby created for the scheme and funding provided for management actions that preserve the site). The Division makes provision for the entering into, duration and variation of those agreements. An agreement that is registered by the Registrar-General will be binding on the successors in title to the owners who entered into the agreement.

**Division 3** provides that the Biodiversity Conservation Trust may enter into a conservation agreement relating to land with the owner of the land for the purpose of conserving or studying the biodiversity of the land.

**Division 4** provides that the Biodiversity Conservation Trust may enter into a wildlife refuge agreement relating to land with the owner of the land for similar purposes but with fewer restrictions on the termination of the agreement.

## Part 6 Biodiversity offsets scheme

**Part 6** establishes the biodiversity offsets scheme under the proposed Act and related planning and native vegetation management legislation. The scheme has the following key elements:

- (a) The establishment of biodiversity stewardship sites on land by means of biodiversity stewardship agreements entered into between the Minister and the owners of the land concerned. Management actions will be required to be carried out on the sites by the owners under those agreements and will be funded from the Biodiversity Stewardship Payments Fund.
- (b) The creation of biodiversity credits in respect of those management actions to be held initially by the owners of those sites following a report by an accredited person on the biodiversity value of those management actions.
- (c) A system for those biodiversity credits to be traded (and thereby enable them to be acquired by developers or other persons who have an obligation to retire biodiversity credits under the scheme). When those credits are first transferred (or retired by the owners of the sites without being first transferred), the Biodiversity Stewardship Payments Fund is to be reimbursed for the payments to be made in future to fund the required management actions on the site that enabled the creation of those credits.
- (d) In relation to proposed development above a threshold prescribed by the regulations under the proposed Act or proposed clearing of native vegetation not authorised without approval—biodiversity assessment and reports by accredited persons about the biodiversity values of the land concerned and the impacts on those values of the proposed development or clearing, and of the biodiversity conservation measures (including the retirement of biodiversity credits) proposed to offset the residual impact on biodiversity values after action that is required to be taken to avoid or minimise the impact. Those biodiversity assessment reports are to be taken into consideration in the determination under relevant legislation of the grant of (and biodiversity conservation actions required under) planning approvals for the proposed development or vegetation clearing approvals for the proposed clearing.
- (e) In relation to environmental impact assessment of proposed activities under Part 5 of the *Environmental Planning and Assessment Act 1979*—the option for proponents of those activities to use those biodiversity assessment reports and offsetting measures to comply with their obligations under that Part.
- (f) In relation to future development in an area—biodiversity assessment and reports by accredited persons about the area and biodiversity certification of that part of the area where future development may be carried out without further biodiversity impact assessment. The impact on biodiversity values of the clearing of native vegetation and the loss of habitat in the area of future development is to be offset by the retirement of biodiversity credits or other conservation measures in connection with the remainder of the area or other areas (or both).
- (g) As an alternative to any requirement under the scheme to retire biodiversity credits—the payment into the Biodiversity Conservation Fund of an amount equivalent to the cost of acquiring those credits determined in accordance with an offsets payment calculator. The Biodiversity Conservation Trust will be under an obligation to later secure biodiversity offsets from the money paid into the Fund.
- (h) The establishment of a biodiversity assessment method for use by accredited persons in biodiversity assessments and reports under the scheme.
- (i) The determination in accordance with principles prescribed by the regulations under the proposed Act of serious and irreversible impacts on biodiversity values. The determination of such an impact by the relevant decision-maker will prevent the grant of planning approval for proposed development, but the determination will only be required to be taken into consideration in the case of State significant development or infrastructure, in the case

of environmental impact assessment of certain proposed activities or in the case of proposals for the biodiversity certification of land.

**Division 1** makes general provision for the biodiversity offsets scheme, including specifying that the impacts on biodiversity values that are subject to assessment and offset under the scheme are the impacts of the clearing of native vegetation and the loss of habitat and any impacts of action that are prescribed by the regulations and listing the biodiversity conservation measures required to offset or compensate for impacts on biodiversity values after any steps taken to avoid or minimise those impacts (namely, the retirement of biodiversity credits and other actions that benefit the biodiversity values of the impacted land or other biodiversity values). The Division also provides for the determination of serious and irreversible impacts on biodiversity values for the purposes of the scheme in accordance with the regulations.

**Division 2** provides that the Minister may establish a biodiversity assessment method in connection with the scheme (including for the purpose of the assessment of the impact on biodiversity values under proposed Part 7 relating to planning assessments of proposed development that is not subject to offsets under the biodiversity offsets scheme). The Division specifies the matters to be dealt with by the method and provides for the accreditation by the Environment Agency Head of persons who apply the biodiversity assessment method for the purposes of preparing biodiversity assessment reports.

**Division 3** provides for the making of biodiversity assessment reports (including biodiversity stewardship site assessment reports, biodiversity development assessment reports and biodiversity certification assessment reports).

**Division 4** provides for the creation and transfer of biodiversity credits. The Division requires payment to be made into the Biodiversity Stewardship Payments Fund before the first transfer of a biodiversity credit is registered and specifies the grounds for cancellation or suspension of a biodiversity credit and for appeals against certain decisions about biodiversity credits.

**Division 5** provides for the retirement of biodiversity credits on the application of their holder and for deferred credit retirement arrangements in relation to a requirement to retire biodiversity credits under the proposed or any other Act.

**Division 6** provides for the making of payments into the Biodiversity Conservation Fund as an alternative to retirement of biodiversity credits and imposes a corresponding obligation on the Biodiversity Conservation Trust to apply the amount paid towards securing biodiversity offsets. The Division also provides for the calculation of the amount payable as alternative to retiring credits and for its payment and verification.

**Division 7** provides for the establishment and management of the Biodiversity Stewardship Payments Fund and for the functions, and reporting and other obligations, of the Fund Manager (which will be the Biodiversity Conservation Trust unless another Fund Manager is appointed).

**Division 8** provides for the recovery of the costs of administering the biodiversity offsets scheme from participants in the scheme, who are required to make contributions into the Biodiversity Stewardship Operations Account established by the proposed Division.

## **Part 7 Biodiversity assessment and approvals under Planning Act**

**Part 7** contains provisions for biodiversity assessment of applications for consent or approvals under the *Environmental Planning and Assessment Act 1979* as a result of the introduction of the biodiversity offsets scheme and the transfer of terrestrial threatened species assessment provisions from that Act to the proposed Act.

**Division 1** defines when a development or an activity is *likely to significantly affect threatened species* for the purposes of the proposed Part and specifies the tests for determining whether any proposed development or activity is likely to significantly affect threatened species. The Division provides that the regulations may declare when proposed development exceeds the biodiversity offsets scheme threshold and is thereby development that is likely to significantly affect threatened species for the purposes of the proposed Part.

**Division 2** specifies the requirements for biodiversity assessment for applications for development consent under Part 4, environmental assessment of an activity under Part 5, or approval of State significant infrastructure under Part 5.1, of the *Environmental Planning and Assessment Act 1979*. Generally, development that is likely to significantly affect threatened species is required to be accompanied by a biodiversity development assessment report. For Part 5 assessment, the proponent of an activity that is likely to significantly affect threatened species will have the option of providing a biodiversity development assessment report or a species impact statement.

**Division 3** requires a Minister who is determining an application for development consent, or approval of an activity that requires environmental impact assessment, under the *Environmental Planning and Assessment Act 1979* to consult the Minister administering the proposed Act if the development or activity is likely to significantly affect threatened species. The Division also requires a consent or determining authority to obtain the concurrence of the Environment Agency Head if the proposed development or activity is likely to significantly affect threatened species. Consultation or concurrence is not required in certain cases if a biodiversity development assessment report is submitted and a requirement to retire biodiversity credits specified in the report is imposed. The Division does not apply to applications for State significant development or infrastructure.

**Division 4** deals with biodiversity assessment under the *Environmental Planning and Assessment Act 1979* where the biodiversity offsets scheme applies. Generally, consent authorities and (where applicable) determining authorities are to take into consideration under that Act the likely impact of the proposed development or activity on biodiversity values, as assessed in the biodiversity development assessment report. The operation of the Division is described in the outline of the key elements of the biodiversity offsets scheme referred to above in relation to proposed Part 6.

**Division 5** makes provision for the form and content of species impact statements for the purposes of the proposed Part and provides for additional requirements to be imposed by the Environment Agency Head in relation to a particular statement.

## **Part 8 Biodiversity certification of land**

**Division 1** contains definitions for the purposes of the proposed Part.

**Division 2** provides for the Minister to make orders conferring biodiversity certification on land. The biodiversity certification results in the displacement of environmental assessment requirements under the *Environmental Planning and Assessment Act 1979* in connection with the development of the biodiversity certified land. Biodiversity certification orders are to specify approved measures to offset the impacts on biodiversity values of the clearing of native vegetation and the loss of habitat on the biodiversity certified land. The Division deals with applications for biodiversity certification, including the provision of a biodiversity certification assessment report under the biodiversity assessment method and public consultation.

**Division 3** provides for the duration, extension and review of biodiversity certification.

**Division 4** provides for the enforcement by the Minister of approved conservation measures and other measures.

**Division 5** provides that the Minister may enter into a biodiversity certification agreement with a person in connection with biodiversity certification and that any such agreement that is registered by the Registrar-General is binding on, and is enforceable against, the owner of the land from time to time.

**Division 6** provides for the suspension, revocation and modification of certification and appeals against such actions.

**Division 7** provides for the notification of certification and changes to certification, disputes between parties to a biodiversity certification and the Minister, and other matters.

## Part 9 Public consultation and public registers

**Division 1** contains provisions about how public consultation is to be undertaken for proposed instruments for which the proposed Act requires consultation.

**Division 2** requires the keeping of public registers (to be made available on government websites) of certain matters under the proposed Act, including registers of biodiversity conservation licences, declarations of areas of outstanding biodiversity value, private land conservation agreements, biodiversity credits and orders conferring biodiversity certification.

## Part 10 Biodiversity Conservation Trust

**Division 1** establishes the Biodiversity Conservation Trust as a NSW Government agency, the object of which is to protect and enhance biodiversity and the functions of which include negotiating, entering into and administering private land conservation agreements, providing assistance to planning authorities in connection with applications for the biodiversity certification of land, managing and controlling the Biodiversity Conservation Fund and the Biodiversity Conservation Trust Public Fund and providing public education on issues of conservation, land management and ecological sustainability.

**Division 2** establishes the Biodiversity Conservation Fund (which will fund the functions of the Biodiversity Conservation Trust) and provides for its management and control by the Trust.

**Division 3** continues the Biodiversity Conservation Trust Public Fund of the Nature Conservation Trust, a not-for-profit fund the proceeds of which may be used by the Trust only for its principal purpose (to protect and enhance biodiversity).

## Part 11 Regulatory compliance mechanisms

**Part 11** creates regulatory mechanisms to assist in ensuring compliance with the proposed Act and Part 5A of the *Local Land Services Act 2013*.

**Division 2** enables the Environment Agency Head to make a stop work order if any action is being, or is about to be, carried out (or if any action that should be carried out is not being carried out) in any area of land that is likely to result in a contravention of the proposed Act or Part 5A of the *Local Land Services Act 2013*.

**Division 3** enables the Minister to make interim protection orders, on the recommendation of the Environment Agency Head, in respect of an area of land that has natural or scientific significance, or in which the Agency Head intends to exercise functions under the proposed Act in relation to animals or plants.

**Division 4** enables the Environment Agency Head to make orders for remediation work relating to damage to certain land, habitat, plants or animals as a result of the commission of an offence against the proposed Act or a native vegetation offence. The Division provides that if a person fails to comply with a remediation order, the Environment Agency Head may authorise any other person to enter the land and carry out work and the Environment Agency Head may recover the cost of that remediation work from the person given the remediation order.

**Division 5** provides for the Minister to make an order requiring a biodiversity stewardship site owner to retire biodiversity credits, if satisfied that, because of any act or omission by the person, biodiversity credits were created in respect of a management action that is not carried out in accordance with the relevant biodiversity stewardship agreement. The Minister can also make an order requiring the owner of a biodiversity stewardship site to rectify any breach of a biodiversity stewardship agreement.

**Division 6** provides for an authorised officer to give a direction to a person to stop an activity that is causing or likely to cause distress to protected animals or give a direction to a person who keeps protected animals in confinement or in a domesticated state to take appropriate action with respect to the feeding, shelter or other welfare of the protected animals.

## Part 12 Investigation powers

**Division 1** provides that the purposes for which the investigation powers in the proposed Part may be exercised include determining whether there has been compliance with the proposed Act (including compliance with the regulations, a biodiversity conservation licence or a private land conservation agreement) or with proposed Part 5A of the *Local Land Services Act 2013* (including the regulations under that Part, land management (native vegetation) codes, certificates or approvals), or with the approved conservation or other measures under biodiversity certification or biodiversity offset obligations under the biodiversity offsets scheme.

**Divisions 2–6** contain provisions (similar to those applying to the Environment Protection Authority) for the appointment of authorised officers, powers to require information and records, powers of entry and search of premises, powers to question and identify persons and offences for failing to comply with any lawful requirement, providing false or misleading information and delaying, obstructing, assaulting, threatening or abusing authorised officers.

**Division 7** includes special provisions relating to native vegetation clearing enforcement (including requiring approval of the Environment Agency Head for entry into land and for attendance to answer questions and preserving the privilege against self-incrimination whether or not objection is made).

## Part 13 Criminal and civil proceedings

**Division 1** provides for the various tiers of maximum monetary penalties for offences under the proposed Act, the conduct of proceedings for offences, the issue of penalty notices, liability of directors and other officers for offences by corporations, continuing offences and matters to be taken into consideration in sentencing for offences. The provisions relate to offences under the proposed Act and native vegetation offences under proposed Part 5A of the *Local Land Services Act 2013*.

**Division 2** provides that any person may bring civil proceedings in the Land and Environment Court to remedy or restrain a breach of the proposed Act, proposed Part 5A of the *Local Land Services Act 2013* or a biodiversity stewardship agreement. The Minister also has the power to bring civil proceedings for enforcement of biodiversity certification agreements.

**Division 3** provides for the making of ancillary orders by a court that finds an offence against the proposed Act or a native vegetation offence proven. Those orders include orders for restoration and prevention (including to prevent, control, abate or mitigate any damage to animals or plants, or their habitat, caused by the commission of the offence, to make good any resulting damage to animals or plants or their habitat, or to prevent the continuance or recurrence of the offence) and orders to recover certain costs, expenses and compensation and to recoup monetary benefits.

**Division 4** provides for the Environment Agency Head to accept and enforce voluntary undertakings in connection with matters in relation to which the Agency Head has a function under the proposed Act, including undertakings to carry out a restorative justice activity.

**Division 5** contains evidentiary provisions.

## Part 14 Miscellaneous

**Part 14** contains the following provisions:

- (a) the establishment of a Biodiversity Conservation Advisory Panel, the functions of which are to advise the Minister on matters relating to the management of biodiversity conservation and to advise the Environment Agency Head on any proposed declaration of an area of outstanding biodiversity value,
- (b) the obligation of the Environment Agency Head to establish programs for the collection, monitoring and assessment of information on biodiversity,
- (c) the clarification of the species that are respectively regulated under the proposed Act and the *Fisheries Management Act 1994*,



- (d) ensuring that the proposed Act does not affect the operation of legislation about the recognition of native title rights and interests,
- (e) standard miscellaneous provisions about the proposed Act binding the Crown, the delegation of functions by the Minister or Environment Agency Head, the exclusion of personal liability of relevant agencies and officials, the recovery, refund or waiver of fees and other charges, the service of documents, the making of regulations and the review of the proposed Act after 5 years.

## Schedules

**Schedule 1** lists threatened species, namely critically endangered species, endangered species and vulnerable species.

**Schedule 2** lists threatened ecological communities, namely critically endangered ecological communities, endangered ecological communities and vulnerable ecological communities.

**Schedule 3** lists extinct species, species extinct in the wild and collapsed ecological communities.

**Schedule 4** lists key threatening processes.

**Schedule 5** lists protected native animals (some of which may also be a threatened species or a part of a threatened ecological community).

**Schedule 6** lists protected native plants (some of which may also be a threatened species or a part of a threatened ecological community).

**Schedule 7** provides for the members and procedure of the Threatened Species Scientific Committee.

**Schedule 8** provides for the members and procedure of the Board of the Biodiversity Conservation Trust.

**Schedule 9** contains savings, transitional and other provisions consequent on the enactment of the proposed Act and the proposed *Local Land Services Amendment Act 2016* (which repeals the *Native Vegetation Act 2003*).

**Schedule 10** repeals the *Threatened Species Conservation Act 1995* and the regulations made under that Act as well as the *Nature Conservation Trust Act 2001*.

**Schedule 11** makes consequential amendments to Acts and instruments, including the following:

- (a) the *Environmental Planning and Assessment Act 1979* (generally omits biodiversity provisions that are to be transferred to Part 7 of the proposed Act and to the *Fisheries Management Act 1994*),
- (b) the *Fisheries Management Act 1994* (generally inserts those transferred planning provisions to maintain existing arrangements relating to threatened species of fish and marine vegetation),
- (c) the *Forestry Act 2012* (generally inserts provisions relating to private native forestry currently dealt with by property vegetation plans under the *Native Vegetation Act 2003*),
- (d) the *Land and Environment Court Act 1979* (generally makes consequential amendments),
- (e) the *National Parks and Wildlife Act 1974* (generally omits provisions relating to the protection of native animals and plants outside the park system that are to be transferred to Part 2 of the proposed Act),
- (f) the *Protection of the Environment Administration Act 1991* (amends the definition of ***the principles of ecologically sustainable development*** to require that social considerations (along with economic and environmental considerations) are effectively integrated in decision-making processes).