

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the Threatened Species Conservation Act 1995 (the principal Act) to establish new arrangements for the biodiversity certification of land.

Under the new arrangements, the Minister administering the Threatened Species Conservation Act 1995 (the Minister) may, on application by a planning authority, confer biodiversity certification on specified land. The effect of biodiversity certification is as follows:

(a) the environmental assessment requirements for the approval of a project, or a concept plan for a project, under Part 3A of the Environmental Planning and Assessment Act 1979 (the Planning Act) do not require an assessment of the impact of the project on biodiversity values if the project is carried out or proposed to be carried out on biodiversity certified land,

(b) development on biodiversity certified land is taken, for the purposes of Part 4 of the Planning Act, to be development that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat,

Explanatory note page 2

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

(c) an activity to which Part 5 of the Planning Act applies which is carried out or proposed to be carried out on biodiversity certified land is taken, for the purposes of Part 5 of the Planning Act, to be an activity that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat,

(d) the Native Vegetation Act 2003 does not apply to the biodiversity certified land.

The Minister may confer biodiversity certification only if the planning authority has a biodiversity certification strategy, which is a policy or strategy for the implementation of conservation measures that ensure that the overall effect of biodiversity certification is to maintain or improve biodiversity values.

The Bill also makes provision for the following matters, which are explained in more detail below:

(a) the establishment of a biodiversity certification assessment methodology (the methodology will set out the rules that are to be used as the basis for assessing whether biodiversity certification improves or maintains biodiversity values),

(b) the enforcement of conservation measures against parties who agree to the biodiversity certification,

(c) the suspension, revocation or modification of biodiversity certification,

(d) biodiversity certification agreements, which are agreements entered into in connection with biodiversity certification.

The new arrangements replace existing arrangements for the biodiversity certification of environmental planning instruments. The existing arrangements will continue to have effect, with some modifications, in relation to the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (the Growth Centres SEPP) and in relation to any biodiversity certification proposals that are certified or are the subject of public consultation before the repeal of those arrangements.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Threatened Species

Conservation Act 1995 No 101

Biodiversity certification of land

The principal amendment is Schedule 1 [4], which sets out the new arrangements relating to biodiversity certification of land (proposed new Part 7AA).

Explanatory note page 3

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

The new arrangements enable the Minister to confer biodiversity certification on specified land, by order published in the Gazette. The effect of biodiversity certification is as explained in the overview.

Application for biodiversity certification

An application for biodiversity certification may be made to the Minister by a planning authority or by 2 or more planning authorities jointly. Planning authorities include the Minister for Planning and local councils.

Biodiversity certification may be conferred only if the applicant has a biodiversity certification strategy. A biodiversity certification strategy is a policy or strategy for the implementation of conservation measures to ensure that the overall effect of biodiversity certification is to improve or maintain biodiversity values. The strategy is to be used as the basis for the assessment of the application.

A biodiversity certification strategy must identify the following:

- (a) the land proposed for biodiversity certification,
- (b) the land proposed for biodiversity conservation (being any land on or in respect of which the conservation measures are to be implemented),
- (c) the proposed conservation measures,
- (d) the parties required to implement the conservation measures.

Conservation measures include:

- (a) the adoption or continuation of development controls under the Planning Act that limit or prohibit development on land or the taking of any other measures under that Act that conserve or enhance the natural environment, and
- (b) the entering into of a biodiversity certification agreement, and
- (c) the entering into of a planning agreement under the Planning Act that makes provision for development contributions to be used or applied towards the conservation or enhancement of the natural environment, and
- (d) the making of a State infrastructure contribution under the Planning Act for the conservation or enhancement of the natural environment, and
- (e) certain other measures relating to the conservation, use and management of land.

The Bill sets out further requirements applicable to an application for biodiversity certification, including public notification requirements.

Assessment of application for biodiversity certification

Biodiversity certification may be conferred only if biodiversity certification will improve or maintain biodiversity values.

Biodiversity certification will improve or maintain biodiversity values only if the Minister determines, on the basis of a biodiversity certification assessment, that certification will improve or maintain biodiversity values. A biodiversity certification assessment is an assessment of the effect of biodiversity certification on

Explanatory note page 4

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

biodiversity values. The assessment is to be made in accordance with the biodiversity certification assessment methodology, and not otherwise.

The Minister may, in a particular case, permit a minor variation to be made to the biodiversity certification assessment methodology in certain circumstances.

The Minister must refuse to confer certification if the certification does not improve or maintain biodiversity values. The Bill also confers broad powers on the Minister to refuse to confer biodiversity certification in other circumstances.

Biodiversity certification assessment methodology

The Bill enables the Minister, by order published in the Gazette, to make rules with respect to the circumstances in which biodiversity certification is to be regarded as improving or maintaining biodiversity values.

In particular, the rules are to establish a methodology for assessing:

- (a) the loss of biodiversity values on land proposed for biodiversity certification, and
- (b) the impact, or likely impact, of proposed conservation measures on land proposed for biodiversity conservation.

The Bill makes provision for:

- (a) publication of the proposed methodology, and of any proposed change to the methodology, including requirements for public consultation, and
- (b) the circumstances in which changes to the methodology do not require public consultation.

Conferral, extension and review of certification

The Minister may, in an order conferring biodiversity certification, specify any approved measures under the biodiversity certification. The approved measures are as follows:

- (a) the proposed conservation measures on which the biodiversity certification assessment was based,
- (b) any requirements, as determined by the Minister, as to the timing of the implementation of the proposed conservation measures,
- (c) any requirements, as determined by the Minister, as to monitoring, reporting or auditing of the implementation of proposed conservation measures,
- (d) any other matters provided for by the regulations.

The Minister may require a party to the biodiversity certification to comply with the approved measures. A planning authority that applies for biodiversity certification is a party to any biodiversity certification that is conferred as a consequence of the application. Other persons or bodies may also be named as parties to the biodiversity certification, with their consent.

The Bill makes provision for the duration of biodiversity certification, extension of biodiversity certification and the periodic review of biodiversity certification.

Explanatory note page 5

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

Enforcement of approved measures

The Minister may require a party to a biodiversity certification to rectify any failure to comply with the approved measures under the biodiversity certification. The Minister may require a party who fails to comply with the requirement to pay to the Minister a penalty based on the cost of implementing the approved measures or equivalent conservation measures.

A party to biodiversity certification (other than a government authority) may appeal to the Land and Environment Court against a decision of the Minister to make an order against the party. If the party concerned is a government authority (that is, a Minister or a public authority) a dispute concerning the implementation of the approved measures may be submitted to the Premier for settlement.

Biodiversity certification agreements

The Bill enables the Minister to enter into an agreement with another person in connection with biodiversity certification (including a proposed conferral, extension or modification of biodiversity certification). The agreement (a biodiversity certification agreement) may require a person to make monetary contributions to the

Minister, to dedicate land or to carry out certain works on land owned by the person. It may also make other provision with respect to conservation measures agreed to be implemented by the person.

An agreement may be registered on the title of land so that it is binding on successors in title.

The Bill makes provision for the following:

- (a) the duration of biodiversity certification agreements,
- (b) the enforcement of biodiversity certification agreements,
- (c) variation to agreements.

The regulations may make further provision in respect of biodiversity certification agreements.

Suspension, revocation and modification of certification

The Minister may, by order published in the Gazette, suspend or revoke any biodiversity certification. The Bill provides for the grounds on which this action can be taken, with the key ground being a failure to comply with the approved measures under the biodiversity certification.

The Minister may, by order published in the Gazette, modify any biodiversity certification by:

- (a) modifying the description of the land that is biodiversity certified (to extend or limit biodiversity certification), or
- (b) modifying the approved measures under the biodiversity certification.

Biodiversity certification may be modified on the Minister's own initiative on specified grounds (including a failure to comply with the approved measures).

Explanatory note page 6

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

Biodiversity certification may also be modified on the application of a party to the biodiversity certification.

A party to a biodiversity certification (other than a government authority) may appeal to the Land and Environment Court against a decision of the Minister to suspend, revoke or modify biodiversity certification. If the party concerned is a government authority, a dispute concerning the Minister's decision may be submitted to the Premier for settlement.

Other general matters

The Bill makes provision for the notification of biodiversity certification and changes to biodiversity certification.

The suspension, revocation or expiry of biodiversity certification does not affect the obligations of parties to the biodiversity certification, or parties to an agreement entered into in connection with the biodiversity certification, unless the Minister otherwise directs.

The suspension, revocation, modification or expiry of biodiversity certification does not affect any consent or approval given, or activity commenced, under the Planning Act before the suspension, revocation, modification or expiry. The Minister may determine the application of the suspension, revocation or modification to matters pending under the Planning Act. The regulations may make further provision in relation to an expiry of biodiversity certification.

The Bill also makes provision for the following:

- (a) the arrangements for settlement of disputes under the biodiversity certification provisions between government authorities and the Minister,
- (b) the use of enforcement powers by authorised officers to investigate compliance with the approved measures under a biodiversity certification or with a biodiversity certification agreement,
- (c) the effect of a failure to comply with procedural requirements,
- (d) power to make regulations in connection with the operation of the new

provisions,

(e) other matters of a related or consequential nature.

Amendments relating to repeal of former biodiversity certification arrangements

Schedule 1 [3] repeals the existing arrangements under which biodiversity certification can be conferred on an environmental planning instrument (EPI).

Schedule 1 [14] saves those arrangements in relation to any EPI which is certified before the repeal of those arrangements or which is the subject of a proposal to confer biodiversity certification that is advertised or publicly exhibited before the repeal of those arrangements.

Explanatory note page 7

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

The provisions largely continue the existing arrangements for those EPIs, with the following modifications:

(a) the new provisions make it clear that an established EPI (that is, an EPI that is in force) can be certified,

(b) the new provisions require any certification that is conferred after the repeal of the former arrangements to specify any relevant measures to be taken under the certification and any conditions of the certification,

(c) the new provisions make it clear that a failure to comply with the relevant measures or to implement any conditions of the certification does not invalidate the certification, but is a ground for suspension or revocation of the certification,

(d) the new provisions require the Minister to undertake periodic reviews of any biodiversity certification conferred on an EPI under the former arrangements.

The amendments also contain other provisions of a consequential nature.

Schedule 1 [10]–[13] make changes to the existing arrangements under Part 7A of Schedule 7 to the principal Act, which confer biodiversity certification on the Growth Centres SEPP. At present, those arrangements partly rely on provisions in the main body of the principal Act relating to the biodiversity certification of EPIs generally (that is, Division 5 of Part 7 of the Act). As those provisions are being repealed, the amendments transfer the relevant provisions to Part 7 of Schedule 7.

Schedule 1 [9] makes it clear that biodiversity certification applies to any development that may be carried out on the subject land, including development that may be carried out under another EPI (besides the Growth Centres SEPP) that applies to the subject land.

Other amendments

Schedule 1 [5] removes the definitions of consent authority and owner from Part 7 of the principal Act. These definitions are transferred to the front of the principal Act by Schedule 1 [1]. The definition of owner is extended to permit the regulations to prescribe other persons who are taken to be the owner of land and is updated to remove a reference to a repealed Act.

Schedule 1 [1] also inserts a definition of Planning Act in the front of the Act.

Schedule 1 [2] is a consequential amendment.

Schedule 1 [6] is an amendment that is consequential on the new biodiversity certification arrangements. The amendment enables assessors to be accredited for the purposes of the scheme.

Schedule 1 [7] removes a provision that requires a review to be carried out of EPIs that are granted biodiversity certification. The provisions in Schedule 1 [14] enable the Minister to undertake periodic reviews of biodiversity certification.

Schedule 1 [8] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

Explanatory note page 8

Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Explanatory note

Schedule 2 Amendment of other legislation

Schedule 2.1 [1], [3], [4] and [5] insert notes in the Planning Act to alert readers to the impact of the biodiversity certification arrangements on relevant provisions of those Acts.

Schedule 2.1 [2] transfers a provision from the Threatened Species Conservation Act 1995 (currently section 126N) to the Planning Act. The provision relates to the imposition of conditions on the grant of concurrence to development by the Director-General of Department of Environment, Climate Change and Water.

Schedule 2.1 [6] is a consequential amendment.

Schedule 2.2 amends the Environmental Planning and Assessment Regulation 2000:

(a) to require an indication as to whether biodiversity certification arrangements apply in respect of development to be included in a development application, and

(b) to make it clear that a species impact statement is not required in relation to a development application if the biodiversity certification arrangements apply, and

(c) to require a planning certificate to include an indication that land is biodiversity certified land.

Schedule 2.3 amends the Land and Environment Court Act 1979 to require appeals to the Land and Environment Court under the new biodiversity certification arrangements to be heard in the class 1 jurisdiction of that Court.

Schedule 2.4 amends the National Parks and Wildlife Act 1974 so that:

(a) money received in the administration of the biodiversity certification scheme is not paid into the National Parks and Wildlife Fund under that Act, and

(b) the costs incurred by the Minister in connection with the scheme are not paid from that Fund.

Schedule 2.5 amends the Native Vegetation Act 2003 so that biodiversity certified land is excluded from the operation of that Act.