

FIRST PRINT

## ENDANGERED FAUNA (INTERIM PROTECTION) BILL 1991

NEW SOUTH WALES



### EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the National Parks and Wildlife Act 1974 and the Environmental Planning and Assessment Act 1979 to make further provision for the protection of fauna.

The amendments to the National Parks and Wildlife Act 1974 are as follows:

- (a) to provide that the Act binds the Crown;
- (b) to extend the definition of "fauna" under the Act to include all amphibians (not just a limited class of protected amphibians as at present);
- (c) to clarify the definition of "take" (in the context of prohibitions against taking or killing protected fauna) by including the significant modification of the habitat of fauna which is likely to adversely affect its essential behavioural patterns;
- (d) to establish a 3 member Scientific Committee and charge it with the function of reviewing Schedule 11 (Unprotected Fauna) and Schedule 12 (Endangered Fauna) to the Act and producing a revised (interim) Schedule 12 within 1 month;
- (e) to provide for Schedule 12 (Endangered Fauna) to be divided into 3 parts (Part 1—Threatened, Part 2—Vulnerable and Rare, Part 3—Marine Mammals);
- (f) to require an application for a licence under the Act to take or kill endangered fauna to be accompanied by a fauna impact statement and to introduce "user pays" in relation to the costs of processing such an application;
- (g) to enable appeals to the Land and Environment Court against the decision on such an application;
- (h) to empower the Minister and the Director to issue a stop work order against any activity likely to significantly affect the environment of any protected fauna;

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- (i) to provide that species are not to be added to the list of unprotected fauna, or added to or removed from the list of endangered fauna, except on the recommendation of the Scientific Committee;
- (j) to increase penalties for certain offences involving endangered and other protected fauna;
- (k) to permit the taking or killing of protected fauna (other than endangered fauna) where it is essential for the purposes of an activity under a development consent or approval under the Environmental Planning and Assessment Act 1979;
- (l) to permit the taking or killing of endangered fauna where it is essential for the purposes of an activity under a development consent or approval under the Environmental Planning and Assessment Act 1979, but only until the revised (interim) Schedule 12 is in place;
- (m) to provide that section 99 (Taking or killing etc. endangered fauna) does not prevent action being taken that is authorised by the Bush Fires Act 1949;
- (n) to remove the power to confer by regulation exemptions from the provisions dealing with the taking or killing of endangered fauna;
- (o) to provide that proceedings for offences under certain sections of the Act concerning protected fauna may be taken only in the Land and Environment Court;
- (p) to make minor, consequential and ancillary amendments.

The amendments to the Environmental Planning and Assessment Act 1979 are as follows:

- (a) to require a development application to be accompanied by a fauna impact statement if the development is likely to significantly affect the environment of protected fauna;
- (b) to provide for the matters that must be taken into account in deciding whether there is likely to be a significant effect on the environment of protected fauna;
- (c) to require consent authorities to take into account the effect of any proposed development on the environment of protected fauna when considering whether to consent to the development;
- (d) to require the preparation of a fauna impact statement (or an environmental impact statement that addresses the same matters) before a determining authority carries out an activity, or approves of the carrying out of an activity, under Part 5 of the Act.

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Clause 1 specifies the short title of the proposed Act.

Clause 2 lists the objects that the proposed Act is intended to achieve.

Clause 3 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 4 gives effect to Schedule 1.

Clause 5 gives effect to Schedule 2.

Clause 6 makes a consequential amendment to the Land and Environment Court Act 1979.

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Clause 7 deals with the repeal of certain amendments to be made by the proposed Act and is explained by an explanatory note that follows that clause.

Clause 8 provides that the explanatory notes appearing in the Bill do not form part of the proposed Act.

Schedules 1 and 2 make the amendments to the National Parks and Wildlife Act 1974 and the Environmental Planning and Assessment Act 1979 described above. Each amendment is explained in detail in the explanatory note relating to the amendment concerned.

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**ENDANGERED FAUNA (INTERIM PROTECTION) BILL 1991**

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# **ENDANGERED FAUNA (INTERIM PROTECTION) BILL 1991**

NEW SOUTH WALES



No. , 1991

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## **A BILL FOR**

An Act to amend the National Parks and Wildlife Act 1974 and the Environmental Planning and Assessment Act 1979 to make provision for the interim protection of endangered and protected fauna and their habitat; and for other purposes.

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Endangered Fauna (Interim Protection) Act 1991.

**Objects**

2. The objects of this Act are:
- (a) to provide urgently an objective scientific evaluation of the conservation status of fauna in New South Wales;
  - (b) to divide species of fauna into endangered, protected and unprotected species;
  - (c) to ensure endangered species of fauna are only harmed with the informed consent of the Director of National Parks and Wildlife;
  - (d) to set criteria and performance standards for the giving or withholding of that consent and to guarantee fairness of treatment by providing an appeal on the merits to the Land and Environment Court;
  - (e) to permit the Director of National Parks and Wildlife to recover the costs of the licensing system from users with a discretion to reduce any fees in cases of hardship or non-commercial uses;
  - (f) to relax the prohibition upon harming protected fauna where consents and approvals have been issued under the Environmental Planning and Assessment Act 1979;
  - (g) to ensure that in the future such consents and approvals are not given for activities without the impact of the activities on protected fauna being examined;
  - (h) to give the Director of National Parks and Wildlife and the Minister an emergency power to stop work where protected fauna is at significant risk;
  - (i) to update the list of unprotected fauna so that pests such as the Queensland Cane Toad can be harmed without liability;
  - (j) to give interim protection to fauna and existing use rights to developers of land and public authorities pending the enactment of an endangered species law.

**Commencement**

3. This Act commences on the date of assent.



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**Amendment of National Parks and Wildlife Act 1974 No. 80**

4. The National Parks and Wildlife Act 1974 is amended as set out in Schedule 1.

**Amendment of Environmental Planning and Assessment Act 1979 No. 203**

5. The Environmental Planning and Assessment Act 1979 is amended as set out in Schedule 2.

**Consequential amendment of Land and Environment Court Act 1979 No. 204**

6. The Land and Environment Court Act 1979 is amended by inserting after section 17 (e) the following paragraph:

(ea) appeals under section 92C of the National Parks and Wildlife Act 1974;

**Repeals**

7. (1) The provision inserted in the National Parks and Wildlife Act 1974 by item (8) of Schedule 1 is repealed at the beginning of 1 September 1992 or upon the date of assent to an Act providing for threatened species conservation, whichever is the sooner.

(2) The provisions inserted in the Environmental Planning and Assessment Act 1979 by Schedule 2 are repealed at the beginning of 1 September 1992 or when provision is made by an Act for further environmental assessment and protection controls applying to developments which are likely to have a significant effect on the environment of a protected species, whichever is the sooner.

**Explanatory note**

Clause 7 provides for the repeal of the amendments to be made by the proposed Act to the Environmental Planning and Assessment Act 1979 (and a consequential amendment to the National Parks and Wildlife Act 1974). Those amendments operate to require consideration of whether there will be significant effect on the environment of protected fauna before a consent or approval is granted under that Act and to relax the prohibition against harming protected fauna where the harm is essential for the carrying out of development or an activity under such a consent or approval. The repeal takes effect on 1 September 1992 or when provision is made by an Act to replace the proposed amendments.

**Explanatory notes**

8. Matter appearing under the heading "Explanatory note" in section 7 and Schedules 1 and 2 does not form part of this Act.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80**

(Sec. 4)

## (1) Section 3:

After section 2, insert:

**Act binds Crown**

3. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**Explanatory note**

Item (1) makes explicit that the New South Wales Government and all its agencies are bound by the National Parks and Wildlife Act 1974 in the same way as persons and corporations.

## (2) Section 5 (Definitions):

- (a) Insert in section 5 (1) in alphabetical order the following definitions:

**“approval”** includes a consent, licence or permission and any form of authorisation;

**“public authority”** means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown;

- (b) Omit the definition of “endangered fauna” in section 5 (1), insert instead:

**“endangered fauna”** means protected fauna of a species named in Schedule 12 as threatened, as vulnerable and rare, or as a marine mammal;

- (c) Omit the definition of “fauna” in section 5 (1), insert instead:

**“fauna”** means any mammal, bird, reptile or amphibian;

- (d) In the definition of “marine mammal” in section 5 (1), omit “Part 5”, insert instead “Part 3”.

- (e) Omit the definition of “protected amphibian” in section 5 (1).

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

- (f) Omit the definition of “take” in section 5 (1), insert instead:  
**“take”**, in relation to any fauna, includes hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure, and without limiting the foregoing also includes significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioural patterns;

**Explanatory note**

Item 2 (a) and (b) insert consequential definitions into the Act.

Item 2 (c) removes the anomaly whereby amphibians could not be listed as endangered fauna. Amphibians are fauna in the same way as mammals, birds or reptiles. Experts have reported a dramatic decline in populations of frogs and predict that some species will become extinct unless the causes of the decline are remedied. Presently, amphibians are protected fauna only if they are listed in Schedule 12A. It is proposed to repeal that Schedule to rationalise the treatment of amphibians.

Item 2 (d) and (e) make consequential amendments.

Item 2 (f) restates the definition of “take” in the Act so as to add specific reference to habitat destruction.

(3) Sections 92A–92E:

After section 92, insert:

**Scientific Committee**

92A. (1) The Director must forthwith appoint a Scientific Committee of 3 persons comprising:

- (a) one person nominated by the Australian Museum; and
- (b) one person nominated by the Ecological Society of Australia; and
- (c) one scientific officer of the National Parks and Wildlife Service,

each with expertise in the assessment and conservation of threatened and vulnerable species of fauna.

(2) Schedule 8B has effect with respect to the members and procedures of the Scientific Committee.

(3) The Scientific Committee is to:

- (a) review Schedule 11 (Unprotected Fauna) and Schedule 12 (Endangered Fauna); and



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

- (b) retain the marine mammal species listed in Part 5 of Schedule 12 (as in force immediately before the commencement of this section) in any revision of that Schedule; and
- (c) provide a revised (interim) Schedule 12 to the Director within 1 month of the appointment of the Committee; and
- (d) make such further revisions of Schedules 11 and 12 as may be appropriate from time to time; and
- (e) provide reasons for its decisions in relation to the revision of Schedule 12 and any recommendation to add species to or omit species from Schedule 12.

(4) The Committee is where appropriate to place the species of mammals, birds, reptiles and amphibians known or expected to be present in New South Wales into Part 1 (Threatened), Part 2 (Vulnerable and Rare) or Part 3 (Marine Mammals) in Schedule 12 and may take account of the regional situation of the species in a listing.

(5) In deciding whether to place a species of fauna in Part 1 (Threatened), the Committee is to have regard to the following:

- (a) whether the population of a species has been reduced to a critical level;
- (b) whether habitat of a species has been drastically reduced or modified;
- (c) whether a species may be in danger of extinction;
- (d) whether a species may now be considered extinct but has been seen in the wild in the last 50 years;
- (e) any other matter which the Committee considers relevant.

(6) In deciding whether to place a species of fauna in Part 2 (Vulnerable and Rare), the Committee is to have regard to the following:

- (a) whether the population of a species is decreasing because of over-exploitation, extensive destruction of habitat or other environmental disturbance;



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND WILDLIFE ACT 1974 No. 80—*continued*

- (b) whether the population of a species has been seriously depleted and its ultimate security has not yet been assured;
  - (c) whether the population of a species is still abundant but is under threat from severe adverse factors throughout its range;
  - (d) whether a species has a small population contained in restricted areas or habitats or thinly scattered over a more extensive area;
  - (e) any other matter which the Committee considers relevant.
- (7) The Committee may seek scientific advice and comments as it sees fit.
- (8) On receipt of the revised (interim) Schedule 12, the Director must forthwith:
- (a) cause a copy of it to be published in the Gazette; and
  - (b) cause a copy of it to be published once in a daily newspaper circulating statewide together with a notice inviting public submissions on it within a period of not less than 56 days of the date of publication; and
  - (c) forward a copy to all public authorities; and
  - (d) make a statement setting out the reasons referred to in subsection (3) (e) available for inspection and purchase.
- (9) On publication of the revised (interim) Schedule 12 in the Gazette, the existing Schedule 12 is omitted and replaced with the revised (interim) Schedule 12.

**Explanatory note**

Proposed section 92A establishes a Scientific Committee with expertise in the assessment and conservation of endangered species. It provides for procedures and conditions for the members of the Scientific Committee in proposed Schedule 8B to the Act. The functions of the Scientific Committee include reviewing Schedules 11 and 12 which are generally regarded as out of date and inadequate. For example, the rare Beech Skink is regarded as vulnerable and rare but is not listed in Schedule 12. There are other fauna common throughout their range which are listed in Schedule 12. Proposed subsection (4) simplifies the categories in Schedule 12. Proposed subsections (5) and (6) adopt

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
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internationally accepted criteria for the assessment and classification of the conservation status of species of fauna. Presently, Schedule 12 may only be revised by the Governor (i.e. the Minister) and no criteria or guidelines for doing so are stated in the Act. Nor is the Minister required to heed scientific advice. The Committee is required to present a revised (interim) Schedule 12 to the Director of National Parks and Wildlife who is required to publish it in the Gazette, whereupon it will become the new Schedule 12. Proposed subsection (8) ensures that the NSW public and government agencies are informed of the new Schedule 12 and the scientific basis for the inclusion of species and can take these into account in their activities.

**Licence applications—special provisions**

92B. (1) After publication of the revised (interim) Schedule 12 in the Gazette, a general licence to take or kill endangered fauna must not be issued except by the Director.

(2) An application for such a licence must be accompanied by:

- (a) a fauna impact statement prepared in accordance with section 92D; and
- (b) an application fee of \$200.

(3) The Director is to levy a processing fee, being an amount not more than the costs (including on-costs) incurred by the Service in the assessment and processing of the application (whether or not it is successful) and the fee is recoverable by the Director as a debt due to the Crown in a court of competent jurisdiction.

(4) The Director may reduce the amount of a processing fee levied for any licence application having regard to the following:

- (a) the extent of scientific examination necessary for the processing of the licence application;
- (b) the adequacy of any fauna impact statement or environmental impact statement supplied by the applicant;
- (c) the capacity of the applicant or persons with whom the applicant is associated to meet the fee levied;
- (d) whether and to what extent the activity sought to be licensed may confer a commercial benefit on the applicant if the licence is granted.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(5) On receipt of an application, the Director must cause to be placed in a newspaper published daily and circulating statewide a notice:

- (a) outlining the nature of the application;
- (b) stating the locations at which copies of the fauna impact statement may be inspected or purchased; and
- (c) inviting public submissions within a period of not less than 28 days of the date of the notice.

(6) In considering an application, the Director must take into account the following:

- (a) any fauna impact statement or environmental impact statement;
- (b) any submissions received within the period specified under subsection (5);
- (c) the factors specified in section 92A (5) and (6); and
- (d) any reasons provided pursuant to section 92A (3) (e),

and may require any further information concerning the proposed action and the environment to be affected from the applicant or from any public authority.

(7) In deciding whether to reject or grant the application, the Director may consider any modifications to the action including the development of a recovery plan.

(8) The Director may grant the application, either unconditionally or subject to conditions, or refuse the application, but must not grant the application until the processing fee levied has been paid.

(9) The Director is to notify the applicant and any person who has made a submission under subsection (5) of the Director's decision and the reasons for it.

(10) All information concerning fauna supplied to the Director in support of a licence application is to be made freely available to the public.

(11) If forestry activities are the subject of the application, the Director may grant the application even if a fauna impact statement did not accompany the application and subsection (5) has not been complied with, but only if:

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

- (a) the Director is satisfied that there is insufficient time to prepare a fauna impact statement and comply with subsection (5); and
- (b) the applicant provides all information requested by the Director about the circumstances of the case; and
- (c) the Director is satisfied that the applicant has made all possible efforts in planning the activities to comply with the requirement for a fauna impact statement and enabling compliance with subsection (5); and
- (d) the Director is satisfied that the activity will not significantly affect endangered fauna.

(12) The Director is to publish the Director's reasons for granting an application under subsection (11) in a newspaper circulating statewide, before the licence concerned is to take effect.

**Explanatory note**

Proposed section 92B imposes additional requirements on the making and processing of applications for licences under section 120 to take or kill endangered fauna. (A licence must be obtained before anyone can harm endangered fauna.) The revision of Schedule 12 by the Scientific Committee will ensure that only the most sensitive species will be afforded this degree of protection. The proposed section will not operate until after the revision of Schedule 12. An up-front fee of \$200 is payable to defray the costs of the Service in advertising the application. A "user pays" fee system, consistent with the Freedom of Information Act 1989, is implemented and provides that the Director may discount the fee under certain circumstances. The proposed amendments permit information about species provided to the Director to be added to the store of knowledge of NSW native animals.

**Appeals**

92C. (1) Despite section 135, an applicant for a licence to which section 92B applies or any person who has made a submission pursuant to section 92B (5), if dissatisfied with the Director's decision under 92B, may appeal to the Land and Environment Court.

(2) In determining an appeal, the Court must take into account the factors set out in section 92B (6), but this does not limit section 39 of the Land and Environment Court Act 1979.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(3) An appeal may be made by a person only within 28 days after notification has been given to the person pursuant to section 92B (9).

(4) A licence has no operation until the expiration of the period for the making of an appeal or (if an appeal is commenced within that time) until the appeal is withdrawn or determined.

(5) Where the Director fails to grant an application for a licence under section 92B, the application is taken to have been refused upon the expiration of 60 days (or such longer period as the Director may notify the applicant is required to consider an application in a particular case) after the application was received by the Director.

**Explanatory note**

Proposed section 92C provides for appeals to the Land and Environment Court as an independent specialist body where there is dissatisfaction with the determination of an application to which proposed section 92B applies. The amendment reflects the scheme for appeals under sections 97 and 98 of the Environmental Planning and Assessment Act 1979.

**Fauna impact statements**

92D. (1) A fauna impact statement must:

- (a) be in writing; and
- (b) be signed by the person who prepared it; and
- (c) include, to the fullest extent reasonably practicable, the following:
  - (i) a full description of the fauna to be affected by the actions and the habitat used by the fauna;
  - (ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;
  - (iii) a description of the actions and how they will modify the environment and affect the essential behavioural patterns of the fauna in the short and long term where long term encompasses the time required to regenerate essential habitat components;

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
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- (iv) details of the measures to be taken to ameliorate the impacts;
- (v) details of the qualifications and experience in biological science and fauna management of the person preparing the statement and of any other person who has conducted research or investigations relied upon.

(2) The person preparing the statement must consult with the Director and must, in preparing the statement, have regard to any requirements notified to him or her by the Director in respect of the form and content of the statement.

(3) The Director must notify any requirements pursuant to subsection (2) within 28 days of the consultation.

(4) Despite sections 77 (3) (d1) and 112 (1B) of the Environmental Planning and Assessment Act 1979, if an environmental impact statement has been prepared pursuant to that Act which addresses the matters set out in subsection (1), no separate fauna impact statement is required.

**Explanatory note**

Proposed section 92D introduces an innovation designed to assess efficiently the impact of a proposal on species and their environments where the impacts are likely to be significant. The fauna impact statement is similar in concept to victim impact statements, family impact statements and regulatory impact statements. In conjunction with other amendments, described below, a fauna impact statement exempts a proponent from the need to obtain a licence under section 120 of the Act for protected species. The amendment provides for an appropriate level of impact assessment without requiring an expensive and time-consuming environmental impact statement.

**Stop work order**

92E. (1) If the Minister or the Director is of the opinion that any action is likely to significantly affect the environment of any protected fauna, and such action is being or is about to be carried out, the Minister or Director may order that any such action is to cease and that no action, other than such action as may be specified in that order, is to be carried out with respect to that environment within a period of 40 days after the date of that order.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(2) An order made under subsection (1) takes effect on and from the date on which a copy of that order is affixed in a conspicuous place in the environment or place the subject of that order or the persons performing or about to perform the action are notified that an order has been made, whichever is the sooner.

(3) When the Minister or Director makes an order under subsection (1), he or she must immediately consult with the person or persons proposing to perform the action to determine whether any modification of the action may be sufficient to protect the environment of any protected fauna.

(4) The Minister or Director may extend an order made pursuant to subsection (1) for such further period or periods of 40 days as the Minister or Director thinks fit.

(5) If, in the opinion of the Minister or the Director, satisfactory provisions cannot be made to protect the environment the subject of an order under subsection (1), he or she must make, or in the case of the Director recommend the making of, an interim protection order under Part 6A.

(6) The Minister or Director is not required, before making an order pursuant to subsection (1), to notify any person who may be affected by the order.

(7) When an order made pursuant to subsection (1) is in force in relation to an environment, an approval, notice or order (whether made or issued before or after the order pursuant to subsection (1)) under any other Act which requires or permits the environment to be significantly affected is void to the extent of the inconsistency with the order.

**Explanatory note**

Proposed section 92E provides for an emergency power to intervene in situations where protected species are at significant risk. This power and the 40 day "cooling off" period are similar to the provisions of the Heritage Act 1977. This provision is essential because developments with existing consents and approvals, which may never have been assessed for their impact on protected fauna, are not required to be licensed because item (7) below removes liability for harming protected fauna in such a case. The effect of the stop work order extends only to that part of a development which harms protected fauna.

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(4) Section 93:

Omit the section, insert instead:

**Amendment of Schedule 11 (unprotected fauna)**

93. The Governor may, by order published in the Gazette, amend Schedule 11 at any time by adding or omitting the name of any species of fauna, but only on the recommendation of the Scientific Committee referred to in section 92A.

(5) Section 94:

Omit the section, insert instead:

**Amendment of Schedule 12 (endangered fauna)**

94. The Governor may, by order published in the Gazette, amend Schedule 12 at any time by adding or omitting the name of any species of protected fauna, but only on the recommendation of the Scientific Committee referred to in section 92A.

**Explanatory note**

Items (4) and (5) make amendments which ensure that any change to the lists of unprotected fauna or endangered fauna in the Act (Schedules 11 and 12) is based on scientific advice provided by the Scientific Committee.

(6) Section 94A (**Amendment of Schedule 12A (protected amphibians)**):

Omit the section.

**Explanatory note**

Item (6) is consequential on the omission from the Act of the list of protected amphibians (see item (15)).

(7) Section 97 (**Certain protected fauna to be property of the Crown**):

(a) Omit section 97 (1) (b1).

(b) From section 97 (1) (c), omit “(not being a protected amphibian)”.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(8) Section 98 (**Taking or killing protected fauna, other than endangered fauna**):

After section 98 (4), insert:

(5) Subsection (2) does not apply in relation to acts which are essential for the carrying out of development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979 or essential for the carrying out of an activity pursuant to an approval of a determining authority within the meaning of Part 5 of that Act.

**Explanatory note**

Item (8) authorises a person to take or kill protected fauna (other than endangered fauna) where it is essential to do so for the purpose of carrying out development under a development consent or approval under the Environmental Planning and Assessment Act 1979. It is not an offence under that section if the defendant did not know and could not reasonably have foreseen that his or her acts would take or kill the fauna.

(9) Section 99 (**Taking or killing etc. endangered fauna**):

(a) Omit the penalty provision from section 99 (1), insert instead:

Penalty:

(a) in respect of any endangered fauna of a species named in Part 1 (threatened fauna) or Part 3 (marine mammals) of Schedule 12—1,000 penalty units or imprisonment for 2 years or both; or

(b) in respect of any endangered fauna of a species named in Part 2 (vulnerable and rare fauna) of Schedule 12—200 penalty units or imprisonment for 1 year or both.

(b) Omit section 99 (3) (a), insert instead:

(a) the provisions of this section prevail, except where the other Act is the Bush Fires Act 1949; and

(c) After section 99 (5), insert:

(6) Until publication of the revised (interim) Schedule 12 under section 92A, subsection (1) does not apply in relation to acts which are essential for the carrying out of development in accordance with a development consent

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
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within the meaning of the Environmental Planning and Assessment Act 1979 or essential for the carrying out of an activity pursuant to an approval of a determining authority within the meaning of Part 5 of that Act.

**Explanatory note**

Item (9) (a) increase the penalties for the unlawful taking or killing of endangered fauna and re-expresses the penalties in penalty units. One penalty unit currently equals \$100. The penalties have been increased to act as a deterrent to those who may engage in the deliberate wanton destruction of or interference with endangered and protected fauna.

Item (9) (b) makes explicit that the Bush Fires Act 1949 prevails over section 99. It is not an offence under that section if the defendant did not know and could not reasonably have foreseen that his or her acts would take or kill the fauna.

Item (9) (c) authorises a person to take or kill endangered fauna where it is essential to do so for the purpose of carrying out development under a development consent or approval under the Environmental Planning and Assessment Act 1979, but only until the revised (interim) Schedule 12 is in place under proposed section 92A. (See item (3)).

**(10) Section 100 (Further provisions respecting taking or killing protected fauna (including endangered fauna)):**

Omit section 100 (2).

**Explanatory note**

Item (10) removes the power to exempt persons from section 98 (2) or 99 (1) by regulation.

**(11) Section 101 (Buying, selling or possessing protected fauna):**

Omit the penalty provision from section 101 (1), insert instead:

Penalty:

- (a) in respect of any protected fauna other than endangered fauna—100 penalty units or imprisonment for 6 months or both;
- (b) in respect of any endangered fauna of a species named in Part 2 (vulnerable and rare fauna) of Schedule 12—200 penalty units or imprisonment for 1 year or both;
- (c) in respect of any other endangered fauna—1,000 penalty units or imprisonment for 2 years or both.

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

**Explanatory note**

Item (11) increases the penalty for buying, selling or possessing protected fauna and re-expresses the penalties in penalty units. One penalty unit currently equals \$100. The penalties have been increased to act as a deterrent to those who may become involved in trafficking in endangered and other protected fauna.

(12) Section 176 (**Proceedings for offences**):

Omit section 176 (1AA), insert instead:

(1AA) Proceedings for an offence under section 90, 98, 99 or 101 may be taken only before the Land and Environment Court in its summary jurisdiction.

**Explanatory note**

Item (12) ensures that prosecutions for offences involving endangered and other protected fauna are brought only in the Land and Environment Court where the expertise and the discretion to impose the full range of penalties reside. This should avoid the present difficulty that inconsistent penalties are frequently imposed by different courts.

(13) Schedule 3 (**Savings, transitional and other provisions**):

After clause 21, insert:

**Protected amphibians**

22. Section 97 (1) (c) applies in respect of fauna that is an amphibian as if the reference in that section to the commencement day were a reference to:

- (a) the date of assent to the National Parks and Wildlife (Amendment) Act 1983 in the case of an amphibian that was a protected amphibian immediately before the date of assent to the Endangered Fauna (Interim Protection) Act 1991; or
- (b) the date of assent to the Endangered Fauna (Interim Protection) Act 1991 in the case of any other amphibian.

**Explanatory note**

Item (13) enacts a consequential savings provision concerning amphibians.



*Endangered Fauna (Interim Protection) 1991*

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(14) Schedule 8B:

After Schedule 8A, insert:

**SCHEDULE 8B—SCIENTIFIC COMMITTEE  
PROCEDURES AND CONDITIONS**

(Sec. 92A)

1. At the first meeting of the Scientific Committee the members are to elect a Convenor.

2. Two members form a quorum at any meeting of the Scientific Committee and any duly convened meeting at which a quorum is present is competent to exercise any function of the Committee.

3. Questions arising at a meeting of the Scientific Committee are to be determined by a majority of votes of the members present and voting.

4. The procedures for the calling of meetings, their frequency and the conduct of business at meetings is to be as determined by the Scientific Committee at its first meeting (and at subsequent meetings if necessary).

5. Each member of the Scientific Committee is entitled to receive such remuneration (including travelling and subsistence allowances) for attending meetings and exercising functions of the Committee as the Director may from time to time determine in respect of him or her.

6. The members of the Scientific Committee hold office until 1 September 1992.

7. In the event of a casual vacancy, the Director must forthwith fill the vacancy by appointing a person nominated in accordance with section 92A (1) by the organisation which would otherwise have no nominee as a member.

**Explanatory note**

Item (14) provides for the procedures and conditions of membership which apply to the Scientific Committee.

(15) Schedule 12A (**Protected amphibians**):

Omit the Schedule.

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

**Explanatory note**

Item (15) repeals the list of protected amphibians. Because the term “fauna” will now include amphibians, all amphibians will be protected fauna. In addition, some species may be listed as endangered fauna. The separate treatment of some amphibians as protected amphibians will therefore no longer be relevant.

SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203

(Sec. 5)

(1) Section 4 (**Definitions**):

Insert in section 4 (1) in alphabetical order the following definition:

“**protected fauna**” has the same meaning as in the National Parks and Wildlife Act 1974;

(2) Section 4A:

After section 4, insert:

**Significant effect on the environment of protected fauna**

4A. For the purpose of sections 77, 90 and 112, in deciding whether there is likely to be a significant effect on the environment of protected fauna the following factors must be taken into account:

- (a) the extent of modification or removal of habitat, in relation to the same habitat type in the locality and region;
- (b) the sensitivity of the species of fauna to removal or modification of its habitat;
- (c) the time required to regenerate critical habitat;
- (d) the effect on the ability of the fauna population to recover, including interactions between the subject land and adjacent habitat that may influence the population beyond the area proposed for development or activities;
- (e) any proposal to ameliorate the impact;
- (f) whether the land is currently being assessed for wilderness by the Director of National Parks and Wildlife under the Wilderness Act 1987.

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SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203—*continued*

**Explanatory note**

Items (1) and (2) provide guidance to public authorities in assessing the impacts of developments when exercising their statutory powers under the Act.

(3) Section 77 (**Making of development applications**):

(a) After section 77 (3) (d), insert:

(d1) (where the application is in respect of a development which is likely to significantly affect the environment of protected fauna) be accompanied by a fauna impact statement in accordance with section 92D of the National Parks and Wildlife Act 1974;

(b) After section 77 (4), insert:

(4A) The consent authority must forthwith forward a copy of any fauna impact statement received under subsection (3) (d1) to the Director of National Parks and Wildlife.

**Explanatory note**

Item (3) sets a threshold above which consent authorities should require the assistance of a fauna impact statement in assessing the impacts of developments when exercising their statutory powers under the Act.

(4) Section 90 (**Matters for consideration**):

After section 90 (1) (c1), insert:

(c2) the significance of the effect of that development on the environment of any protected fauna;

**Explanatory note**

Item (4) ensures that consent authorities direct their minds to the effect of a development on the environment of protected fauna.

(5) Section 112 (**Decision of determining authority in relation to certain activities**):

After section 112 (1A), insert:

(1B) Without in any way limiting the provisions of subsection (1), a determining authority must not carry out an activity, or grant an approval in relation to an activity, being an activity which is likely to significantly affect the environment of any protected fauna unless a fauna impact statement has been prepared in accordance with section 92D of the National Parks and Wildlife Act 1974.



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*Endangered Fauna (Interim Protection) 1991*

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SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203—*continued*

(1C) Despite subsection (1B), where an environmental impact statement has been prepared pursuant to subsection (1) which addresses the matters set out in section 92D (1) of the National Parks and Wildlife Act 1974, no separate fauna impact statement is required.

(1D) A determining authority must forthwith forward a copy of any environmental or fauna impact statement referred to in subsection (1B) or (1C) to the Director of National Parks and Wildlife.

**Explanatory note**

Item (5) sets a threshold above which determining authorities should require the assistance of a fauna impact statement in assessing the impacts of developments when exercising their statutory powers under the Act. A one-stop process is envisaged. Proposed subsection (1C) prevents duplication of effort.

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**ENDANGERED FAUNA (INTERIM PROTECTION) ACT  
1991 No. 66**

**NEW SOUTH WALES**



**TABLE OF PROVISIONS**

1. Short title
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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND WILDLIFE ACT  
1974 No. 80**

**SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL PLANNING AND  
ASSESSMENT ACT 1979 No. 203**

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**ENDANGERED FAUNA (INTERIM PROTECTION) ACT  
1991 No. 66**

NEW SOUTH WALES



**Act No. 66, 1991**

An Act to amend the National Parks and Wildlife Act 1974 and the Environmental Planning and Assessment Act 1979 to make provision for the interim protection of endangered and protected fauna and their habitat; and for other purposes. [Assented to 17 December 1991]

*Endangered Fauna (Interim Protection) 1991*

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**The Legislature of New South Wales enacts:**

**Short title**

1. This Act may be cited as the Endangered Fauna (Interim Protection) Act 1991.

**Objects**

2. The objects of this Act are:

- (a) to provide urgently an objective scientific evaluation of the conservation status of fauna in New South Wales;
- (b) to divide species of fauna into endangered, protected and unprotected species;
- (c) to ensure endangered species of fauna are only harmed with the informed consent of the Director of National Parks and Wildlife;
- (d) to set criteria and performance standards for the giving or withholding of that consent and to guarantee fairness of treatment by providing an appeal on the merits to the Land and Environment Court;
- (e) to permit the Director of National Parks and Wildlife to recover the costs of the licensing system from users with a discretion to reduce any fees in cases of hardship or non-commercial uses;
- (f) to relax the prohibition upon harming protected fauna where consents and approvals have been issued under the Environmental Planning and Assessment Act 1979;
- (g) to ensure that in the future such consents and approvals are not given for activities without the impact of the activities on protected fauna being examined;
- (h) to give the Director of National Parks and Wildlife and the Minister an emergency power to stop work where protected fauna is at significant risk;
- (i) to update the list of unprotected fauna so that pests such as the Queensland Cane Toad can be harmed without liability;
- (j) to give interim protection to fauna and existing use rights to developers of land and public authorities pending the enactment of an endangered species law.

**Commencement**

3. This Act commences on the date of assent.



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**Amendment of National Parks and Wildlife Act 1974 No. 80**

4. The National Parks and Wildlife Act 1974 is amended as set out in Schedule 1.

**Amendment of Environmental Planning and Assessment Act 1979 No. 203**

5. The Environmental Planning and Assessment Act 1979 is amended as set out in Schedule 2.

**Consequential amendment of Land and Environment Court Act 1979 No. 204**

6. The Land and Environment Court Act 1979 is amended by inserting after section 17 (e) the following paragraph:

(ea) appeals under section 92C of the National Parks and Wildlife Act 1974;

**Repeals**

7. (1) The provision inserted in the National Parks and Wildlife Act 1974 by item (8) of Schedule 1 is repealed at the beginning of 1 December 1992 or upon the date of assent to an Act providing for threatened species conservation, whichever is the sooner.

(2) The provisions inserted in the Environmental Planning and Assessment Act 1979 by Schedule 2 are repealed at the beginning of 1 December 1992 or when provision is made by an Act for further environmental assessment and protection controls applying to developments which are likely to have a significant effect on the environment of a protected species, whichever is the sooner.

**Explanatory note**

Clause 7 provides for the repeal of the amendments to be made by the proposed Act to the Environmental Planning and Assessment Act 1979 (and a consequential amendment to the National Parks and Wildlife Act 1974). Those amendments operate to require consideration of whether there will be significant effect on the environment of protected fauna before a consent or approval is granted under that Act and to relax the prohibition against harming protected fauna where the harm is essential for the carrying out of development or an activity under such a consent or approval. The repeal takes effect on 1 December 1992 or when provision is made by an Act to replace the proposed amendments.

**Savings provision**

8. The amendments made by this Act to the Environmental Planning and Assessment Act 1979 do not affect:

*Endangered Fauna (Interim Protection) 1991*

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- (a) any development consent granted before the commencement of this Act or any development carried out in accordance with such a consent; or
- (b) any activity to which Part 5 of that Act applies (or any approval for the carrying out of any such activity) if the provisions of that Part were complied with for that activity before the commencement of this Act.

**Explanatory notes**

9. Matter appearing under the heading "Explanatory note" in section 7 and Schedules 1 and 2 does not form part of this Act.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80**

(Sec. 4)

(1) Section 3:

After section 2, insert:

**Act binds Crown**

3. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

**Explanatory note**

Item (1) makes explicit that the New South Wales Government and all its agencies are bound by the National Parks and Wildlife Act 1974 in the same way as persons and corporations.

(2) Section 5 (Definitions):

- (a) Insert in section 5 (1) in alphabetical order the following definitions:

"approval" includes a consent, licence or permission and any form of authorisation;

"public authority" means a public or local authority constituted by or under an Act, a Government Department or a statutory body representing the Crown;

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

- (b) Omit the definition of “endangered fauna” in section 5 (1), insert instead:

“**endangered fauna**” means protected fauna of a species named in Schedule 12 as threatened, as vulnerable and rare, or as a marine mammal;

- (c) Omit the definition of “fauna” in section 5 (1), insert instead:

“**fauna**” means any mammal, bird, reptile or amphibian;

- (d) In the definition of “marine mammal” in section 5 (1), omit “Part 5”, insert instead “Part 3”.

- (e) Omit the definition of “protected amphibian” in section 5 (1).

- (f) Omit the definition of “take” in section 5 (1), insert instead:

“**take**”, in relation to any fauna, includes hunt, shoot, poison, net, snare, spear, pursue, capture, disturb, lure or injure, and without limiting the foregoing also includes significant modification of the habitat of the fauna which is likely to adversely affect its essential behavioural patterns;

**Explanatory note**

Item 2 (a) and (b) insert consequential definitions into the Act.

Item 2 (c) removes the anomaly whereby amphibians could not be listed as endangered fauna. Amphibians are fauna in the same way as mammals, birds or reptiles. Experts have reported a dramatic decline in populations of frogs and predict that some species will become extinct unless the causes of the decline are remedied. Presently, amphibians are protected fauna only if they are listed in Schedule 12A. It is proposed to repeal that Schedule to rationalise the treatment of amphibians.

Item 2 (d) and (e) make consequential amendments.

Item 2 (f) restates the definition of “take” in the Act so as to add specific reference to habitat destruction.

- (3) Sections 92A–92E:

After section 92, insert:

**Scientific Committee**

92A. (1) The Director must forthwith appoint a Scientific Committee of 3 persons comprising:



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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

- (a) one person nominated by the Australian Museum; and
- (b) one person nominated by the Ecological Society of Australia; and
- (c) one scientific officer of the National Parks and Wildlife Service,

each with expertise in the assessment and conservation of threatened and vulnerable species of fauna.

(2) Schedule 8B has effect with respect to the members and procedures of the Scientific Committee.

(3) The Scientific Committee is to:

- (a) review Schedule 11 (Unprotected Fauna) and Schedule 12 (Endangered Fauna); and
- (b) provide a revised (interim) Schedule 12 to the Director within 1 month of the appointment of the Committee; and
- (c) make such further revisions of Schedules 11 and 12 as may be appropriate from time to time; and
- (d) provide reasons for its decisions in relation to the revision of Schedule 12 and any recommendation to add species to or omit species from Schedule 12.

(4) The Committee is where appropriate to place the species of mammals, birds, reptiles and amphibians known or expected to be present in New South Wales into Part 1 (Threatened), Part 2 (Vulnerable and Rare) or Part 3 (Marine Mammals) in Schedule 12 and may take account of the regional situation of the species in a listing.

(5) In deciding whether to place a species of fauna in Part 1 (Threatened), the Committee is to have regard to the following:

- (a) whether the population of a species has been reduced to a critical level;
- (b) whether habitat of a species has been drastically reduced or modified;
- (c) whether a species may be in danger of extinction;
- (d) whether a species may now be considered extinct but has been seen in the wild in the last 50 years;

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

- (e) any other matter which the Committee considers relevant.
- (6) In deciding whether to place a species of fauna in Part 2 (Vulnerable and Rare), the Committee is to have regard to the following:
  - (a) whether the population of a species is decreasing because of over-exploitation, extensive destruction of habitat or other environmental disturbance;
  - (b) whether the population of a species has been seriously depleted and its ultimate security has not yet been assured;
  - (c) whether the population of a species is still abundant but is under threat from severe adverse factors throughout its range;
  - (d) whether a species has a small population contained in restricted areas or habitats or thinly scattered over a more extensive area;
  - (e) any other matter which the Committee considers relevant.
- (7) The Committee may seek scientific advice and comments as it sees fit.
- (8) On receipt of the revised (interim) Schedule 12, the Director must forthwith:
  - (a) cause a copy of it to be published in the Gazette; and
  - (b) cause a copy of it to be published once in a daily newspaper circulating statewide together with a notice inviting public submissions on it within a period of not less than 56 days of the date of publication; and
  - (c) forward a copy to all public authorities; and
  - (d) make a statement setting out the reasons referred to in subsection (3) (d) available for inspection and purchase.
- (9) On publication of the revised (interim) Schedule 12 in the Gazette, the existing Schedule 12 is omitted and replaced with the revised (interim) Schedule 12.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

(10) The Committee is required to consider any submissions received in response to the invitation to the public under subsection (8) (b) for the purpose of deciding whether to recommend any amendment of the revised (interim) Schedule 12.

**Explanatory note**

Proposed section 92A establishes a Scientific Committee with expertise in the assessment and conservation of endangered species. It provides for procedures and conditions for the members of the Scientific Committee in proposed Schedule 8B to the Act. The functions of the Scientific Committee include reviewing Schedules 11 and 12 which are generally regarded as out of date and inadequate. For example, the rare Beech Skink is regarded as vulnerable and rare but is not listed in Schedule 12. There are other fauna common throughout their range which are listed in Schedule 12. Proposed subsection (4) simplifies the categories in Schedule 12. Proposed subsections (5) and (6) adopt internationally accepted criteria for the assessment and classification of the conservation status of species of fauna. Presently, Schedule 12 may only be revised by the Governor (i.e. the Minister) and no criteria or guidelines for doing so are stated in the Act. Nor is the Minister required to heed scientific advice. The Committee is required to present a revised (interim) Schedule 12 to the Director of National Parks and Wildlife who is required to publish it in the Gazette, whereupon it will become the new Schedule 12. Proposed subsection (8) ensures that the NSW public and government agencies are informed of the new Schedule 12 and the scientific basis for the inclusion of species and can take these into account in their activities.

**Licence applications—special provisions**

92B. (1) After publication of the revised (interim) Schedule 12 in the Gazette, a general licence to take or kill endangered fauna must not be issued except by the Director.

(2) An application for such a licence must be accompanied by:

- (a) a fauna impact statement prepared in accordance with section 92D; and
- (b) an application fee of \$200.

(3) The Director is to levy a processing fee, being an amount not more than the costs (including on-costs) incurred by the Service in the assessment and processing of the application (whether or not it is successful) and the fee is recoverable by the Director as a debt due to the Crown in a



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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

court of competent jurisdiction. The Director may, before dealing with the application, require the applicant to pay an amount not exceeding one-half of the estimated processing fee.

(4) The Director may reduce the amount of a processing fee levied for any licence application having regard to the following:

- (a) the extent of scientific examination necessary for the processing of the licence application;
- (b) the adequacy of any fauna impact statement or environmental impact statement supplied by the applicant;
- (c) the capacity of the applicant or persons with whom the applicant is associated to meet the fee levied;
- (d) whether and to what extent the activity sought to be licensed may confer a commercial benefit on the applicant if the licence is granted.

(5) On receipt of an application, the Director must cause to be placed in a newspaper circulating statewide a notice:

- (a) outlining the nature of the application;
- (b) stating the locations at which copies of the fauna impact statement may be inspected or purchased; and
- (c) inviting public submissions within a period of not less than 28 days of the date of the notice.

(6) In considering an application, the Director must take into account the following:

- (a) any fauna impact statement or environmental impact statement;
  - (b) any submissions received within the period specified under subsection (5);
  - (c) the factors specified in section 92A (5) and (6); and
  - (d) any reasons provided pursuant to section 92A (3) (d),
- and may require any further information concerning the proposed action and the environment to be affected from the applicant or from any public authority.

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(7) In deciding whether to reject or grant the application, the Director may consider any modifications to the action including the development of a recovery plan.

(8) The Director may grant the application, either unconditionally or subject to conditions, or refuse the application, but must not grant the application until the processing fee levied has been paid.

(9) The Director is to notify the applicant and any person who has made a submission under subsection (5) of the Director's decision and the reasons for it.

(10) All information concerning fauna supplied to the Director in support of a licence application is to be made freely available to the public.

(11) Despite anything to the contrary in this section, the Director may grant the application even though a fauna impact statement did not accompany the application and subsections (5) and (6) have not been complied with, but only if the things authorised by the licence are essential for the carrying out of:

- (a) development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979; or
- (b) an activity, whether by a determining authority or pursuant to an approval of a determining authority, within the meaning of Part 5 of that Act if the determining authority has complied with that Part.

Any such development consent or approval must have been granted before the commencement of this section or during the period of 3 months after that commencement or, in the case of an activity by a determining authority, the activity must have been commenced before the end of that period.

(12) A licence issued pursuant to subsection (11) is to be a temporary licence which ceases to have effect after the period of 120 days after its issue.

(13) Within 14 days after the issue of a licence to which this section applies, the Director is required to publish in the Gazette notice of the decision to issue the licence.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(14) The Director is required to make available for public inspection the Director's reasons for issuing a licence to which this section applies. A person is entitled to a copy of those reasons on payment of such reasonable fee as the Director determines.

**Explanatory note**

Proposed section 92B imposes additional requirements on the making and processing of applications for licences under section 120 to take or kill endangered fauna. (A licence must be obtained before anyone can harm endangered fauna.) The revision of Schedule 12 by the Scientific Committee will ensure that only the most sensitive species will be afforded this degree of protection. The proposed section will not operate until after the revision of Schedule 12. An up-front fee of \$200 is payable to defray the costs of the Service in advertising the application. A "user pays" fee system, consistent with the Freedom of Information Act 1989, is implemented and provides that the Director may discount the fee under certain circumstances. The proposed amendments permit information about species provided to the Director to be added to the store of knowledge of NSW native animals.

**Appeals**

92C. (1) Despite section 135, an applicant for a licence to which section 92B applies or any person who has made a submission pursuant to section 92B (5), if dissatisfied with the Director's decision under 92B, may appeal to the Land and Environment Court.

(2) In determining an appeal, the Court must take into account the factors set out in section 92B (6), but this does not limit section 39 of the Land and Environment Court Act 1979.

(3) An appeal may be made by a person only within 28 days after notification has been given to the person pursuant to section 92B (9).

(4) A licence has no operation until the expiration of the period for the making of an appeal or (if an appeal is commenced within that time) until the appeal is withdrawn or determined.

(5) Where the Director fails to grant an application for a licence under section 92B, the application is taken to have been refused upon the expiration of 40 days (or such longer period as the Director may notify the applicant is required to



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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

consider an application in a particular case) after the application was received by the Director.

**Explanatory note**

Proposed section 92C provides for appeals to the Land and Environment Court as an independent specialist body where there is dissatisfaction with the determination of an application to which proposed section 92B applies. The amendment reflects the scheme for appeals under sections 97 and 98 of the Environmental Planning and Assessment Act 1979.

**Fauna impact statements**

92D. (1) A fauna impact statement must:

- (a) be in writing; and
- (b) be signed by the person who prepared it; and
- (c) include, to the fullest extent reasonably practicable, the following:
  - (i) a full description of the fauna to be affected by the actions and the habitat used by the fauna;
  - (ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;
  - (iii) a description of the actions and how they will modify the environment and affect the essential behavioural patterns of the fauna in the short and long term where long term encompasses the time required to regenerate essential habitat components;
  - (iv) details of the measures to be taken to ameliorate the impacts;
  - (v) details of the qualifications and experience in biological science and fauna management of the person preparing the statement and of any other person who has conducted research or investigations relied upon.

(2) The person preparing the statement must consult with the Director and must, in preparing the statement, have regard to any requirements notified to him or her by the Director in respect of the form and content of the statement.

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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(3) The Director must notify any requirements pursuant to subsection (2) within 28 days of the consultation.

(4) Despite sections 77 (3) (d1) and 112 (1B) of the Environmental Planning and Assessment Act 1979, if an environmental impact statement has been prepared pursuant to that Act which addresses the matters set out in subsection (1), no separate fauna impact statement is required.

**Explanatory note**

Proposed section 92D introduces an innovation designed to assess efficiently the impact of a proposal on species and their environments where the impacts are likely to be significant. The fauna impact statement is similar in concept to victim impact statements, family impact statements and regulatory impact statements. In conjunction with other amendments, described below, a fauna impact statement exempts a proponent from the need to obtain a licence under section 120 of the Act for protected species. The amendment provides for an appropriate level of impact assessment without requiring an expensive and time-consuming environmental impact statement.

**Stop work order**

92E. (1) If the Minister or the Director is of the opinion that any action is likely to significantly affect the environment of any protected fauna, and such action is being or is about to be carried out, the Minister or Director may order that any such action is to cease and that no action, other than such action as may be specified in that order, is to be carried out with respect to that environment within a period of 40 days after the date of that order.

(2) An order made under subsection (1) takes effect on and from the date on which a copy of that order is affixed in a conspicuous place in the environment or place the subject of that order or the persons performing or about to perform the action are notified that an order has been made, whichever is the sooner.

(3) When the Minister or Director makes an order under subsection (1), he or she must immediately consult with the person or persons proposing to perform the action to determine whether any modification of the action may be sufficient to protect the environment of any protected fauna.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—continued**

(4) The Minister or Director may extend an order made pursuant to subsection (1) for such further period or periods of 40 days as the Minister or Director thinks fit.

(5) If, in the opinion of the Minister or the Director, satisfactory provisions cannot be made to protect the environment the subject of an order under subsection (1), he or she must make, or in the case of the Director recommend the making of, an interim protection order under Part 6A.

(6) The Minister or Director is not required, before making an order pursuant to subsection (1), to notify any person who may be affected by the order.

(7) When an order made pursuant to subsection (1) is in force in relation to an environment, an approval, notice or order (whether made or issued before or after the order pursuant to subsection (1)) under any other Act which requires or permits the environment to be significantly affected is void to the extent of the inconsistency with the order.

**Explanatory note**

Proposed section 92E provides for an emergency power to intervene in situations where protected species are at significant risk. This power and the 40 day "cooling off" period are similar to the provisions of the Heritage Act 1977. This provision is essential because developments with existing consents and approvals, which may never have been assessed for their impact on protected fauna, are not required to be licensed because item (7) below removes liability for harming protected fauna in such a case. The effect of the stop work order extends only to that part of a development which harms protected fauna.

**(4) Section 93:**

Omit the section. insert instead:

**Amendment of Schedule 11 (unprotected fauna)**

93. The Governor may, by order published in the Gazette, amend Schedule 11 at any time by adding or omitting the name of any species of fauna, but only on the recommendation of the Scientific Committee referred to in section 92A.



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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

**(5) Section 94:**

Omit the section, insert instead:

**Amendment of Schedule 12 (endangered fauna)**

94. The Governor may, by order published in the Gazette, amend Schedule 12 at any time by adding or omitting the name of any species of protected fauna, but only on the recommendation of the Scientific Committee referred to in section 92A.

**Explanatory note**

Items (4) and (5) make amendments which ensure that any change to the lists of unprotected fauna or endangered fauna in the Act (Schedules 11 and 12) is based on scientific advice provided by the Scientific Committee.

**(6) Section 94A (Amendment of Schedule 12A (protected amphibians)):**

Omit the section.

**Explanatory note**

Item (6) is consequential on the omission from the Act of the list of protected amphibians (see item (15)).

**(7) Section 97 (Certain protected fauna to be property of the Crown):**

(a) Omit section 97 (1) (b1).

(b) From section 97 (1) (c), omit "(not being a protected amphibian)".

**(8) Section 98 (Taking or killing protected fauna, other than endangered fauna):**

After section 98 (4), insert:

(5) Subsection (2) does not apply in relation to things which are essential for the carrying out of:

(a) development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979; or

(b) an activity, whether by a determining authority or pursuant to an approval of a determining authority, within the meaning of Part 5 of that Act if the determining authority has complied with that Part.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

**Explanatory note**

Item (8) authorises a person to take or kill protected fauna (other than endangered fauna) where it is essential to do so for the purpose of carrying out development under a development consent or approval under the Environmental Planning and Assessment Act 1979. It is not an offence under that section if the defendant did not know and could not reasonably have foreseen that his or her acts would take or kill the fauna.

**(9) Section 99 (Taking or killing etc. endangered fauna):**

- (a) Omit the penalty provision from section 99 (1), insert instead:

**Penalty:**

- (a) in respect of any endangered fauna of a species named in Part 1 (threatened fauna) or Part 3 (marine mammals) of Schedule 12—1,000 penalty units or imprisonment for 2 years or both; or
- (b) in respect of any endangered fauna of a species named in Part 2 (vulnerable and rare fauna) of Schedule 12—200 penalty units or imprisonment for 1 year or both.

- (b) Omit section 99 (3) (a), insert instead:

- (a) the provisions of this section prevail, except where the other Act is the Bush Fires Act 1949; and

- (c) After section 99 (5), insert:

(6) Until publication of the revised (interim) Schedule 12 under section 92A, subsection (1) does not apply in relation to things which are essential for the carrying out of:

- (a) development in accordance with a development consent within the meaning of the Environmental Planning and Assessment Act 1979; or
- (b) an activity, whether by a determining authority or pursuant to an approval of a determining authority, within the meaning of Part 5 of that Act if the determining authority has complied with that Part.

**Explanatory note**

Item (9) (a) increase the penalties for the unlawful taking or killing of endangered fauna and re-expresses the penalties in penalty units. One penalty unit currently equals \$100. The penalties have been increased to act as a deterrent to those who may engage in the deliberate wanton destruction of or interference with endangered and protected fauna.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued***

Item (9) (b) makes explicit that the Bush Fires Act 1949 prevails over section 99. It is not an offence under that section if the defendant did not know and could not reasonably have foreseen that his or her acts would take or kill the fauna.

Item (9) (c) authorises a person to take or kill endangered fauna where it is essential to do so for the purpose of carrying out development under a development consent or approval under the Environmental Planning and Assessment Act 1979, but only until the revised (interim) Schedule 12 is in place under proposed section 92A. (See item (3)).

- (10) Section 100 (**Further provisions respecting taking or killing protected fauna (including endangered fauna)**):

Omit section 100 (2).

**Explanatory note**

Item (10) removes the power to exempt persons from section 98 (2) or 99 (1) by regulation.

- (11) Section 101 (**Buying, selling or possessing protected fauna**):

Omit the penalty provision from section 101 (1), insert instead:

**Penalty:**

- (a) in respect of any protected fauna other than endangered fauna—100 penalty units or imprisonment for 6 months or both;
- (b) in respect of any endangered fauna of a species named in Part 2 (vulnerable and rare fauna) of Schedule 12—200 penalty units or imprisonment for 1 year or both;
- (c) in respect of any other endangered fauna—1,000 penalty units or imprisonment for 2 years or both.

**Explanatory note**

Item (11) increases the penalty for buying, selling or possessing protected fauna and re-expresses the penalties in penalty units. One penalty unit currently equals \$100. The penalties have been increased to act as a deterrent to those who may become involved in trafficking in endangered and other protected fauna.



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SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—*continued*

(12) Section 120 (**General licence**):

(a) At the end of section 120 (1), insert:

(e) to take or kill any protected fauna in the course of carrying out specified development or specified activities.

(b) After section 120 (2), insert:

(3) A general licence may be issued without conditions or limitations or may be issued subject to specified conditions or limitations.

(4) Without affecting the generality of subsection (3):

(a) a general licence may but need not specify the species of protected fauna that may be taken or killed under its authority; and

(b) a general licence may but need not be limited to specified areas.

(5) A general licence may authorise any specified persons in addition to the person to whom the licence is issued to do the things authorised by the licence. In any such case, the specified persons are taken to be holders of the licence for the purposes of this Act.

(6) To avoid doubt, the Director is not a determining authority for the purposes of Part 5 of the Environmental Planning and Assessment Act 1979 when issuing a general licence.

(13) Section 176 (**Proceedings for offences**):

Omit section 176 (1AA), insert instead:

(1AA) Proceedings for an offence under section 99 may be taken only before the Land and Environment Court in its summary jurisdiction.

(1BB) Proceedings for an offence under section 90, 98 or 101 may be taken before the Land and Environment Court in its summary jurisdiction or before a Local Court constituted by a Magistrate sitting alone.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND  
WILDLIFE ACT 1974 No. 80—continued**

**Explanatory note**

Item (13) ensures that prosecutions for offences involving endangered fauna are brought only in the Land and Environment Court where the expertise and the discretion to impose the full range of penalties reside. This should avoid the present difficulty that inconsistent penalties are frequently imposed by different courts.

**(14) Schedule 3 (Savings, transitional and other provisions):**

After clause 21, insert:

**Protected amphibians**

22. Section 97 (1) (c) applies in respect of fauna that is an amphibian as if the reference in that section to the commencement day were a reference to:

- (a) the date of assent to the National Parks and Wildlife (Amendment) Act 1983 in the case of an amphibian that was a protected amphibian immediately before the date of assent to the Endangered Fauna (Interim Protection) Act 1991; or
- (b) the date of assent to the Endangered Fauna (Interim Protection) Act 1991 in the case of any other amphibian.

**Explanatory note**

Item (14) enacts a consequential savings provision concerning amphibians.

**(15) Schedule 8B:**

After Schedule 8A, insert:

**SCHEDULE 8B—SCIENTIFIC COMMITTEE  
PROCEDURES AND CONDITIONS**

(Sec. 92A)

1. At the first meeting of the Scientific Committee the members are to elect a Convenor.
2. Two members form a quorum at any meeting of the Scientific Committee and any duly convened meeting at which a quorum is present is competent to exercise any function of the Committee.
3. Questions arising at a meeting of the Scientific Committee are to be determined by a majority of votes of the members present and voting.

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**SCHEDULE 1—AMENDMENT OF NATIONAL PARKS AND WILDLIFE ACT 1974 No. 80—*continued***

4. The procedures for the calling of meetings, their frequency and the conduct of business at meetings is to be as determined by the Scientific Committee at its first meeting (and at subsequent meetings if necessary).

5. Each member of the Scientific Committee is entitled to receive such remuneration (including travelling and subsistence allowances) for attending meetings and exercising functions of the Committee as the Director may from time to time determine in respect of him or her.

6. In the event of a casual vacancy, the Director must forthwith fill the vacancy by appointing a person nominated in accordance with section 92A (1) by the organisation which would otherwise have no nominee as a member.

**Explanatory note**

Item (15) provides for the procedures and conditions of membership which apply to the Scientific Committee.

**(16) Schedule 12A (Protected amphibians):**

Omit the Schedule.

**Explanatory note**

Item (16) repeals the list of protected amphibians. Because the term "fauna" will now include amphibians, all amphibians will be protected fauna. In addition, some species may be listed as endangered fauna. The separate treatment of some amphibians as protected amphibians will therefore no longer be relevant.

**SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 No. 203**

(Sec. 5)

**(1) Section 4 (Definitions):**

Insert in section 4 (1) in alphabetical order the following definition:

"protected fauna" has the same meaning as in the National Parks and Wildlife Act 1974;



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**SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203—continued**

**(2) Section 4A:**

After section 4, insert:

**Significant effect on the environment of protected fauna**

4A. For the purpose of sections 77, 90 and 112, in deciding whether there is likely to be a significant effect on the environment of protected fauna the following factors must be taken into account:

- (a) the extent of modification or removal of habitat, in relation to the same habitat type in the locality;
- (b) the sensitivity of the species of fauna to removal or modification of its habitat;
- (c) the time required to regenerate critical habitat, namely, the whole or any part of the habitat which is essential for the survival of that species of fauna;
- (d) the effect on the ability of the fauna population to recover, including interactions between the subject land and adjacent habitat that may influence the population beyond the area proposed for development or activities;
- (e) any proposal to ameliorate the impact;
- (f) whether the land is currently being assessed for wilderness by the Director of National Parks and Wildlife under the Wilderness Act 1987;
- (g) any adverse effect on the survival of that species of protected fauna or of populations of that fauna.

**Explanatory note**

Items (1) and (2) provide guidance to public authorities in assessing the impacts of developments when exercising their statutory powers under the Act.

**(3) Section 77 (Making of development applications):**

(a) After section 77 (3) (d), insert:

- (d1) (where the application is in respect of a development which is likely to significantly affect the environment of protected fauna) be accompanied by a fauna impact statement in accordance with section 92D of the National Parks and Wildlife Act 1974;

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**SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203—*continued***

(b) After section 77 (4), insert:

- (4A) The consent authority must forthwith forward a copy of any fauna impact statement received under subsection (3) (d1) to the Director of National Parks and Wildlife.

**Explanatory note**

Item (3) sets a threshold above which consent authorities should require the assistance of a fauna impact statement in assessing the impacts of developments when exercising their statutory powers under the Act.

(4) Section 90 (**Matters for consideration**):

After section 90 (1) (c1), insert:

- (c2) whether there is likely to be a significant effect on the environment of protected fauna;

**Explanatory note**

Item (4) ensures that consent authorities direct their minds to the effect of a development on the environment of protected fauna.

(5) Section 112 (**Decision of determining authority in relation to certain activities**):

After section 112 (1A), insert:

(1B) Without in any way limiting the provisions of subsection (1), a determining authority must not carry out an activity, or grant an approval in relation to an activity, being an activity which is likely to significantly affect the environment of any protected fauna unless a fauna impact statement has been prepared in accordance with section 92D of the National Parks and Wildlife Act 1974.

(1C) Despite subsection (1B), where an environmental impact statement has been prepared pursuant to subsection (1) which addresses the matters set out in section 92D (1) of the National Parks and Wildlife Act 1974, no separate fauna impact statement is required.

(1D) A determining authority must forthwith forward a copy of any environmental or fauna impact statement referred to in subsection (1B) or (1C) to the Director of National Parks and Wildlife.

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**SCHEDULE 2—AMENDMENT OF ENVIRONMENTAL  
PLANNING AND ASSESSMENT ACT 1979 No. 203—*continued***

**Explanatory note**

Item (5) sets a threshold above which determining authorities should require the assistance of a fauna impact statement in assessing the impacts of developments when exercising their statutory powers under the Act. A one-stop process is envisaged. Proposed subsection (1C) prevents duplication of effort.

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*[Member's second reading speech made in—  
Legislative Assembly on 5 December 1991]*

*Minister's second reading speech made in—  
Legislative Council on 12 December 1991]*



