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Threatened species legislation in NSW: a recent history

by Laura Ismay

1. Introduction

'Biodiversity' or 'biological diversity' is the variety of life on earth. It includes all plants, animals and micro-organisms, their genes, and the terrestrial, marine and freshwater ecosystems of which they are a part.¹ Biodiversity conservation policy initiatives focus in part on the conservation of threatened species, those Australian native plants and animals deemed to be at risk of extinction in the wild. Under the NSW [Threatened Species Conservation Act 1995](#) (TSC Act) this includes vulnerable, endangered and critically endangered species, populations and ecological communities.

The protection of threatened species in Australia is a matter of concern at both Federal and State levels. The Federal Government first became involved in threatened species conservation in the 1980s, with the establishment of an Endangered Species Advisory Committee.² Most recently, with the appointment of the first National Threatened Species Commissioner in 2014 and development of a [Threatened Species Strategy \(2015\)](#), the Federal Government reconfirmed its commitment to "promot[ing] awareness of threatened species at a national level".³ Threatened species protection initiatives at a State level are of equal, if not greater importance. Indeed, academics have noted that "most progress in conserving threatened species has been the result of State and Territory initiatives."⁴

Launched in 2013, [Saving our Species](#) is the NSW conservation program aimed at maximising the number of threatened species that can be secured in the wild in NSW for 100 years. In 2014, the [Independent Biodiversity Legislation Review Panel](#) was appointed to conduct a comprehensive review of NSW's biodiversity legislation, including the TSC Act. In March 2015, the Government committed to implementing all 43 recommendations contained within the Panel's final report. Many of these recommendations will be implemented by the proposed [Biodiversity Conservation Bill 2016](#). If passed, this Bill will repeal the TSC Act and [Nature Conservation Trust Act 2001](#) in full, as well as parts of the [National Parks and Wildlife Act 1974](#)

creating a single piece of biodiversity legislation. The cognate [Local Land Services Amendment Bill 2016](#) will repeal the [Native Vegetation Act 2003](#).

This e-brief starts with an overview of current biodiversity conservation legislation in NSW. Particular attention is given to threatened species legislation, its development in NSW and common themes across Australian jurisdictions. Three key NSW Acts are then covered – the [Endangered Fauna \(Interim Protection\) Act 1991](#), [Threatened Species Conservation Act 1995](#) and [Fisheries Management Act 1994](#), with a focus on the TSC Act. This e-brief finishes with a snapshot of threatened species in NSW today, as encapsulated by the [NSW State of the Environment 2015](#) report.

2. Biodiversity conservation legislation

Biota first received legal protection in NSW under the *Game Protection Act 1866*. Since then, biodiversity conservation legislation has undergone a number of significant changes with respect to its objectives, and the focus of its protection. The way in which it has achieved these objectives has also changed – evolving from a “punitive” approach, to one that encourages community-based conservation in partnership with government.⁵

According to Jarman and Brock, “modern” Australian threatened species legislation developed in the late 1980s and early 1990s in several Australian jurisdictions including NSW and the Commonwealth. This legislation contained a number of common objectives including:

- conserving biological diversity in all its forms;
- preventing extinction and promoting the recovery of endangered species, populations and ecological communities;
- the elimination or management of threatening processes;
- ensuring the proper assessment of the impact of actions affecting threatened taxa and communities; and
- encouraging the conservation of threatened species, populations and ecological communities.⁶

The [Endangered Fauna \(Interim Protection\) Act 1991](#) (EFIP Act) was the first piece of “modern” threatened species legislation in NSW. This interim legislation came from recognition that existing provisions under the [National Parks and Wildlife Act 1974](#) (NP&W Act) and [Environmental Planning and Assessment Act 1979](#) (EP&A Act) did not adequately protect endangered species outside national parks. Coupled with growing public sentiment and scientific understanding of conservation, the push for new legislation with a focus on terrestrial and aquatic areas outside of protected areas on Crown lands was strong. The EFIP Act built upon existing protection strategies under the NP&W and EP&A Acts, extending the reach of threatened species legislation to all fauna across NSW (it excluded invertebrates and flora).

The EFIP Act also paved the way for the introduction of the [Fisheries Management Act 1994](#) and TSC Act in 1995, which remain the cornerstones of threatened species legislation in NSW today. These Acts form part of a suite of biodiversity conservation legislation in NSW that also includes the [Native Vegetation Act 2003](#), NP&W Act and EP&A Act.⁷

3. Endangered Fauna (Interim Protection) Act 1991

The EFIP Act was a direct response by the Opposition to the Government's introduction of a special regulation under the Fauna Protection Regulations in 1991. This followed the Land & Environment Court's decision in *Corkhill v Forestry Commission of New South Wales* (LEC 40169/91). Justice Stein held that the Forestry Commission – which was engaged in logging of the Chaelundi State Forest at the time – was bound to observe the provisions of ss 98 and 99 of the NP&W Act, which it had not done. Following advice from the Solicitor-General that this judgment would result in the closing down of all forestry operations in NSW, the Government introduced the special regulation to exempt certain bodies from the provisions of ss98(2) and s99(1), if they had otherwise complied with the EP&A Act.

Concerned that this regulation would create “a window of opportunity for the destruction of endangered species”, the Interim Protection Bill was introduced by the Shadow Minister for the Environment, Pam Allan in December 1991. According to Ms Allan, the Bill formed part of a “three-part package” in response to the regulation:

...First, disallowance of the regulation; second, enactment of the *Endangered Fauna (Interim Protection) Bill*; and, third, enactment of a threatened species conservation Act next year.⁸

The regulation was disallowed on 12 December, with the Opposition gaining the support of the Independents in this motion. On the same day, and following a series of amendments inserted by the Government in the Committee stage, the Bill passed with an initial sunset clause of December 1992. Key objects of the EFIP Act were as follows:

- to provide urgently an objective scientific evaluation of the conservation status of fauna in New South Wales;
- to divide species of fauna into endangered, protected and unprotected species;
- to ensure endangered species of fauna are only harmed with the informed consent of the Director of National Parks and Wildlife;
- to relax the prohibition upon harming protected fauna where consents and approvals have been issued under the *Environmental Planning and Assessment Act 1979*;
- 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; and
- 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.

Three Bills followed the EFIP Act, none of which were passed: the Endangered and Other Threatened Species Conservation Bill 1993, introduced by the Coalition; and the Threatened Species Conservation Bill 1993 and Threatened Species Conservation Bill No. 1 1995, both introduced by the Independent, Dr Peter MacDonald. The Coalition's Bill was the subject of the 1993 Endangered and Other Threatened Species

Conservation Bill Committee, which tabled its report in December 1994 prior to the prorogation of Parliament for the 1995 State election.

4. Threatened Species Conservation Act 1995

Having campaigned on a policy of environmental law reform during the 1995 State election campaign, Labor's Minister for the Environment Pam Allan outlined the Government's proposed environmental reform package soon after coming into office. This was to focus on updating outdated policies and improving existing strategies.⁹ With respect to legislating to protect threatened species, the Government was faced with the deadline imposed by the sunset clause of October 1995 contained in the EFIP Act. The Government announced that the legislation that would replace this Act would be more comprehensive:

“coordinat[ing] species protection and recovery plans for key rare and endangered species and maintain[ing] the current endangered species licensing arrangements.”¹⁰

The Carr Government's [Threatened Species Conservation Bill 1995 \(No 2\)](#) sought to repeal the EFIP Act, along with amending the NP&W Act and EP&A Act.

According to Lyster et al., the TSC Act supplemented existing NSW environmental legislation (see the NP&W Act) to more closely reflect the principles of the [Rio Biodiversity Convention](#), to which Australia was a party.¹¹ It was based on an approach which required the establishment of lists of species, communities and populations that were in need of protection and the identification of key threatening processes. After being listed, with the exception of species presumed extinct, a recovery plan could have been prepared to promote the recovery of the species, community or population to a position of viability in nature. In addition to this, threat abatement plans could have been prepared to neutralise the effects of any key threatening process.

The TSC Act also interacted with a number of key pieces of legislation. The NP&W Act provided offence provisions for the TSC Act, whilst applicants for development consent under the EP&A Act may have been required to submit a species impact statement if a listed group was likely to be affected.

The objects of the TSC Act as passed were as follows:

- (a) to conserve biological diversity and promote ecologically sustainable development, and
- (b) to prevent the extinction and promote the recovery of threatened species, populations and ecological communities, and
- (c) to protect the critical habitat of those threatened species, populations and ecological communities that are endangered, and
- (d) to eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities, and

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

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

The Act as passed provided for:

- the **listing** and classification of vulnerable and endangered species, populations and ecological communities;
- the identification of **key threatening processes** that may threaten the survival of those species, populations and ecological communities;
- the declaration, and mapping, of **critical habitats** essential for the survival of threatened species, populations and ecological communities;
- the preparation of **recovery plans** for threatened species, populations and ecological communities and **threat abatement plans** to manage key threatening processes;
- the use of **species impact statements** to assess, manage and regulate actions that may damage critical or other habitat or otherwise significantly affect threatened species, populations and ecological communities;
- the establishment of a **Scientific Committee**;
- the creation of **new offences** in the NP&W Act relating to harming and picking threatened species, populations and ecological communities of plants or animals, buying, selling or possessing threatened species, and damaging critical and other habitats;
- the ability for any person (including a third party) to **bring proceedings** in the Land & Environment Court to remedy or restrain a breach of the Act; and
- the ability of the Minister to make an **interim protection order** over land containing threatened species, populations and ecological communities, critical habitat or other habitat under the NP&W Act.

4.1 2002 reforms – First reforms to the TSC Act

Two key developments provided impetus for reform of the TSC Act in 2002. The Joint Select Committee on the *Threatened Species Conservation Act 1995* conducted an inquiry into the Act in 1997, delivering its final report on 3 December. The primary focus of the inquiry was to assess whether the policy objectives of the TSC Act remained valid and whether its provisions remained appropriate for securing those objectives. The Committee found that whilst the policy objectives were valid, a number of areas of the TSC Act required review, including those relating to the cost of complying with the Act and the resources required to fund its administration.¹² In 1999, the Commonwealth Government overhauled its threatened species laws, enacting the [*Environment Protection and Biodiversity Conservation Act 1999*](#) (EPBC Act).

In May 2002, the NSW Government introduced the [Threatened Species Conservation Amendment Act 2002](#), both in response to the Committee recommendations, as well as to ensure that the TSC Act was consistent with the new Commonwealth legislation. The Act as passed introduced the following major changes:

- Provided for the listing of **vulnerable ecological communities** under Schedule 2;
- Altered the requirements for listing a species as endangered. This was intended to **exclude isolated populations of limited conservation value** from the list;
- As recommended by the Joint Select Committee, it introduced both **multispecies recovery plans and threat abatement plans**;
- Required the Director-General of National Parks and Wildlife to have regard to the **special role that indigenous people can play** in the making of recovery plans and threat abatement plans;
- **Streamlined licensing procedures** by providing for a single licence for scientific, educational and conservation activities that affect protected and threatened species, endangered populations and endangered ecological communities; and
- Amended section 112 of the EP&A Act to make it clear that where the impact of an action is on threatened species or critical habitat only, a full environmental impact statement is not required, just a species impact statement.

4.2 2004 reforms – Biodiversity certification

Introduced in August 2004, the [Threatened Species Legislation Amendment Act 2004](#) allowed the Minister to confer **biodiversity certification** on environmental planning instruments (EPIs), as well as on the native vegetation reform package.¹³ In conferring this certification, the Minister was also required to be satisfied that relevant measures would be taken that would lead to the overall improvement or maintenance of biodiversity values. Biodiversity values include threatened species, populations and communities, and their habitats.

The introduction of biodiversity certification simplified the planning process, replacing the traditional system of site-by-site threatened species assessment under the EP&A Act. As biodiversity certification was to be undertaken at the strategic planning phase, rather than on a site-by-site basis, it was thought that this would provide greater certainty for biodiversity outcomes, development applicants, local governments and other stakeholders.

Once biodiversity certification was conferred on an EPI, subsequent development under Part 4 or Part 5 of the EP&A Act would generally not require threatened species assessment. However, biodiversity certification did not remove the need for threatened species assessment of development under Part 3A of the EP&A Act, nor the need to undertake any assessment in accordance with the Commonwealth EPBC Act. The Act also expanded the categories listed under Schedule 1, inserting **critically endangered species** as a group within the TSC Act.

Additionally, a new Part 5A introduced the requirement to create a **Threatened Species Priorities Action Statement**.¹⁴ This Action Statement was to establish priorities for the recovery of all threatened species and for threat abatement of key threatening processes. While recovery plans and threat abatement plans were no longer mandatory, if considered necessary they could still be prepared in accordance with the Action Statement.

4.3 2006 reforms – Biobanking Scheme

The [*Threatened Species Conservation Amendment \(Biodiversity Banking\) Act 2006*](#) introduced the [BioBanking scheme](#) under Part 7A of the TSC Act. BioBanking is a market based approach to conserving biodiversity through the planning process. Developers can opt to use BioBanking to offset the impacts of their development by purchasing **biodiversity credits**, generated on a BioBank site, as an alternative to the traditional threatened species regime under the EP&A Act.

The Act also amended the TSC Act to permit the conditional biodiversity certification of an EPI, allowing the Minister to limit the certification to specified threatened species, or specified development or activities.

4.4 2008 reforms – Growth Centres SEPP

Under the 2004 reforms, the Minister could grant biodiversity certification to an EPI. Accordingly, an [order](#) conferring biodiversity certification on the Sydney Region Growth Centres State Environment Planning Policy (Growth Centres SEPP) was made in December 2007 under section 126G of the TSC Act. In March 2008, the True Conservation Association, represented by the Environmental Defenders Office, [challenged](#) the conferral of this biodiversity certification in the Land and Environment Court. The True Conservation Association argued that the certification was granted without appropriate notice, was based on inadequate information and that the Minister's exercise of discretion under s 126G(1) in granting the certification was manifestly unreasonable.

In response to this challenge, the [*Threatened Species Conservation Amendment \(Special Provisions\) Act 2008*](#) was passed in June 2008, "to remove doubts about the validity of the original certification of the Growth Centres SEPP".¹⁵ The legislation operated retrospectively to directly confer biodiversity certification on the Growth Centres SEPP, essentially rendering the legal challenge redundant. This legislation was relevant to the Growth Centres SEPP only; the Minister was still required to confer biodiversity certification directly onto any other EPI.

4.5 2010 reforms – Biodiversity certification and new offence provisions

The amendments introduced by the [*Threatened Species Conservation Amendment \(Biodiversity Certification\) Act 2010*](#) repealed Part 7, Division 5 of the TSC Act which had permitted the Minister to grant biodiversity certification to EPIs. The Act inserted a new Part 7AA which allowed the Minister to confer biodiversity certification directly onto specified land instead, an alternative method to certifying an EPI in order to remove the

need for site-by-site threatened species assessment. The Minister's Second Reading speech noted:

This ensures that the benefits of certification are recognised regardless of which planning controls apply, or if multiple planning controls apply. It clarifies the process of making an application for biodiversity certification. Only planning authorities will be able to make an application.¹⁶

The Act also extended biodiversity certification to include projects determined under Part 3A of the EP&A Act and exempted biodiversity certified land from the operation of the [Native Vegetation Act 2003](#). The Minister stated that such changes would bring the assessment process more in line with the Commonwealth's EPBC Act, reducing unnecessary duplication between the schemes.

The [National Parks and Wildlife Amendment Act 2010](#) also introduced a number of important changes to the TSC Act, particularly around offences and remedies available to courts. The Minister's Second Reading speech noted that the amendments were "designed to improve the enforcement and operation of the National Parks and Wildlife Act 1974",¹⁷ the Act under which breaches of the TSC Act were enforced. On this point, the Amendment Act inserted Part 9B into the TSC Act, detailing the possible orders and remedies available to a court with respect to proven offences under the Act. The TSC Act had previously been silent on this part and had left the question of orders and remedies to the discretion of the court. It also established the defendant as the party with the onus of proof (s154B) with regards to having a reasonable excuse for having committed an offence under the TSC Act.

5. Fisheries Management Act 1994

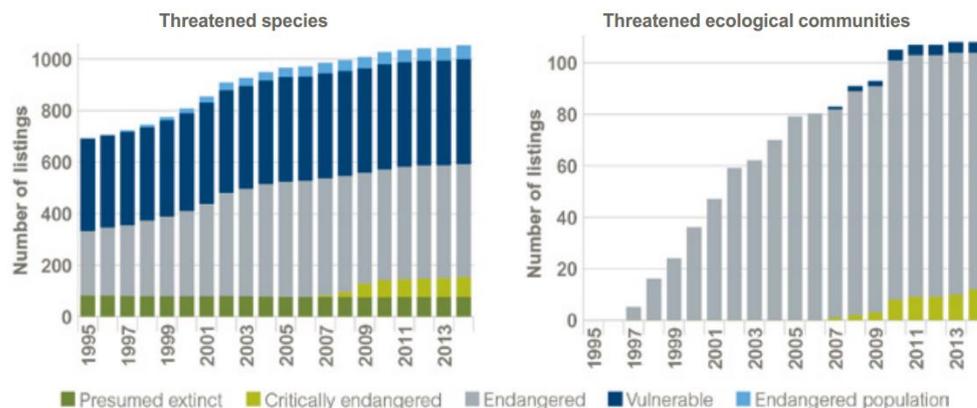
The [Fisheries Management Act 1994](#) (FM Act) was introduced in April 1994 with the aims of conserving, developing and sharing the fishery resources of the State for the benefit of present and future generations. As first introduced, the FM Act provided for habitat protection and the establishment of aquatic reserves.

Following the passage of the [Fisheries Management Amendment Act 1997](#) in December 1997, a similar protection regime to the TSC Act was introduced as Part 7A of the FM Act, to protect fish and marine vegetation. As with the TSC Act, it provided for the creation of a Fisheries Scientific Committee, a threatened species listing procedure and a range of offences. It also provided for the declaration of critical habitats and the preparation of recovery plans, threat abatement plans and a priorities action statement.

6. Threatened species in NSW

The [NSW State of the Environment 2015](#) report assesses the status and condition of major environmental resources in NSW and looks at the pressures that affect the environment and the NSW Government's responses to those pressures. Figure 1 shows the increase in the numbers of species and ecological communities listed under the TSC Act and FM Act. As of December 2014, 999 fauna and flora and 108 threatened ecological communities are listed under NSW threatened species legislation.

Figure 1: Changes in total listings of threatened species and ecological communities (1995-2014)



Source: OEH and DPI data 2015

Between 2012 and 2014, listings increased by 10, with both aquatic and terrestrial species listings increasing by five each – an increase of 1%. The report also states that overall, the number of species considered at risk of extinction in the TSC Act rose between these years, but at a slowing rate. The report noted that:

In 2013, the performance of the NSW Threatened Species Priorities Action Statement under the TSC Act was reviewed following its first three years of operation (2007–10). This review found that while significant worthwhile conservation work was being undertaken, it was unclear to what extent this work benefited threatened species. The review has led to an innovative method of developing projects to meet the needs of threatened species in NSW, namely the Saving our Species program. The program aims to maximise the number of terrestrial threatened species that can be secured in the wild in NSW for 100 years.¹⁸

The major threats to biodiversity include habitat loss, including the clearing and the disturbance of native vegetation, the impacts of invasive pest and weed species, altered fire regimes, and climate change.¹⁹ The pressure affecting the largest number of terrestrial threatened species in NSW (87%) is the clearing and disturbance of native vegetation, followed by invasive pest and weed species.

7. Conclusion

“Modern” Australian threatened species legislation contains a number of common objectives. These include preventing extinction and promoting the recovery of endangered species, populations and ecological communities; the elimination or management of threatening processes and ensuring the proper assessment of the impact of actions affecting threatened taxa and communities.

While these objectives are incorporated into the [Threatened Species Conservation Act 1995](#) and [Fisheries Management Act 1994](#) the effectiveness of these Acts has been questioned, with the number of threatened species and ecological communities in NSW having risen considerably since 1995. Across the spectrum, various stakeholders agree that reform is needed.

On 3 May 2016 the NSW Government released a draft [Biodiversity Conservation Bill 2016](#), draft [Local Land Services Amendment Bill 2016](#) and supporting products for public exhibition. Public consultation on the reform package closed on 28 June 2016, with over 1000 submissions received. Due to be introduced to Parliament in October 2016, if passed these Bills will establish a new biodiversity conservation regime in NSW. The Research Service is planning to publish an Issues Backgrounder on these Bills in the near future.

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- ¹ Department of the Environment and Energy, [Biodiversity](#), Commonwealth of Australia, 2016
 - ² J Woinarski & A Fisher, [The Australian Endangered Species Protection Act](#), *Conservation Biology*, Vol. 15, No. 5, October 1999
 - ³ Australian Government, [Threatened Species Strategy](#), 2015
 - ⁴ Dr A Burbidge, [Submission on Threatened Species](#), Senate Standing Committee on Environment and Communications Inquiry into the effectiveness of threatened species and ecological communities' protection in Australia, 2012
 - ⁵ P Jarman & M Brock (2004), The evolving intent and coverage of legislation to protect biodiversity in New South Wales, in (eds) P Hutchings, D Lunney and C Dickman, *Threatened species legislation: is it just an Act?*, Royal Zoological Society of New South Wales, p. 10
 - ⁶ Ibid.
 - ⁷ Other legislation relevant to biodiversity conservation includes the [Wilderness Act 1987](#), [Forestry Act 2012](#), [Nature Conservation Trust Act 2001](#), [Local Land Services Act 2013](#), [Coastal Management Act 2016](#), [Marine Estate Management Act 2014](#), and [Natural Resources Commission Act 2003](#).
 - ⁸ P Allan, [Second Reading Speech](#), NSW Parliamentary Debates, 5 December 1991, p 4
 - ⁹ P Allan, "Excerpts from a Speech to the Australian Centre for Environmental Law outlining the incoming New South Wales Government's Environmental Law Reform Agenda", *Environmental Law & Planning Journal*, Vol 12, 1995, p. 342
 - ¹⁰ Ibid.
 - ¹¹ This treaty was signed by Australia in 1992, with ratification following on 29 December 1993. R Lyster et. al (2016), *Environmental and Planning Law in New South Wales*, The Federation Press, p. 408
 - ¹² Report of the Joint Select Committee upon the Threatened Species Conservation Act 1995, p 9.
 - ¹³ The native vegetation reform package included the [Native Vegetation Act 2003](#) and the regulations under that Act, State-wide standards and targets for natural resource management issues recommended under the [Natural Resources Commission Act 2003](#) and adopted by the Government, [catchment action plans](#) under the [Catchment Management Authorities Act 2003](#) and protocols and guidelines adopted or made under the [Native Vegetation Regulation 2005](#), the [Catchment Management Authorities Act 2003](#) and the [Natural Resources Commission Act 2003](#).
 - ¹⁴ The current [Saving our Species](#) program operates as the Priorities Action Statement.
 - ¹⁵ N Rees, [Second Reading Speech](#), NSW Parliamentary Debates, 18 June 2008, p. 8778
 - ¹⁶ F Sartor, [Second Reading Speech](#), NSW Parliamentary Debates, 20 May 2010, p. 23208
 - ¹⁷ Ibid.
 - ¹⁸ [NSW State of the Environment 2015](#), NSW Environment Protection Authority (EPA), 2015
 - ¹⁹ Ibid.

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