



New South Wales

# **Biodiversity Conservation Regulation 2017**

under the

Biodiversity Conservation Act 2016

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Biodiversity Conservation Act 2016*.

Minister for the Environment

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# public consultation draft

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Biodiversity Conservation Regulation 2017 [NSW]  
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## Biodiversity Conservation Regulation 2017

under the

Biodiversity Conservation Act 2016

### Part 1 Preliminary

#### 1.1 Name of Regulation

This Regulation is the *Biodiversity Conservation Regulation 2017*.

#### 1.2 Commencement

This Regulation commences on [*date to be specified*] and is required to be published on the NSW legislation website.

#### 1.3 Definitions

(1) In this Regulation:

***national park estate and other conservation areas*** means any of the following areas:

- (a) a wilderness area declared under the *Wilderness Act 1987*,
- (b) land reserved under the *National Parks and Wildlife Act 1974* or acquired by the Minister administering that Act under Part 11 of that Act,
- (c) land dedicated or set apart as a flora reserve under the *Forestry Act 2012* (or any Act repealed by that Act),
- (d) land to which an interim heritage order or listing on the State Heritage Register under the *Heritage Act 1977* applies,
- (e) a declared area of outstanding biodiversity value under the Act,
- (f) an area declared to be critical habitat under Division 3 of Part 7A of the *Fisheries Management Act 1994*,
- (g) a declared World Heritage property within the meaning of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth,
- (h) land dedicated or reserved under the *Crown Lands Act 1989* for similar public purposes for which land is reserved, declared or listed under the other Acts referred to in this definition,
- (i) land to which an interim protection order under Part 11 of the Act applies,
- (j) Lord Howe Island.

***the Act*** means the *Biodiversity Conservation Act 2016*.

(2) Notes included in this Regulation do not form part of this Regulation.

#### 1.4 Additional biodiversity values (section 1.5 of the Act)

The following are prescribed as additional biodiversity values for the purposes of the Act:



- (a) threatened species abundance—being the occurrence and abundance of threatened species or threatened ecological communities, or their habitat, at a particular site,
- (b) vegetation abundance—being the occurrence and abundance of vegetation at a particular site,
- (c) habitat connectivity—being the degree to which a particular site connects different areas of habitat of threatened species that facilitates the movement of those species across their range,
- (d) threatened species movement—being the degree to which a particular site contributes to the movement of threatened species to maintain their lifecycle,
- (e) flight path integrity—being the degree to which the flight paths of protected animals over a particular site are free from interference,
- (f) water sustainability—being the degree to which water quality, water bodies and hydrological processes sustain threatened species and threatened ecological communities at a particular site.

## 1.5 Fee unit for purposes of this Regulation

- (1) For the purposes of this Regulation, a *fee unit* is:
  - (a) in the financial year 2017/2018—\$100, and
  - (b) in each subsequent financial year—the amount calculated as follows:

$$\$100 \times \frac{A}{B}$$

where:

*A* is the CPI number for the March quarter in the financial year immediately preceding the financial year for which the amount is calculated.

*B* is the CPI number for the March quarter of 2017.

- (2) The amount of a fee unit and the amount of a fee calculated by reference to a fee unit is to be rounded to the nearest dollar (and an amount of 50 cents is to be rounded down).
- (3) However, if the amount of a fee unit calculated for any financial year is less than the amount that applied for the previous financial year, then the amount for that previous financial year applies instead.
- (4) As soon as practicable after the CPI number for the March quarter is first published by the Australian Statistician, the Environment Agency Head is required to publish on the NSW legislation website a notice of the amount of the fee unit for the next financial year. That notice may be published by the addition of an editorial note relating to the amount of the fee unit in the in force version of this Regulation published on the NSW legislation website.
- (5) The Environment Agency Head is also required to give public notice on an appropriate government website of the actual amounts of the fees applying in each financial year resulting from the application of the amount of fee unit calculated under this clause.
- (6) This clause operates to change an amount of a fee that is calculated by reference to a fee unit and that change is not dependent on the publication of a notice by the Environment Agency Head under this clause.
- (7) In this clause:

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Part 1 Preliminary

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***CPI number*** means the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics in the latest published series of that index.

***financial year*** means a period of 12 months commencing on 1 July.

**Note.** See section 14.6 of the Act with respect to recovery, waiver or refund of fees.

## Part 2 Protection of animals and plants

### Division 2.1 Protection of marine mammals

#### 2.1 Definitions

In this Division:

**approach** a marine mammal includes operate an aircraft or vessel that approaches the marine mammal.

**aircraft** means any airborne craft, including a fixed wing craft, helicopter, gyrocopter, glider, hang glider, hot air balloon, airship or unmanned aircraft.

**calf** means a whale, dolphin or dugong that is not more than half the length of an adult of the same species.

**constant slow speed**, in relation to a marine mammal or group of marine mammals that is being approached, means a speed of approach to the marine mammal or group that is constant, slow and leaves negligible wake.

**dolphin** means an animal of the family Delphinidae or the family Phocoenidae.

**dugong** means an animal of the species *Dugong dugon*.

**marine mammal** means an animal of the order of Cetacea, Sirenia or Pinnipedia.

**operate** a vessel includes:

- (a) to determine or exercise control over the course or direction of the vessel or over the means of propulsion of the vessel (whether or not the vessel is underway), and
- (b) to pilot the vessel.

**prohibited vessel** means a vessel that is a personal motorised water craft (for example, a jet ski), parasail, hovercraft, wing-in-ground effect craft or a motorised diving aid (for example, a motorised underwater scooter) and includes a remotely operated water craft (for example, a remote controlled speed boat).

**pup** means a seal or sea lion that is not more than half the length of an adult of the same species.

**seal** or **sea lion** means an animal of the family Odobenidae, the family of Otariidae or the family of Phocidae.

**swimming** includes snorkelling or diving.

**unmanned aircraft** means any unmanned airborne craft, including a drone or other remotely piloted airborne craft.

**vessel** includes a water craft of any description that is used or capable of being used as a means of transportation on water, but does not include an aircraft that is capable of landing on water.

**whale** means an animal of the order Cetacea other than a dolphin.

#### 2.2 Interfering with marine mammals

- (1) A person must not interfere with a marine mammal.  
Maximum penalty: Tier 2 monetary penalty.
- (2) In this clause, **interfere with** includes harass, chase, herd, tag, mark and brand.

#### 2.3 Approaching marine mammals

- (1) A person must not approach a marine mammal any closer than the distance declared by or under this clause.  
Maximum penalty: Tier 2 monetary penalty.

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Biodiversity Conservation Regulation 2017 [NSW]  
Part 2 Protection of animals and plants

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- (2) The following distances are declared for any marine mammal (except a marine mammal to which subclause (3) or (4) applies):
- (a) 300 metres, if the person is approaching a whale, dolphin or dugong and is on, or using, a prohibited vessel,
  - (b) 100 metres, if the person is approaching a whale and is on, or using, a vessel other than a prohibited vessel,
  - (c) 50 metres, if the person is approaching a dolphin or dugong and is on, or using, a vessel other than a prohibited vessel,
  - (d) 30 metres, if the person is approaching a whale, dolphin or dugong and is swimming,
  - (e) a height lower than 100 metres within a horizontal radius of 100 metres, if the person is operating an unmanned aircraft,
  - (f) a height lower than 300 metres within a horizontal radius of 300 metres, if the person is operating an aircraft (other than a helicopter, gyrocopter or unmanned aircraft),
  - (g) a height lower than 500 metres within a horizontal radius of 500 metres, if the person is operating a helicopter or gyrocopter,
  - (h) 10 metres, if the person is approaching a seal or sea lion (other than a pup) that is in the water and the person is in, or on, a vessel or is swimming or is a pedestrian,
  - (i) 40 metres, if the person is approaching a seal or sea lion (other than a pup) that is hauled out on land and the person is swimming, operating a vessel or vehicle or is a pedestrian,
  - (j) 80 metres, if the person is approaching a pup.
- (3) The following distances are declared for any whale, dolphin or dugong that is predominantly white in colour and that is approached by a person operating a vessel or aircraft:
- (a) 500 metres, if the person is operating a vessel,
  - (b) a height lower than 610 metres within a horizontal radius of 610 metres, if the person is operating an aircraft (other than an unmanned aircraft),
  - (c) a height lower than 100 metres within a horizontal radius of 100 metres, if the person is operating an unmanned aircraft.
- (4) The Environment Agency Head may, by order, declare a special protection approach distance for a marine mammal described in the order that is approached by a person in the circumstances described in the order if satisfied that the marine mammal is:
- (a) dugong or other rarely sighted species of marine mammal, or
  - (b) a morphological or colour-variant marine mammal, or
  - (c) a female marine mammal that has recently given, or is about to give, birth, or
  - (d) a calf separated from a mother or group of marine mammals, or
  - (e) a sick or injured marine mammal, or
  - (f) at risk of harassment, injury or death.
- An order under this subclause is required to be published in the Gazette as soon as practicable after it is made and has effect for the period (not exceeding 6 months) specified in the order.
- (5) Until the order declaring a special protection approach distance is so published, the order does not apply to any persons who establish that they were not aware of the declaration.

- (6) This clause does not apply to a person approaching a marine mammal in the following circumstances:
- (a) the person is approaching in the course of taking action that is reasonably necessary to prevent a risk to human health or to deal with a serious threat to human life or property,
  - (b) the person is approaching in the course of taking action in the person's capacity as an officer of or person acting on behalf of a law enforcement agency and the action is reasonably necessary for the purposes of law enforcement,
  - (c) the person is approaching in the course of taking an action in the person's capacity as a fisheries officer under the *Fisheries Management Act 1994* and the action is reasonably necessary for the purposes of exercising a law enforcement function conferred on the officer under that Act,
  - (d) the person is approaching in the course of taking action that is a result of an unavoidable accident, other than an accident caused by the person's negligent or reckless behaviour,
  - (e) the person is approaching in the course of taking any action as a result of the person being given a direction by an authorised officer (within the meaning of Part 12 of the Act) and that is being taken in accordance with that direction.

## 2.4 Operation of prohibited vessels approached by marine mammals

A person operating a prohibited vessel that is being approached by a whale, dolphin or dugong must move away from the whale, dolphin or dugong at a constant slow speed so that the vessel remains at least 300 metres away from the whale, dolphin or dugong.

Maximum penalty: Tier 2 monetary penalty.

## 2.5 Operation of vessels that are not prohibited vessels

- (1) In this clause:
- caution zone** for a whale, dolphin or dugong means an area around the whale, dolphin or dugong of a radius of the following:
- (a) for a dolphin or dugong (including a calf)—150 metres,
  - (b) for a whale (including a calf)—300 metres.
- (2) Within the caution zone for a whale, dolphin or dugong (other than a calf), a person operating a vessel that is not a prohibited vessel:
- (a) must operate the vessel at a constant slow speed and in a manner that consistently minimises noise, and
  - (b) must make sure that the vessel does not drift closer than:
    - (i) for a dolphin or dugong—50 metres, or
    - (ii) for a whale—100 metres, and
  - (c) if the whale, dolphin or dugong shows signs of being disturbed—must immediately withdraw the vessel from the caution zone at a constant slow speed, and
  - (d) if there is more than one person on the vessel—must post a lookout for whales, dolphins or dugongs, and
  - (e) without limiting paragraph (b), must approach a whale, dolphin or dugong only:
    - (i) from the rear, at an angle of no closer than 30 degrees to its observed direction of travel, or

- (ii) by positioning the vessel ahead of the whale, dolphin or dugong at more than 30 degrees from its observed direction of travel, and
  - (f) must make sure the vessel does not restrict the path of the whale, dolphin or dugong, and
  - (g) must make sure the vessel is not used to pursue the whale, dolphin or dugong.
- For the purposes of paragraph (c), signs of disturbance include regular changes in direction or speed of swimming, hasty dives, changes in breathing patterns, changes in acoustic behaviour or aggressive behaviour such as tail slashing or trumpet blows.
- (3) A person operating a vessel that is not a prohibited vessel must not allow the vessel to enter the caution zone of a calf.
  - (4) If a calf approaches a vessel that is not a prohibited vessel so that the vessel comes within the caution zone of the calf, the person operating the vessel:
    - (a) must immediately stop the vessel, and
    - (b) must:
      - (i) turn off the vessel's engines, or
      - (ii) disengage the vessel's gears, or
      - (iii) withdraw the vessel from the caution zone at a constant slow speed.
  - (5) A person operating a vessel that is not a prohibited vessel must not enter the caution zone of a whale, dolphin or dugong if there are more than 2 vessels in the caution zone.
  - (6) If a whale (other than a calf) approaches a vessel that is not a prohibited vessel or comes within the limits specified in subclause (2) (b), the person operating the vessel must:
    - (a) disengage the vessel's gears and let the whale approach, or
    - (b) reduce the speed of the vessel and continue on a course away from the whale.
  - (7) If a dolphin or dugong (other than a calf) approaches a vessel that is not a prohibited vessel or comes within the limits specified in subclause (2) (b), the person operating the vessel must not suddenly change the course or speed of the vessel.
- Maximum penalty: Tier 2 monetary penalty.

## 2.6 Operation of aircraft in vicinity of marine mammals

- (1) A person must not operate an aircraft so as to approach a marine mammal from head-on for the purpose of observing a marine mammal.
  - (2) A person must not operate an aircraft so as to hover over a marine mammal.
  - (3) A person must not land an aircraft on water for the purpose of observing a marine mammal.
- Maximum penalty: Tier 2 monetary penalty.

## 2.7 Feeding marine mammals

- (1) A person must not intentionally feed or attempt to feed a marine mammal that is in its natural environment.
- Maximum penalty: Tier 2 monetary penalty.
- (2) In this clause:  
*feed* a marine mammal includes throwing food or rubbish in the water near a marine mammal.

## 2.8 Swimming with whales, dolphins or dugongs

- (1) A person must not enter water within 100 metres of a whale or within 50 metres of a dolphin or dugong.
- (2) If any whale, dolphin or dugong comes within 30 metres of a person who is in the water, the person:
  - (a) must move slowly to avoid startling it, and
  - (b) must not touch it or move towards it.

Maximum penalty: Tier 2 monetary penalty.

**Note.** Section 2.10 of the Act provides that it is a defence to a prosecution for an offence under this Division if the person charged establishes that the act that constituted the offence was authorised by and done in accordance with a biodiversity conservation licence. Section 2.7 (5) of the Act prevents the issue of biodiversity conservation licences that authorise harm to marine mammals or the obtaining of marine mammals for exhibition or other purposes unless it is necessary for genuine scientific or educational purposes or any other purpose connected with the conservation or protection of marine mammals.

## Division 2.2 Defences and other exclusions

### 2.9 Defences provided by adopted codes of practice (section 2.9)

- (1) It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act if the person charged establishes that the act that constitutes the offence was authorised by, and done in accordance with, a code of practice relating to animals or plants made by order of the Minister and published on the NSW legislation website-

**Note.** Division 1 of Part 9 of the Act requires the Minister to undertake public consultation on a proposed code of practice.
- (2) A code of practice may limit the offences for which the code provides a defence.

### 2.10 Emergency response in respect of marine mammals (section 2.9)

- (1) It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act if the person charged establishes that the act that constitutes the offence was part of an emergency response carried out in relation to any marine mammal by or under the authority of:
  - (a) an authorised officer under Part 12 of the Act, or
  - (b) an employee of the Public Service in course of the administration of or the exercise of functions under the Act, the *Fisheries Management Act 1994* or the *Marine Estate Management Act 2014*.
- (2) In this clause:

**emergency response** includes intervention for the purposes of providing assistance to marine mammals that are entangled or stranded, that are suffering trauma or injury resulting from being struck by a vessel, that are threatened by disease or that otherwise require immediate intervention and assistance.

**Note.** The offences in Division 2.1 above are offences arising under Division 1 of Part 2 of the Act and are accordingly offences to which this defence applies.

### 2.11 Authority to liberate homing pigeons (section 2.6 (3))

For the purposes of section 2.6 of the Act, a person is authorised to liberate a homing pigeon.

### 2.12 Harming snakes (section 2.9)

It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act if the act that constitutes the offence was harming a snake, unless the prosecution establishes that the person charged did not have any reasonable grounds to believe

that the snake was endangering or likely to endanger any person or property at the time it was harmed.

**2.13 Authority to harm or pick in reserved areas etc under NPW Act (section 2.9)**

It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act if the person charged establishes that the act that constitutes the offence was authorised by, and done in accordance with, an authority given under section 171 of the *National Parks and Wildlife Act 1974*.

**2.14 Authority conferred by property management plan under former TSC Act (section 2.9)**

It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act if the person charged establishes that the act that constitutes the offence was authorised by, and done in accordance with, a property management plan approved under section 113B of the *Threatened Species Conservation Act 1995* before the repeal of that Act.

**2.15 Protecting distressed animals (section 2.9)**

It is a defence to a prosecution for an offence under section 2.5 of the Act constituted by the possession of an animal if the person charged establishes that:

- (a) the animal was not capable of fending for itself, and
- (b) the person notified the Environment Agency Head in writing of the person's possession of the animal within 3 days after the animal came into the person's possession, and
- (c) the person complied with any direction given to the person by the Environment Agency Head with respect to the animal.

**2.16 Landholder possessing naturally occurring plants on the land (section 2.9)**

It is a defence to a prosecution for an offence for an offence under section 2.5 of the Act constituted by the possession of a plant on any land if the person charged establishes that:

- (a) the plant naturally occurs on the land, and
- (b) the person is a landholder of the land.

**2.17 Picking protected plants on private land by or with consent of landholder (section 2.9)**

It is a defence to a prosecution for an offence under Division 1 of Part 2 of the Act constituted by the picking of a protected plant on any land if the person charged establishes that:

- (a) the plant was grown or cultivated on the land, and
- (b) the person is a landholder of the land or had the consent of the landholder to pick the plant.

**2.18 Buying, selling or otherwise dealing in plants obtained from commercial plant grower (section 2.9)**

It is a defence to a prosecution for an offence under section 2.5 of the Act constituted by dealing (or attempting to deal) in any plant if the person charged establishes that the plant was obtained from a person who was authorised to grow and sell the plant by a licence under the Act.



## 2.19 Authorised import or export of protected plants (section 2.9)

It is a defence to a prosecution for an offence under section 2.5 of the Act constituted by importing into, or exporting from, New South Wales (or attempting to so import or export) a protected plant if the person charged establishes that:

- (a) the plant was tagged in accordance with relevant requirements made under the Act, or
- (b) in the case of the import of a plant from a State or Territory that requires the plant to be tagged—the plant was tagged in accordance with those requirements.

## 2.20 Dealing in meat and other products of protected animals or plants lawfully killed or picked (section 2.9)

(1) It is a defence to a prosecution for an offence under section 2.5 of the Act constituted by any of the following:

- (a) a dealing in any meat derived from a protected animal that was lawfully killed for the purposes of sale (other than a dealing in the carcass of a kangaroo),
- (b) a dealing in any product derived from an emu that was lawfully killed for the purposes of sale,
- (c) a dealing in any manufactured article derived from the skin of a protected animal that was lawfully killed for the purposes of sale (other than an article that is an unprocessed or processed skin),
- (d) a dealing in any manufactured article derived from a protected plant (for example, wood or oils) that was lawfully picked.

(2) For the purposes of this clause, a reference to an animal or plant that is lawfully killed or picked is a reference to an animal or plant that is lawfully killed or picked under the Act or under a corresponding law of the Commonwealth or of an other State or Territory.

## 2.21 Harm to swamphens, raven, crow, cockatoo or galah (section 2.9)

It is a defence to a prosecution for an offence under section 2.1 of the Act if the person charged establishes that the act that constitutes the offence was causing harm to any of the following species of animal and was not for sporting or recreational purposes:

- (a) purple swamphens (*Porphyrio porphyrio*)—but only if:
  - (i) the harm is for the purpose of mitigating damage to commercial rice crops, and
  - (ii) the harm occurs between 1 December and 30 April in the following year, and
  - (iii) the harm occurs in the local government areas of Berrigan, Carrathool (south of the Mid Western Highway), Edward River, Griffith, Hay, Leeton, Murrumbidgee (except former Jerilderie Shire), Narrandera, Federation (except only so much of the former Corowa Shire that is within the Berriquin and West Cororgan Private Irrigation Districts), and Murray River, and
  - (iv) the harm does not occur in national park estate and other conservation areas,
- (b) Australian raven (*Corvus coronoides*), forest raven (*Corvus tasmanicus*), little raven (*Corvus mellori*), Australian crow (*Corvus orru*) or little crow (*Corvus bennetti*)—but only if the harm occurs outside the counties of Camden, Cumberland and Northumberland and outside national park estate and other conservation areas,

- (c) sulphur-crested cockatoo (*Cacatua galerita*) or galah (*Cacatua roseicapilla*)—but only if the harm occurs in areas within the Central or Western Divisions under the *Crown Lands Act 1989* other than national park estate and other conservation areas.

**Note.** See also section 6A of the *Game and Feral Animal Control Act 2002*.

## 2.22 Exclusion of certain animals from offence of dealing in animals (section 2.5)

- (1) This clause applies to the offence of dealing or attempting to deal in an animal under section 2.5 of the Act.
- (2) The offence does not apply to the following:
- Sulphur-crested cockatoo (*Cacatua galerita*),
  - Western corella (*Cacatua pastinator butleri*),
  - Galah (*Cacatua roseicapilla*),
  - Little corella (*Cacatua sanguinea*),
  - Long-billed corella (*Cacatua tenuirostris*),
  - Cockatiel (*Nymphicus hollandicus*),
  - Scaly-breasted lorikeet (*Trichoglossus chlorolepidotus*),
  - Rainbow lorikeet (*Trichoglossus haematodus*),
  - Red-collared lorikeet (*Trichoglossus rubritorquis*),
  - Musk lorikeet (*Glossopsitta concinna*),
  - Princess parrot (*Polytelis alexandrae*),
  - Pale-headed rosella (*Platycercus adscitus*),
  - Adelaide rosella (*Platycercus elegans adelaidae*),
  - Yellow rosella (*Platycercus elegans flaveolus*),
  - Eastern rosella (*Platycercus eximius*),
  - Western rosella (*Platycercus icterotis*),
  - Red-capped parrot (*Purpureicephalus spurius*),
  - Twenty-eight parrot (*Barnardius zonarius semitorquatus*),
  - Port lincoln parrot (*Barnardius zonarius zonarius*),
  - Hooded parrot (*Psephotus dissimilis*),
  - Red-rumped parrot (*Psephotus haematonotus*),
  - Bourke's parrot (*Neopsephotus bourkii*),
  - Elegant parrot (*Neophema elegans*),
  - Scarlet-chested parrot (*Neophema splendida*),
  - Budgerigar (*Melopsittacus undulatus*),
  - King quail (*Coturnix chinensis*),
  - Stubble quail (*Coturnix pectoralis*),
  - Brown quail (*Coturnix ypsilophora*),
  - Painted button-quail (*Turnix varia*),
  - Little button-quail (*Turnix velox*),
  - Diamond dove (*Geopelia cuneata*),
  - Bar-shouldered dove (*Geopelia humeralis*),
  - Peaceful dove (*Geopelia striata*),

Common bronzewing (*Phaps chalcoptera*),  
Crested pigeon (*Ocyphaps lophotes*),  
Emerald dove (*Chalcophaps indica*),  
Star finch (*Neochmia ruficauda*),  
Painted finch (*Emblema pictum*),  
Gouldian finch (*Erythrura gouldiae*),  
Blue-faced parrot finch (*Erythrura trichroa*),  
Zebra finch (*Taeniopygia guttata*).

**Consultation note.** “Dealing” includes buying or selling and possessing. There may be additional animals included in the above exclusion as a result of public consultation on the proposed Regulation.

## **2.23 Exclusions from defence for acts done by Aboriginal persons for domestic purposes (section 2.8 (1) (k))**

- (1) This clause applies to the defence under section 2.8 (1) (k) of the Act.
- (2) The defence does not apply in relation to:
  - (a) a parrot, or
  - (b) a raptor, or
  - (c) an animal that is of a threatened species, or
  - (d) an animal that is part of a threatened ecological community.

## **2.24 Acts authorised by joint management agreements**

- (1) This clause applies to the defence under section 2.8 (1) (n) of the Act relating to acts authorised by a joint management agreement entered into in accordance with the regulations between the Minister and one or more public authorities for the management or control of any action that is jeopardising the survival of a threatened species or threatened ecological community.
- (2) The Minister may enter into such a joint management agreement. Other persons may also be parties to a joint management agreement.
- (3) The parties to a joint management agreement may amend the agreement by a further joint management agreement.
- (4) A joint management agreement is to contain terms, binding on all parties, that:
  - (a) identify the threatened species or threatened ecological community to which the agreement applies, and
  - (b) identify the action that it manages, controls, regulates or restricts, and
  - (c) state its objective (for example, maintenance of a habitat in a state that will contribute to the long-term survival of the species or ecological community), and
  - (d) state the way in which the objective is to be achieved, and
  - (e) specify the measures by which progress towards achieving the objective is to be assessed, and
  - (f) identify the parties who are responsible for the implementation of those measures.
- (5) A joint management agreement entered into with a public authority is void to the extent to which it fetters any discretion of the public authority in the granting or refusal of a planning approval (within the meaning of Part 6 of the Act) or an approval under the *Local Government Act 1993*.

- (6) A joint management agreement under this clause and a joint management agreement within the meaning of Division 8 of Part 7A of the *Fisheries Management Act 1994* may be combined into a single document if both agreements deal with the same subject-matter.
- (7) The Minister must, before entering into a joint management agreement:
  - (a) give a copy of the draft agreement to the Threatened Species Scientific Committee for review, and
  - (b) give the public an opportunity to make submissions on the draft agreement.

Division 1 of Part 9 of the Act applies to the draft agreement in the same way as it applies to a public consultation document under that Division.
- (8) Before a joint management agreement is entered into, the Threatened Species Scientific Committee must review the draft joint management agreement and provide the Minister with comments on the review by the date specified for the making of public submissions on the draft agreement.
- (9) The Minister must consider all written submissions received by the Minister on or before the date specified for the making of public submissions about the draft agreement.
- (10) The Minister may, with the consent of the other parties to the agreement, amend the draft joint management agreement to take into account any of those submissions and any comments made by the Threatened Species Scientific Committee about the draft agreement.
- (11) The Threatened Species Scientific Committee must also:
  - (a) conduct an annual review of the performance of all parties to a joint management agreement, and
  - (b) advise the Minister of any deficiencies in implementation of any joint management agreement by any party to it.

The Threatened Species Scientific Committee's advice on the annual review of joint management agreements is to be set out in the annual report of the Environment Agency Head to Parliament or is to be available for public inspection at a place specified in that annual report.

## **Division 2.3 Biodiversity conservation licences**

### **2.25 Assessment of application for licence (section 2.17)**

The Environment Agency Head may take the following matters into consideration in determining an application for a biodiversity conservation licence:

- (a) any likely impact of the activity to be authorised by the licence on:
  - (i) any protected animals or protected plants, and
  - (ii) any animals or plants that are of a threatened species, and
  - (iii) any animals or plants that are part of a threatened ecological community, and
  - (iv) the habitat of any such animals or plants,
- (b) any likely contribution of the activity to be authorised by the licence to the conservation of matters referred to in paragraph (a),
- (c) any likely impact of the activity to be authorised by the licence on national park estate and other conservation areas,
- (d) whether the activity to be authorised by the licence is directed at preventing or minimising a threat or potential threat to human health, safety or well-being,

- (e) whether the activity to be authorised by the licence is directed at preventing or minimising damage or loss to property that is being or likely to be caused by an animal,
- (f) any relevant management plan referred to in Division 2.4,
- (g) the public interest,
- (h) any other matter the Environment Agency Head considers relevant.

## 2.26 Persons eligible to hold a licence (section 2.17)

- (1) A person is not eligible to hold a biodiversity conservation licence unless the Environment Agency Head is satisfied that the person is a fit and proper person to hold the licence.
- (2) The Environment Agency Head may, in determining whether an applicant for a biodiversity conservation licence is a fit and proper person to hold the licence, have regard to any of the following matters:
  - (a) whether the applicant has contravened any relevant legislation or any licence or other authority under relevant legislation,
  - (b) whether the applicant was a director or other person concerned in the management of a corporation that has contravened any relevant legislation or any licence or other authority under relevant legislation,
  - (c) whether, in the opinion of the Environment Agency Head, the applicant is of good repute having regard to character, honesty and integrity.
  - (d) whether the applicant is a partner or other associate of a person whom the Environment Agency Head considers is not a fit and proper person to hold such a licence,
  - (e) whether the applicant has the technical competencies required to undertake the activities to be authorised by the licence.
- (3) For the purposes of this clause, **relevant legislation** means any of the following:
  - (a) the Act,
  - (b) this Regulation or any other statutory instrument made under the Act,
  - (c) any Act repealed by the Act or any statutory instrument made under any such repealed Act,
  - (d) Part 5A of the *Local Land Services Act 2013* or any statutory instrument made under that Part,
  - (e) the *Protection of the Environment Operations Act 1997*, the *Biosecurity Act 2015*, the *Fisheries Management Act 1994*, the *Prevention of Cruelty to Animals Act 1979*, the *Animal Research Act 1985* or the *Exhibited Animals Protection Act 1986* or any statutory instrument made under any such Act,
  - (f) any other Act or statutory instrument of the State, the Commonwealth, any other State or Territory or any other country that relates to the protection of the environment, the welfare of animals or other matter that the Environment Agency Head considers relevant in determining whether a person is a fit and proper person to hold a licence.

## 2.27 Standard application fee for licence (section 2.12)

An application for a biodiversity conservation licence is to be accompanied by a standard fee of [to be determined].

Section 2.12 of the Act enables the Environment Agency Head to determine an additional application fee if the cost of determining the application exceeds the standard amount. Section 14.6 of the Act provides for the recovery, waiver or refund of fees.

**Consultation note.** The standard fee is to be determined following a review of existing fees in consultation with stakeholders. Information about applicable fees will be published on the OEH website.

## **2.28 Time for dealing with application for licence (section 2.17)**

- (1) The Environment Agency Head is to determine an application for a biodiversity conservation licence:
  - (a) within 28 days after the date on which the application has been duly made, or
  - (b) if the Environment Agency Head determines that additional time is required to determine the licence, within 56 days after that date.
- (2) Any period after the applicant is required by the Environment Agency Head under section 2.12 (3) of the Act to provide additional information and until that additional information is provided is not to be counted in calculating that 28-day or 56-day period.
- (3) An application for a biodiversity conservation licence that has not been determined is taken to have been refused:
  - (a) after the expiration of the period within which the Environment Agency Head is required by this clause to determine the application, or
  - (b) after the expiration of the period of 90 days after the application was made, whichever is the latter.

**Note.** Section 2.16 of the Act confers a right of appeal to the Land and Environment Court against the refusal of an application for a licence.
- (4) The Environment Agency Head may grant or refuse an application for a biodiversity licence even if the application for the licence is taken to have been refused under subsection (3).
- (5) For the purposes of this clause, an application for a licence is not duly made unless the applicant has complied with the requirements of section 2.12 (1) and (2) of the Act in relation to the application.

## **2.29 Time for appeal against licence decisions (section 2.16 (4))**

- (1) An appeal by an applicant for, or by the holder of, a biodiversity conservation licence is to be made within 28 days after the date the applicant or holder is given notice of the decision.
- (2) If an application for a licence is taken to have been refused under clause 2.28, the appeal is to be made within 28 days after the date the application is taken to have been so refused.

## **Division 2.4 Management plans for protected animals and plants**

### **2.30 Environment Agency Head may make or adopt management plans (section 2.19 (2) (d))**

- (1) The Environment Agency Head may make or adopt a management plan in relation to the conservation of any of the following that may be adversely affected by any commercial activity:
  - (a) a protected animal or protected plant,
  - (b) an animal or plant that is of a threatened species,
  - (c) an animal or plant that is a part of a threatened ecological community.
- (2) The Environment Agency Head is to take the following matters into consideration in deciding whether to make or adopt a management plan:

- (a) the ecology of the species,
- (b) the sustainability of the proposed management regime,
- (c) Aboriginal cultural practices in relation to the species,
- (d) whether limits need to be placed on the number of biodiversity conservation licences that may be granted for a commercial activity if a licence is required for that activity,
- (e) whether it is necessary to monitor the commercial activity,
- (f) any other matter the Environment Agency Head considers relevant.

### **2.31 Public consultation on management plans**

Division 1 of Part 9 of the Act applies to a management plan in the same way as it applies to a public consultation document under that Division.

### **2.32 Biodiversity conservation licences may require compliance with management plans**

A biodiversity conservation licence may require compliance with a management plan under this Division in connection with the carrying out of any activity authorised by the licence.

**Note.** For example, a biodiversity conservation licence that is granted to a person to authorise the person to sell protected animals or plants may require the animal or plant to be tagged in accordance with a management plan under this Division - a contravention of that tagging requirement results in the person not having a defence to a prosecution for unauthorised dealing in the protected animal or plant under section 2.5 of the Act.

## **Division 2.5 Miscellaneous**

### **2.33 Definition of "relevant instrument"**

In this Division:

**relevant instrument** means a biodiversity conservation licence, a code of practice under clause 2.9 or a management plan under Division 2.4.

### **2.34 Registration of persons or premises in relation to dealing in protected animals or plants (section 2.19 (2) (b))**

- (1) A relevant instrument may require:
  - (a) persons who deal in protected animals or protected plants, as referred to in section 2.5 of the Act, to be registered by the Environment Agency Head, or
  - (b) premises used by a person for the purposes of dealing in protected animals or protected plants to be registered by the Environment Agency Head.
- (2) The relevant instrument may:
  - (a) provide for the cancellation of any such registration for a contravention of the Act, this Regulation or any other statutory instrument made under the Act, and
  - (b) require the payment of a fee for registration.

### **2.35 Tagging of protected animals or plants (section 2.19 (2) (d))**

- (1) A relevant instrument may require a tag to be attached to a protected animal or protected plant that is harmed or picked or that is subject to a dealing referred to in section 2.5 of the Act.
- (2) For the purposes of any such requirement, the relevant instrument may:
  - (a) specify the manner in which the tag is to be attached to the animal or plant, and
  - (b) specify the place on the animal or plant where the tag is to be attached, and

- (c) specify the type of tag that is to be attached to the animal or plant, and
- (d) require the tag that is attached to be purchased from the Environment Agency Head, and
- (e) restrict the number of tags that are available to be purchased from the Environment Agency Head during a specified period.

**2.36 Keeping of records etc with respect to dealing in protected animals or plants (section 2.19 (2) (c))**

- (1) A relevant instrument may require a person who deals in protected animals or protected plants, as referred to in section 2.5 of the Act, to keep records of any matter relating to the dealing in the animals or plants and to produce any such record on request to an authorised officer under Part 12 of the Act.
- (2) A relevant instrument may require a person who deals in protected animals or protected plants, as referred to in section 2.5 of the Act, to notify the Environment Agency Head of any matter relating to the dealing in the animals or plants.

**2.37 Offences relating to registration, tagging and record keeping (section 2.19 (2))**

- (1) A person to whom a relevant instrument applies and who contravenes a requirement of the instrument relating to:
  - (a) the registration of the person or of premises used by the person, or
  - (b) the tagging of a protected animal or plant, or
  - (c) the keeping or production of records relating to a dealing in animals or plants,is guilty of an offence.  
Maximum penalty: \$5,500.
- (2) If an act or omission constitutes an offence against this clause and an offence against any provision of Division 1 of Part 2 of the Act, the person may not be convicted of both offences.

**2.38 Prohibition on breeding native waterfowl with non-native waterfowl (section 2.19 (2) (a))**

- (1) In this clause:  
*native waterfowl* means waterfowl that are protected animals.  
*waterfowl* means ducks, geese or swans.
- (2) A person who interbreeds native waterfowl under the person's control with waterfowl that are not native waterfowl is guilty of an offence.  
Maximum penalty: \$5,500.



## Part 3 Areas of outstanding biodiversity value

### Division 3.1 Criteria for declaration

#### 3.1 Criteria for declaring areas of outstanding biodiversity value (section 3.2)

- (1) This clause sets out the criteria to be applied by the Minister in determining whether an area should be declared an area of outstanding biodiversity value because:
  - (a) the area is important at a state, national or global scale, and
  - (b) the area makes a significant contribution to the persistence of at least one of the following:
    - (i) multiple species or at least one threatened species or ecological community,
    - (ii) irreplaceable biological distinctiveness,
    - (iii) ecological processes or ecological integrity,
    - (iv) outstanding ecological value for education or scientific research.
- (2) An area makes a significant contribution to the persistence of multiple species or at least one threatened species or ecological community if:
  - (a) it provides resilience during periods of environmental stress that is important for their continued existence, or
  - (b) it sustains adaptive capacity or evolutionary potential because it contains high levels of unique components of genetic diversity that will enable species to adapt to changing environments or it functions as an important ecological or evolutionary refuge able to sustain viable populations of species at risk due to climate change or other environmental stresses, or
  - (c) it supports migration or dispersal of animals and plants, currently or in the future, that will contribute significantly to the persistence of species at risk, or
  - (d) it is habitat critical for the survival of a threatened species.
- (3) An area makes a significant contribution to the persistence of irreplaceable biological distinctiveness if:
  - (a) it has a very high structural, functional or compositional diversity, or
  - (b) it is an essential site for the persistence of evolutionary or ecological distinctive species, endemic species or ecological communities, or
  - (c) it is an essential site for the persistence of 2 or more threatened species or ecological communities in any combination.
- (4) An area makes a significant contribution to the persistence of ecological processes or ecological integrity if:
  - (a) it has ecological integrity, being an area that is:
    - (i) an outstanding, relatively intact example of a functioning ecosystem type, or if a fully intact ecosystem does not remain, then the best remaining example of that ecosystem type that contributes to maintaining the persistence of biodiversity and ecological integrity, or
    - (ii) the most intact remaining site of a species occurrence that provides habitat requirements vital to the conservation of a species, or
    - (iii) the last known remaining site of a species occurrence, or
  - (b) it is a primary contributor to the continuation of essential ecological processes, or

- (c) it is an essential site for a significant proportion of the population of a species during one or more key life history stages or processes.
- (5) An area makes a significant contribution to the persistence of outstanding ecological value for education or scientific research if it contains established infrastructure or data related to long-term ecological research monitoring programs that establish an irreplaceable historic baseline, being the best site anywhere in NSW for long-term research on particular species, ecological communities or ecological processes.
- (6) The Environment Agency Head may, following consultation with the Secretary of the Department of Planning and Environment, publish guidelines on the application of the criteria under this clause that the Environment Agency Head will take into account when making a recommendation under section 3.3 of the Act for the declaration of an area of outstanding biodiversity value.

### 3.2 Minister to publish map of area and reasons area eligible to be declared etc

- (1) The notice of the declaration of an area of outstanding biodiversity value (and the public register under Division 2 of Part 9 of the Act) is to include:
  - (a) an indicative map showing the spatial extent of the area, and
  - (b) a statement of the reasons that the area is eligible to be so declared.
- (2) Subclause (1) does not apply if the Environment Agency Head is authorised by section 9.10 of the Act to restrict access to information about the area concerned.
- (3) If the Environment Agency Head would be authorised by section 9.10 of the Act to restrict access to information about a declared area of outstanding biodiversity value, the Environment Agency Head may also restrict access to that information during public consultation and other procedures required for the purposes of making the declaration.

## Division 3.2 Little Penguin declared area

**Consultation note.** This Division contains a number of offences for acts or omissions relating to the Little Penguin declared area (with the maximum penalty of \$5,500 available for contraventions of the regulations under the Act). If the act or omission causes actual damage to the declared area then the relevant offence under section 2.3 carries a maximum tier 1 monetary penalty or imprisonment for 2 years, or both. If the act or omission causes or attempts to cause actual harm to a penguin then the relevant offence under section 2.1 also carries a maximum tier 1 monetary penalty or imprisonment for 2 years, or both.

### 3.3 Definitions

In this Division:

**designated officer** means an employee of the Office of Environment and Heritage, a person authorised by the Environment Agency Head as a designated officer for the purposes of this Division or a police officer.

**Little Penguin breeding season** means the period from 1 July in any year until 28 February in the following year (both dates inclusive).

**Little Penguin declared area** means the area of land declared to be the critical habitat of the endangered population of Little Penguins at North Sydney Harbour, as described in the notification published in the Gazette under section 47 of the *Threatened Species Conservation Act 1995*, and as continued as an area of outstanding biodiversity value by clause 6 of Schedule 9 to the *Biodiversity Conservation Act 2016*.

**Note.** See Gazette No 263 of 20.12.2002, p 10,983 for the declaration of land as critical habitat of the Little Penguin.

**Little Penguin declared area A** means the area marked A on the map of the Little Penguin declared area published by the Environment Agency Head in the Gazette.

### 3.4 Companion animals prohibited

- (1) A person must not bring a companion animal into the Little Penguin declared area.  
Maximum penalty: \$5,500
- (2) If a companion animal is found in the Little Penguin declared area:
  - (a) the owner of the companion animal, or
  - (b) if the owner is not present at the time of the offence and another person who is of or above the age of 16 years is in charge of the companion animal at that time, that other person,is guilty of an offence.  
Maximum penalty: \$5,500.
- (3) In any prosecution for an offence against this clause it is a defence if the defendant establishes that the relevant companion animal is an assistance animal that was being used by a person with a disability (within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth).
- (4) In any prosecution of the owner of a companion animal for an offence against this clause it is a defence if the defendant establishes that:
  - (a) another owner of the animal has been convicted of an offence arising out of the same circumstances, or
  - (b) the commission by another owner of the animal of an offence arising out of the same circumstances has been proved but a court has made an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* in respect of the offence, or
  - (c) the offence could not have been avoided by any reasonable efforts on the defendant's part.
- (5) In this clause:  
**assistance animal** means an assistance animal within the meaning of the *Disability Discrimination Act 1992* of the Commonwealth.  
**companion animal** and **owner** of a companion animal have the same meanings as in the *Companion Animals Act 1998*.

### 3.5 Anchoring, mooring and access by vessels

- (1) A person must not:
  - (a) anchor or moor a vessel in the Little Penguin declared area A during the Little Penguin breeding season, or
  - (b) anchor or moor a vessel outside the Little Penguin declared area A during the Little Penguin breeding season in such a way that the anchored or moored vessel enters the Little Penguin declared area A, or
  - (c) cause a vessel (other than a non-motorised tender) to enter or remain in the Little Penguin declared area A between sunset and sunrise during the Little Penguin breeding season.Maximum penalty: \$5,500.
- (2) In this clause:  
**moor** a vessel includes attach a vessel to a mooring by any means.  
**mooring** means any post, stake, pile, float, pontoon or any other object (other than the anchor of a vessel) secured by any direct or indirect means to the waters' bed or placed on the waters' bed for the purpose of attaching a vessel to the bed.  
**tender** has the same meaning as in the *Marine Safety Regulation 2016*.

**vessel** includes a water craft of any description used or capable of being used as a means of transportation on water, including:

- (a) any non-displacement craft, and
- (b) a seaplane, but only while it is on water.

### 3.6 Fishing

- (1) A person must not take or attempt to take fish from the Little Penguin declared area between sunset and sunrise during the Little Penguin breeding season.

Maximum penalty: \$5,500.

- (2) In this clause, **take** fish has the same meaning as in section 4 (1) of the *Fisheries Management Act 1994*.

### 3.7 Interference with burrows or nests

A person must not interfere with a burrow or nesting box in the Little Penguin declared area.

Maximum penalty: \$5,500.

**Note.** Section 2.3 of the Act also provides that a person must not damage the biodiversity values of a declared area of outstanding biodiversity value. The maximum penalty for a contravention is \$1.65 million in the case of a corporation or \$330,000 in the case of an individual, or imprisonment for 2 years, or both.

### 3.8 Interference with Little Penguins

- (1) A person must not knowingly be within 5 metres of a Little Penguin while the Little Penguin is on land in the Little Penguin declared area.

Maximum penalty: \$5,500.

- (2) A person must not knowingly disturb a Little Penguin in the Little Penguin declared area if the Little Penguin is moulting.

Maximum penalty: \$5,500.

- (3) In this clause, **disturb** a Little Penguin includes shining a light on the penguin.

### 3.9 Directions given by a designated officer

- (1) If a designated officer is of the opinion that a person is contravening this Division or disturbing a Little Penguin's breeding or moulting activities, or is likely to do so, the officer may give one or more of the following directions:

- (a) direct the person to cease a particular activity within the Little Penguin declared area,
- (b) direct the person to leave the Little Penguin declared area.

- (2) A person must not, without reasonable excuse, fail to comply with a direction given under this clause.

Maximum penalty: \$5,500.

- (3) A person is not guilty of an offence of failing to comply with a direction given under this clause unless it is established that the designated officer:

- (a) warned the person that a failure to comply with the direction is an offence, and
- (b) identified himself or herself as a designated officer.

- (4) A designated officer may remove from the Little Penguin declared area, or any part of it, any person who fails to comply with a direction under this clause and any vehicle, vessel, animal or other property in the possession of the person.

### 3.10 Defences

It is a defence to a prosecution for an offence against this Division if the defendant establishes any of the following in relation to the act constituting the offence:

- (a) that the act was an act authorised under Division 2 (Defences) of Part 2 of the Act in relation to an alleged offence under section 2.3 of the Act of damaging a declared area of outstanding biodiversity value, or
- (b) that the act was carried out:
  - (i) by an employee of the Office of Environment and Heritage in the exercise of his or her functions as such an employee, or
  - (ii) by a designated officer in the exercise of his or her functions as such an officer, or
  - (iii) by an employee of the local council of the area concerned or a State government agency in the exercise of his or her monitoring or enforcement functions as such an employee, or
  - (iv) with the written authorisation of the Environment Agency Head.

### Division 3.3 Wollemi Pine declared area

**Consultation note.** This Division contains a number of offences for acts or omissions relating to the Wollemi Pine declared area (with the maximum penalty of \$5,500 available for contraventions of the regulations under the Act). If the act or omission causes actual damage to the declared area then the relevant offence under section 2.3 carries a maximum tier 1 monetary penalty or imprisonment for 2 years, or both. If the act or omission causes or attempts to cause actual harm to a Wollemi Pine then the relevant offence under section 2.2 also carries a maximum tier 1 monetary penalty or imprisonment for 2 years, or both.

### 3.11 Definitions

In this Division:

**damage** to the Wollemi Pine declared area includes:

- (a) picking any plant within the Wollemi Pine declared area, and
- (b) clearing or removing any vegetation (whether or not living) within the Wollemi Pine declared area, and
- (c) harming any animal within the Wollemi Pine declared area, and
- (d) introducing, or causing the spread of, *Phytophthora cinnamomi* within the Wollemi Pine declared area.

**designated officer** means an employee of the Office of Environment and Heritage, a person authorised by the Environment Agency Head as a designated officer for the purposes of this Division or a police officer.

**Wollemi Pine declared area** means the area of land declared by the Minister for the Environment on 23 February 2007 to be the critical habitat of the endangered species *Wollemia nobilis* (Wollemi Pine), and notified in Gazette No 33 of 23 February 2007 under the *Threatened Species Conservation Act 1995*, and as continued as an area of outstanding biodiversity value by clause 6 of Schedule 9 to the *Biodiversity Conservation Act 2016*.

### 3.12 Operation of Division

Nothing in this Division affects the operation of Part 2 of the *National Parks and Wildlife Regulation 2009*.

**Note.** For example, under Divisions 1 and 3 of Part 2 of the *National Parks and Wildlife Regulation 2009*, a park authority may regulate the use and closure of a national park by means of a public notice, a written notice or an oral direction and an authorised officer may remove a person from a national park in certain circumstances.

### 3.13 Closure by public notice

- (1) The Environment Agency Head may close all or any part of the Wollemi Pine declared area to the public by means of a notice displayed in, or at the boundary of, the Wollemi Pine declared area or the part of it to which the notice relates.
- (2) Any such closure may be specified to have effect at all times or during specified times.
- (3) A person must not enter, remain in, or leave a vehicle parked in, any part of the Wollemi Pine declared area that is closed to the public in accordance with this clause.  
Maximum penalty: \$5,500.

### 3.14 Closure by order

- (1) The Environment Agency Head may close all or any part of the Wollemi Pine declared area to the public by order published in the Gazette.
- (2) Any such closure may be specified to have effect at all times or during specified times.

**Note.** The Environment Agency Head may decide not to disclose the location of the declared area to the public under section 9.10 of the *Biodiversity Conservation Act 2016*. This clause gives the Environment Agency Head an alternative means of closing the declared area without disclosing the location of the declared area to the public.

### 3.15 Directions given by a designated officer

- (1) A designated officer may direct a person to leave any part of the Wollemi Pine declared area that is closed to the public in accordance with this Part.
- (2) If a designated officer is of the opinion that a person is contravening this Division or causing damage to the Wollemi Pine declared area, or is likely to do so, the officer may give one or more of the following directions:
  - (a) direct the person to cease a particular activity within the Wollemi Pine declared area,
  - (b) direct the person to modify a particular activity within the Wollemi Pine declared area so as to avoid any damage or likelihood of damage to the Wollemi Pine declared area,
  - (c) direct the person to leave the Wollemi Pine declared area.
- (3) A person must not, without reasonable excuse, fail to comply with a direction given under this clause.  
Maximum penalty: \$5,500.
- (4) A person is not guilty of an offence of failing to comply with a direction given under this clause unless it is established that the designated officer:
  - (a) warned the person that a failure to comply with the direction is an offence, and
  - (b) identified himself or herself to the person as a designated officer.
- (5) A designated officer may remove from the Wollemi Pine declared area, or any part of it, any person who fails to comply with a direction under this clause and any vehicle, animal or other property in the possession of the person.

### 3.16 Defences

It is a defence to a prosecution for an offence against this Division if the defendant establishes any of the following in relation to the act constituting the offence:

- (a) that the act was an act authorised under Division 2 (Defences) of Part 2 of the Act in relation to an alleged offence under section 2.3 of the Act of damaging a declared area of outstanding biodiversity value, or

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- (b) that the act was carried out:
  - (i) by an employee of the Office of Environment and Heritage in the exercise of his or her functions as such an employee, or
  - (ii) by a designated officer in the exercise of his or her functions as such an officer, or
  - (iii) with the written authorisation of the Environment Agency Head.

## Part 4 Threatened species and ecological communities— listing criteria

### Division 4.1 Criteria for listing of threatened species

#### 4.1 Specific eligibility criteria for determinations by Scientific Committee of threatened species listings (section 4.4)

(1) **Critically endangered species**

The relevant criteria for critically endangered species set out in this Division apply to a determination by the Scientific Committee that a species is eligible to be listed as a critically endangered species on the basis that it is facing an extremely high risk of extinction in Australia in the immediate future.

(2) **Endangered species**

The relevant criteria for endangered species set out in this Division apply to a determination by the Scientific Committee that a species is eligible to be listed as an endangered species on the basis that:

- (a) it is facing a very high risk of extinction in Australia in the near future, and
- (b) it is not eligible to be listed as a critically endangered species.

(3) **Vulnerable species**

The relevant criteria for vulnerable species set out in this Division apply to a determination by the Scientific Committee that a species is eligible to be listed as a vulnerable species on the basis that:

- (a) it is facing a high risk of extinction in Australia in the medium-term future, and
- (b) it is not eligible to be listed as a critically endangered species or an endangered species.

(4) **Listing may be based on species satisfying any one or more of the relevant criteria**

A species is eligible to be listed in a particular category if the criteria specified in any more of the following clauses of this Division apply to the species.

(5) **Special additional criteria for listing populations**

A population of a species is not eligible to be listed as a threatened species under any of the criteria specified in the following clauses of this Division unless:

- (a) the species to which the population belongs is not separately listed as a threatened species, and
- (b) the population is, in the opinion of the Scientific Committee, of significant conservation value based on its role in the conservation of the species or of the number of the species.

**Note.** Section 4.4 of the Act provides that if a species is not eligible to be listed in any category in accordance with that section on the basis of the risk of extinction in Australia, then it is eligible to be listed in accordance with that section on the basis of the risk of extinction in New South Wales.

#### 4.2 Reduction in population size of species

(1) The species has undergone or is likely to undergo within a time frame appropriate to the life cycle and habitat characteristics of the taxon:

- (a) for *critically endangered species*—a very large reduction in population size, or
- (b) for *endangered species*—a large reduction in population size, or



- (c) for *vulnerable species*—a moderate reduction in population size.
- (2) The determination of that criteria is to be based on any of the following:
  - (a) direct observation,
  - (b) an index of abundance appropriate to the taxon,
  - (c) a decline in the geographic distribution, habitat quality or diversity,
  - (d) the actual or potential levels of exploitation of the species,
  - (e) the effects of introduced taxa, hybridisation, pathogens, pollutants, competitors or parasites.

#### 4.3 Restricted geographic distribution of species and other conditions

The geographic distribution of the species is:

- (a) for *critically endangered species*—very highly restricted, or
  - (b) for *endangered species*—highly restricted, or
  - (c) for *vulnerable species*—moderately restricted,
- and at least 2 of the following 3 conditions apply:
- (d) the population or habitat of the species is severely fragmented or nearly all the mature individuals of the species occur within a small number of locations,
  - (e) there is a projected or continuing decline in any of the following:
    - (i) an index of abundance appropriate to the taxon,
    - (ii) the geographic distribution of the species,
    - (iii) habitat area, extent or quality,
    - (iv) the number of locations in which the species occurs or of populations of the species,
  - (f) extreme fluctuations occur in any of the following:
    - (i) an index of abundance appropriate to the taxon,
    - (ii) the geographic distribution of the species,
    - (iii) the number of locations in which the species occur or of populations of the species.

#### 4.4 Low numbers of mature individuals of species and other conditions

The estimated total number of mature individuals of the species is:

- (a) for *critically endangered species*—very low, or
  - (b) for *endangered species*—low, or
  - (c) for *vulnerable species*—moderately low,
- and either of the following 2 conditions apply:
- (d) a continuing decline in the number of mature individuals that is (according to an index of abundance appropriate to the species):
    - (i) for *critically endangered species*—very large, or
    - (ii) for *endangered species*—large, or
    - (iii) for *vulnerable species*—moderate,
  - (e) both of the following apply:
    - (i) a continuing decline in the number of mature individuals (according to an index of abundance appropriate to the species), and
    - (ii) at least one of the following applies:
      - (A) the number of individuals in each population of the species is:

- (I) for *critically endangered species*—extremely low, or
- (II) for *endangered species*—very low, or
- (III) for *vulnerable species*—low,
- (B) all or nearly all mature individuals of the species occur within a small number of populations or locations,
- (C) extreme fluctuations occur in an index of abundance appropriate to the species.

#### 4.5 Low total numbers of mature individuals of species

The total number of mature individuals of the species is:

- (a) for *critically endangered species*—extremely low, or
- (b) for *endangered species*—very low, or
- (c) for *vulnerable species*—low.

#### 4.6 Quantitative analysis of extinction probability

The probability of extinction of the species is estimated to be:

- (a) for *critically endangered species*—extremely high, or
- (b) for *endangered species*—very high, or
- (c) for *vulnerable species*—high.

#### 4.7 Very highly restricted geographic distribution of species—vulnerable species

For *vulnerable species*, the geographic distribution of the species or the number of locations of the species is very highly restricted such that the species is prone to the effects of human activities or stochastic events within a very short time period.

### Division 4.2 Criteria for listing of ecological communities

#### 4.8 Specific eligibility criteria for determinations by Scientific Committee of threatened ecological communities listings (section 4.5)

##### (1) Critically endangered ecological communities

The relevant criteria for critically endangered ecological communities set out in this Division apply to a determination by the Scientific Committee that an ecological community is eligible to be listed as a critically endangered ecological community on the basis that it is facing an extremely high risk of extinction in Australia in the immediate future.

##### (2) Endangered ecological communities

The relevant criteria for endangered ecological communities set out in this Division apply to a determination by the Scientific Committee that an ecological community is eligible to be listed as an endangered ecological community on the basis that:

- (a) it is facing a very high risk of extinction in Australia in the near future, and
- (b) it is not eligible to be listed as a critically endangered ecological community.

##### (3) Vulnerable ecological communities

The relevant criteria for vulnerable ecological communities set out in this Division apply to a determination by the Scientific Committee that an ecological community is eligible to be listed as a vulnerable ecological community on the basis that:

- (a) it is facing a high risk of extinction in Australia in the medium-term future, and

- (b) it is not eligible to be listed as a critically endangered ecological community or an endangered ecological community.
- (4) **Listing may be based on ecological community satisfying any one or more of the relevant criteria**

An ecological community is eligible to be listed in a particular category if the criteria specified in any more of the following clauses of this Division apply to the ecological community.

**Note.** Section 4.5 of the Act provides that if an ecological community is not eligible to be listed in any category in accordance with that section on the basis of the risk of extinction in Australia, then it is eligible to be listed in accordance with that section on the basis of the risk of extinction in New South Wales.

#### 4.9 Reduction in geographic distribution of ecological community

The ecological community has undergone or is likely to undergo within a time span appropriate to the life cycle and habitat characteristics of its component species:

- (a) for *critically endangered ecological communities*—a very large reduction in geographic distribution, or
- (b) for *endangered ecological communities*—a large reduction in geographic distribution, or
- (c) for *vulnerable ecological communities*—a moderate reduction in geographic distribution.

#### 4.10 Restricted geographic distribution of ecological community

The ecological community's geographic distribution is:

- (a) for *critically endangered ecological communities*—very highly restricted, or
- (b) for *endangered ecological communities*—highly restricted, or
- (c) for *vulnerable ecological communities*—moderately restricted,

and at least one of the following conditions apply:

- (d) there is a projected or continuing decline in any of the following:
  - (i) a measure of spatial extent appropriate to the ecological community,
  - (ii) a measure of environmental quality appropriate to the characteristic biota of the ecological community,
  - (iii) a measure of disruption to biotic interactions appropriate to the characteristic biota of the ecological community,
- (e) there are threatening processes that are likely to cause continuing decline in either geographic distribution, environmental quality or biotic interactions within the near future,
- (f) the ecological community exists at:
  - (i) for *critically endangered ecological communities*—an extremely low number of locations, or
  - (ii) for *endangered ecological communities*—a very low number of locations, or
  - (iii) for *vulnerable ecological communities*—a low number of locations.

#### 4.11 Environmental degradation of ecological community

The ecological community has undergone or is likely to undergo within a time span appropriate to the life cycle and habitat characteristics of its component species:

- (a) for *critically endangered ecological communities*—a very large degree of environmental degradation, or

- (b) for *endangered ecological communities*—a large degree of environmental degradation, or
- (c) for *vulnerable ecological communities*—a moderate degree of environmental degradation.

#### 4.12 Disruption of biotic process or interactions in ecological community

The ecological community has undergone or is likely to undergo within a time span appropriate to the life cycle and habitat characteristics of its component species:

- (a) for *critically endangered ecological communities*—a very large disruption of biotic processes or interactions, or
- (b) for *endangered ecological communities*—a large disruption of biotic processes or interactions, or
- (c) for *vulnerable ecological communities*—a moderate disruption of biotic processes or interactions.

#### 4.13 Quantitative analysis of probability of collapse of ecological community

The probability of collapse of the ecological community is estimated to be:

- (a) for *critically endangered ecological communities*—extremely high, or
- (b) for *endangered ecological communities*—very high, or
- (c) for *vulnerable ecological communities*—high.

#### 4.14 Very small number of locations—vulnerable ecological community

For *vulnerable ecological communities*, the number of locations of the ecological community such that the ecological community is prone to the effects of human activities or stochastic events within a very short time period.

### Division 4.3 Interpretation of listing criteria

#### 4.15 Application of Division

This Division applies for the purposes of the interpretation and application of the criteria prescribed by Division 4.1 or 4.2.

#### 4.16 Establishing matters or things in criteria

A relevant criteria for the listing of species or ecological communities that refers to a state of affairs, matter or thing, or a likely or projected state of affairs, matter or thing, extends to a state of affairs, matter or thing that is observed, estimated, inferred or reasonably suspected.

#### 4.17 Mature individuals

- (1) Mature individuals are individuals in the wild that are capable of producing viable offspring. The total number of mature individuals excludes individuals that are too young (juvenile), too old (senescent), too moribund (for example, diseased) or otherwise unable to produce viable offspring (for example, due to low population density).
- (2) In populations with biased sex ratios, it is appropriate to use a lower value for the total number of mature individuals in a way that takes this into account.
- (3) In populations that fluctuate, the number of mature individuals will refer to a minimum number of individuals that are present most of the time (in a time span appropriate to the life cycle and habitat characteristics of the species), and will thus usually be much less than the mean number present.

- (4) In clonal organisms, reproducing units may be regarded as mature individuals, so long as they survive independently of one another. However, if clonally reproduced individuals are more limited in viability or dispersal ability than sexually reproduced individuals, the total number of mature individuals may be reduced accordingly to take this into account.
- (5) For species in which individuals have synchronous dormant life stages, the number of mature individuals should be assessed during, or projected for, a time when mature individuals are available for breeding.
- (6) Re-introduced individuals must have produced viable offspring (after the individuals were re-introduced) before they are counted as mature individuals.
- (7) Captive, cultivated or artificially maintained individuals cannot be counted as mature individuals.

#### **4.18 Geographic distribution**

- (1) Geographic distribution is the area or areas in which a species or ecological community occurs, excluding cases of vagrancy in species.
- (2) This may be assessed by estimating:
  - (a) the extent of occurrence (the area of the total geographic range that includes all extant populations of the species or all extant occurrences of the ecological community), or
  - (b) the area of occupancy (the area within the total range that is currently occupied by the species or ecological community, that is it excludes unsuitable and unoccupied habitat), or
  - (c) the area of suitable habitat (the area within the total range that includes occupied and unoccupied suitable habitat, but excludes unsuitable habitat).
- (3) The scale at which a geographic distribution is assessed should be appropriate to the biology of the species (or component species in ecological communities), the nature of threats and available data.

#### **4.19 Severely fragmented**

The population or habitat of a species is severely fragmented if individuals of the species are distributed among sub-populations or patches of habitat that are small and isolated relative to the life cycle and habitat characteristics of the species.

#### **4.20 Extreme fluctuations**

- (1) Extreme fluctuations occur when the population or distribution of a species varies reversibly, widely and frequently, as:
  - (a) indicated by changes of:
    - (i) an index of abundance appropriate to the taxon, or
    - (ii) the geographic distribution of the species, or
    - (iii) the number of locations or populations of the species, or
  - (b) inferred from the life history or habitat biology of the species.
- (2) The cause of fluctuations must be understood or inferred so that they may be distinguished from declines or reductions.

**Division 4.4 Procedure for listing**

**4.21 Publication of notice of preliminary determination (section 4.13 (3) (c))**

The Scientific Committee is required to publish notice of, and invite submissions on, a preliminary determination under section 4.13 of the Act for a period of at least 4 weeks.

## **Part 5 Provisions relating to private land conservation agreements**

### **5.1 Criteria for determining if land eligible to be designated as biodiversity stewardship site (section 5.7 (3))**

- (1) Land is not eligible to be designated as a biodiversity stewardship site by a biodiversity stewardship agreement if:
  - (a) the Minister is of the opinion that any use or proposed use of the land proposed to be designated as the site is inconsistent with biodiversity conservation, or
  - (b) the Minister is of the opinion that any use or proposed use of any land proposed to be designated as the site (or that is in the vicinity of that land) will prevent relevant management actions from being carried out on the land proposed to be designated as the site or prevent the purpose of those actions from being achieved, or
  - (c) the Minister is of the opinion that the owner of the land proposed to be designated as the site is already under a legal obligation to carry out relevant biodiversity conservation measures of an ongoing nature on the land unless:
    - (i) the legal obligation was imposed by a statutory body or officer and that officer or body (or the Minister to whom the body or officer is responsible) advises in writing that the legal obligation was not imposed for biodiversity offset purposes, or
    - (ii) the biodiversity stewardship agreement is entered into for the purpose of satisfying the legal obligation and the biodiversity credits generated in connection with meeting the legal obligation are to be retired on the commencement of the agreement and not traded or used to meet any other biodiversity offset obligation,
  - (d) the land is reserved under Part 4 or Part 4A of the *National Parks and Wildlife Act 1974*, or
  - (e) the land is a flora reserve or special management zone within the meaning of the *Forestry Act 2012*.
- (2) A legal obligation to carry out relevant biodiversity conservation measures of an ongoing nature referred to in subclause (1) (c) includes an obligation under:
  - (a) an offset (within the meaning of the *Native Vegetation Regulation 2005*) under a property vegetation plan approved under the *Native Vegetation Act 2003*, or
  - (b) a set aside under section 60ZC of the *Local Land Services Act 2013*, or
  - (c) a condition of an approval or consent under the *Environmental Planning and Assessment Act 1979*, or
  - (d) an offset arrangement made for the purpose of complying with requirements imposed by or under any Act (including the requirements of any authority granted by a public authority under any Act).
- (3) Subclause (1) does not prevent other parts of a parcel of land (that do not comprise land referred to in subclause (1) (a)–(e)) from being designated as a biodiversity stewardship site by a biodiversity stewardship agreement.

### **5.2 Fees payable in connection with biodiversity stewardship agreements**

#### **(1) Application to enter agreement (section 5.8)**

An application to enter into a biodiversity stewardship agreement is to be accompanied by a processing fee of 25 fee units.

(2) **Request for termination of agreement (section 5.10)**

A request for the consent of the Minister to the termination of a biodiversity stewardship agreement is to be accompanied by a fee of 25 fee units.

(3) **Request for variation of agreement (section 5.11)**

A request for the consent of the Minister to the variation of a biodiversity stewardship agreement is to be accompanied by:

- (a) in the case of a variation to create additional biodiversity credits—a fee of 65 fee units, or
- (b) in the case of a variation to include additional owners subject to the agreement—a fee of 105 fee units, or
- (c) in any other case (not being a variation that the Minister is satisfied is a minor variation)—a fee of 15 fee units.

**5.3 Fit and proper person requirements for owners of proposed biodiversity stewardship sites (section 5.8 (5))**

(1) The Minister may consider any of the following matters that are known to the Minister in determining whether a person is a fit and proper person to enter into, and fulfil the obligations imposed by, a proposed biodiversity stewardship agreement:

- (a) whether the person (or an associated manager of the person) has contravened any relevant legislation, or has held a licence or other authority that has been suspended or revoked under any relevant legislation,
- (b) the record of compliance with relevant legislation of the person (or an associated manager of the person),
- (c) whether, in the opinion of the Minister, the management actions that are to be carried out under the agreement will be in the hands of a person competent to undertake them,
- (d) whether, in the opinion of the Minister, the person (or an associated manager of the person) is of good repute, having regard to character, honesty and integrity,
- (e) whether the person (or an associated manager of the person), in the previous 10 years, has been convicted in New South Wales or elsewhere of an offence involving fraud or dishonesty,
- (f) whether the person (or an associated manager of the person), during the previous 3 years, was an undischarged bankrupt or applied to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounded with his or her creditors or made an assignment of his or her remuneration for their benefit,
- (g) whether the person (if a body corporate) is the subject of a winding up order or has had a controller or administrator appointed during the previous 3 years,
- (h) whether the person (if an individual) is or was a director or concerned in the management of a body corporate that is the subject of a winding up order or for which a controller or administrator has been appointed during the previous 3 years,
- (i) whether the person has demonstrated to the Minister the financial capacity to comply with the person's obligations under the proposed biodiversity stewardship agreement.

(2) Without limiting the generality of subclause (1), the Minister:



- (a) may disregard contraventions referred to in that subclause having regard to the seriousness of the contraventions, the length of time since they occurred, and other matters that appear relevant to the Minister, and
  - (b) may have regard to action taken by a person referred to in that subclause to address past contraventions.
- (3) In this clause:
- associated manager** of a person means:
- (a) if the person is a body corporate—a person who is or has been a director or concerned in the management of the body corporate, or
  - (b) if the person is in partnership with another person in connection with carrying out management actions on the proposed biodiversity stewardship site—that other person.
- relevant legislation** means the following Acts, or parts of Acts, and any regulations, agreements, authorities or other instruments entered into, granted or made under those Acts or parts (whether or not still in force):
- (a) the Act,
  - (b) Part 5A of the *Local Land Services Act 2013*,
  - (c) Parts 7 and 7A of the *Fisheries Management Act 1994*,
  - (d) an Act or part of an Act administered by the Minister,
  - (e) a repealed Act that corresponds to an above-mentioned Act,
  - (f) an Act of the Commonwealth, another State or a Territory that corresponds to an above-mentioned Act.

**5.4 Other grounds on which Minister may decline a request to enter into a biodiversity stewardship agreement (section 5.8 (6))**

The grounds on which the Minister may decline a request to enter into a biodiversity stewardship agreement include the following:

- (a) the application of the owner is not duly made or unclear,
- (b) the application is not accompanied by any required fee or contribution,
- (c) the applicant fails to provide any additional information required by the Minister to determine the application,
- (d) the application relates to a site that has been the subject of a previous rejected application and the application is not materially different to the previous application,
- (e) the biodiversity stewardship assessment report accompanying the application has not been properly prepared,
- (f) any other ground the Minister considers sufficient.

**5.5 Determination that application to vary biodiversity stewardship agreement need not be accompanied by assessment report (section 5.11 (7))**

The Minister may determine that an application to vary a biodiversity stewardship agreement need not be accompanied by a biodiversity stewardship site assessment report if:

- (a) the variation is a minor variation referred to in clause 5.6, or
- (b) the Minister is satisfied that the variation will not significantly impact on the retention or improvement of biodiversity values that the agreement seeks to achieve.

## **5.6 Minor variations of biodiversity stewardship agreements without required consents or consultation (section 5.11 (8))**

A biodiversity stewardship agreement may be varied without any consent or consultation otherwise required by section 5.11 of the Act if the Minister is satisfied that:

- (a) the variation makes a minor change to the management actions or plans, or the timing of payments relating to management actions, under the agreement, or
- (b) the variation is to correct a grammatical or other minor error or omission, or
- (c) the variation deals with a consequential, transitional or machinery matter.

## **5.7 Splitting of obligations and entitlements where different successors in title of different parts of biodiversity stewardship site (section 5.13 (3))**

- (1) This clause applies if there are different successors in title to different parts of the land subject to a biodiversity stewardship agreement, as referred to in section 5.13 (3) of the Act.
- (2) The Minister may notify the successors in title that the Minister wishes to vary the agreement to allocate separate obligations and entitlements under the agreement among those different successors in title.
- (3) The Minister may vary the agreement under section 5.11 of the Act without the consent of the owners of the land (and without the consent of or consultation with any other person otherwise required under that section) for the purpose of:
  - (a) dividing the obligations to carry out management actions required under the agreement among the different successors in title, and
  - (b) dividing the entitlement to management payments under the agreement among the different successors in title.
- (4) The Minister may so vary the agreement only if the Minister and the successors in title have failed to agree on the division of obligations and entitlements within 3 months after the Minister notified the successors in title of the Minister's wish to vary the agreement.
- (5) Before so varying the agreement:
  - (a) the Minister must, by written notice, give all the owners of the land the opportunity to make submissions to the Minister about the proposed variation, and
  - (b) the Minister must consider any submission made within the period (of not less than 28 days) specified in the notice, and
  - (c) the Minister must be satisfied that the division of obligations and entitlements is appropriate and will not have a negative impact on the biodiversity values protected by the agreement (or that any such negative impact will be offset by measures that the owners will be required to take).

## **5.8 Reimbursement of site establishment costs of owner or Minister by holder of mining or petroleum authority on termination or variation of biodiversity stewardship agreement (section 5.18 (11))**

- (1) This clause applies when a biodiversity stewardship agreement:
  - (a) is terminated by the Minister under section 5.18 (1) of the Act, or by the owner under section 5.18 (9) of the Act, as a result of the grant of a mining or petroleum authority in respect of the biodiversity stewardship site, or
  - (b) is varied by the Minister under section 5.18 (1) of the Act as a result of the grant of a mining or petroleum authority in respect of the biodiversity stewardship site (being a variation that, in the opinion of the Minister, will

adversely affect any biodiversity values protected by or management actions carried out under the biodiversity stewardship agreement).

- (2) The Minister may require the holder of the mining or petroleum authority to pay to the Minister the costs of the Minister and the owner of the land of establishing the biodiversity stewardship agreement.
- (3) Any money recovered by the Minister under this clause in connection with the costs of the owner of the land of establishing the biodiversity stewardship agreement is to be paid by the Minister to the owner.
- (4) Any money that is required to be paid to a person or body under this clause is recoverable by that person or body as a debt in a court of competent jurisdiction from the person or body required to make the payment.

## **5.9 Reimbursement provisions with respect to termination or variation of conservation agreements following grant of mining or petroleum authority (section 5.23 (10))**

- (1) This clause applies when a conservation agreement:
  - (a) is terminated by the Minister under section 5.23 (7) of the Act as a result of the grant of a mining or petroleum authority in respect of the land, or
  - (b) is varied by the Minister under section 5.23 (7) of the Act as a result of the grant of a mining or petroleum authority in respect of the land (being a variation that, in the opinion of the Minister, will adversely affect any biodiversity values protected by or management actions carried out under the conservation agreement).
- (2) The Biodiversity Conservation Trust may require the owner of the land to repay any amounts paid to the owner under the conservation agreement that has not been spent or committed at the time the agreement is terminated.
- (3) If the conservation agreement was registered on title before the mining or petroleum authority was granted (or if the mining authority is not a mining lease or mineral claim under the *Mining Act 1992* or not a production lease under the *Petroleum (Onshore) Act 1991*), the Minister may require the holder of the mining or petroleum authority to pay to the Minister:
  - (a) the costs of the Minister, the Biodiversity Conservation Trust and the owner of the land of establishing the conservation agreement, and
  - (b) any amount that the Biodiversity Conservation Trust has paid to the owner of the land (or previous owners of the land) in connection with the conservation agreement that the Trust is not entitled to recover from the owner of the land.

In any other case, the Minister may request the holder of the mining or petroleum authority to pay those costs or amounts to the Minister.

- (4) Any money recovered by the Minister under this clause in connection with the costs of the owner of the land of establishing the conservation agreement is to be paid by the Minister to the owner.
- (5) Any money recovered by the Minister under this clause in connection with the costs of the Biodiversity Conservation Trust of establishing the conservation agreement, or with the amounts that have been paid by the Trust to the owner of the land, is to be paid by the Minister to the Trust.
- (6) Any money that is required to be paid to a person or body under this clause is recoverable by that person or body as a debt in a court of competent jurisdiction from the person or body required to make the payment.

## Part 6 Biodiversity offsets scheme

### Division 6.1 General

#### 6.1 Additional biodiversity impacts to which scheme applies (sections 6.3 and 6.6 (2))

- (1) The impacts on biodiversity values of the following actions are prescribed (subject to subclause (2)) as biodiversity impacts to be assessed under the biodiversity offsets scheme:
  - (a) the impacts of development on the habitat of threatened species or ecological communities associated with:
    - (i) karst, caves, crevices, cliffs and other geological features of significance, or
    - (ii) rocks, or
    - (iii) human made structures, or
    - (iv) non-native vegetation,
  - (b) the impacts of development on the connectivity of different areas of habitat of threatened species that facilitates the movement of those species across their range,
  - (c) the impacts of development on movement of threatened species that maintains their lifecycle,
  - (d) the impacts of development on water quality, water bodies and hydrological processes that sustain threatened species and threatened ecological communities (including from subsidence or upsidence resulting from underground mining or other development),
  - (e) the impacts of wind turbine strikes on protected animals,
  - (f) the impacts of vehicle strikes on threatened species of animals or on animals that are part of a threatened ecological community.
- (2) The additional biodiversity impacts prescribed by this clause are prescribed only for the purposes of biodiversity assessment and reports under the Act and are not additional biodiversity impacts for the purposes of calculating the number and class of biodiversity credits that are required to be retired to offset the residual impact on biodiversity values of proposed development, proposed clearing of native vegetation or proposed biodiversity certification of land.

#### 6.2 Offset rules under biodiversity offsets scheme (section 6.4)

- (1) This clause relates to the offset rules that apply to the determination under the biodiversity offsets scheme of the biodiversity conservation measures to offset or compensate for the impacts on biodiversity values after the steps taken to avoid or minimise those impacts.
- (2) The measures to offset or compensate for those impacts are (subject to the Act and any other applicable Act) any one or a combination of the following options:
  - (a) The retirement of the required number and class of like-for-like biodiversity credits.
  - (b) The retirement of the required biodiversity credits in accordance with the variation rules.
  - (c) The funding of a biodiversity conservation action that would benefit the relevant threatened species or ecological community and that is equivalent to the cost of acquiring the required like-for-like biodiversity credits as determined by the offsets payment calculator referred to in section 6.32 of the Act.

- (d) In the case of State significant development or infrastructure under the *Environmental Planning and Assessment Act 1979* that is mining under a mining lease—an obligation to rehabilitate the impacted site that has the same credit value (determined in accordance with the biodiversity assessment method) as the retirement of like-for-like biodiversity credits.
  - (e) The payment under section 6.30 of the Act of an amount into the Biodiversity Conservation Fund determined in accordance with the offsets payment calculator to satisfy the requirement to retire biodiversity credits.
- (3) In the case of a combination of the above options, the required number of credits to be retired or the required amount of funding or other obligations is the requisite proportion in respect of each such option.
  - (4) The biodiversity conservation actions that qualify as biodiversity conservation measures under the offset rules are the actions for which provision is made in the biodiversity assessment method.
  - (5) When conferring biodiversity certification on land under Part 8 of the Act, the determination under this clause of conservation measures to offset or compensate for the impacts on biodiversity values is subject to the following:
    - (a) the offset rules applying under this clause do not affect approved conservation measures as referred to in section 8.3 of the Act,
    - (b) in the case of biodiversity certification conferred as a result of an application that is not a strategic application for biodiversity certification—the impacts on biodiversity values may only be offset by the retirement of like-for-like biodiversity credits or, if authorised by the variation rules, other biodiversity credits.

### **6.3 Like-for-like biodiversity credits (section 6.4)**

- (1) This clause applies to the determination of like-for-like biodiversity credits for the purposes of the application of the offset rules or variation rules.
- (2) In the case of impacts on threatened ecological communities—like-for-like biodiversity credits represent:
  - (a) the same threatened ecological community located in:
    - (i) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
    - (ii) any such subregion that is within 100 kilometres of the outer edge of the impacted site, and
  - (b) if the threatened ecological community contains hollow bearing trees—vegetation that contains hollow bearing trees.
- (3) In the case of impacts on the habitat of threatened species that are ecosystem credit species or other native vegetation—like-for-like biodiversity credits represent:
  - (a) the same class of native vegetation located in:
    - (i) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
    - (ii) any such subregion that is within 100 kilometres of the outer edge of the impacted site, and
  - (b) the same offset trading group, and
  - (c) if the impacted habitat contains hollow bearing trees—vegetation that contains hollow bearing trees.
- (4) In the case of impacts on threatened species that are species credit species—like-for-like biodiversity credits represent the same threatened species.

## 6.4 Variation rules under biodiversity offsets scheme (section 6.4 (4))

- (1) The circumstances in which the ordinary offset rules for the determination of the like-for-like biodiversity credits required as biodiversity offsets may be varied are as follows (the *variation rules*):
  - (a) The proponent who is to retire the biodiversity credits has taken reasonable steps to obtain the requisite like-for-like biodiversity credits.
  - (b) In the case of impacts on threatened ecological communities or on the habitat of threatened species that are ecosystem credit species or other native vegetation—the biodiversity credits to be retired need not represent the same threatened ecological community or the same class of vegetation or represent a location in the same or adjoining Interim Biogeographic Regionalisation of Australia subregion, so long as:
    - (i) they represent the same vegetation formation, and
    - (ii) they are in the same or a higher offset trading group, and
    - (iii) they represent a location that is in:
      - (A) the same Interim Biogeographic Regionalisation of Australia region as the impacted site, or
      - (B) any such subregion that is within 100 kilometres of the outer edge of the impacted site, and
    - (iv) if the impacted habitat contains hollow bearing trees or artificial hollows—they represent vegetation that contains hollow bearing trees or artificial hollows.
  - (c) In the case of impacts on threatened species that are species credit species—the biodiversity credits to be retired need not represent the same threatened species, so long as:
    - (i) if the impacted species is a plant—they represent a plant, and
    - (ii) if the impacted species is an animal—they represent an animal, and
    - (iii) they represent a species that has the same or a higher category of listing under Part 4 of the Act as a threatened species, and
    - (iv) they represent a location that is in:
      - (A) the same or an adjoining Interim Biogeographic Regionalisation of Australia subregion as the impacted site, or
      - (B) any such subregion that is within 100 kilometres of the outer edge of the impacted site.
- (2) The variation rules do not apply in relation to impacts on threatened species or ecological communities that are excluded by the Environment Agency Head.

## 6.5 Ancillary rules of Environment Agency Head for purposes of biodiversity offset and variation rules (section 6.4)

- (1) The Environment Agency Head is to publish ancillary rules for the purposes of the interpretation and application of the offset rules and variation rules.
- (2) The ancillary rules are to:
  - (a) identify the threatened species or ecological communities that would benefit from the retirement of different classes of biodiversity credits, and
  - (b) set out standards for the ecological rehabilitation of sites impacted by the carrying out of mining under a mining lease, and
  - (c) contain a threatened species profile database (which includes the identification of species credit species and of ecosystem credit species), and
  - (d) determine the various offset trading groups, and

- (e) set out any impacts on threatened species or ecological communities that are excluded from the application of the variation rules, and
  - (f) set out the reasonable steps that a proponent is required to take to obtain requisite like-for-like biodiversity credits before the variation rules can be applied, which may include:
    - (i) checking the public register of biodiversity credits, and
    - (ii) lodging an entry in the public register of persons seeking biodiversity credits for a minimum specified period, and
    - (iii) contacting landholders who are entered on the public register of biodiversity stewardship site expressions of interest, and
  - (g) define what constitutes hollow bearing trees or artificial hollows, and
  - (h) include any other provisions that the Environment Agency Head considers necessary or convenient for the purposes of the interpretation or application of the offset rules or variation rules.
- (3) The ancillary rules are to be published on a government website maintained by the Environment Agency Head.

## **6.6 Offset and other rules applying to Biodiversity Conservation Trust applying Fund money towards securing biodiversity offsets (sections 6.31 and 10.12)**

- (1) The Biodiversity Conservation Trust may use any of the following options in applying an amount paid into the Biodiversity Conservation Fund under Division 6 of Part 6 of the Act towards securing biodiversity offsets in substitution for the relevant number and class of biodiversity offsets that would otherwise have been required to be retired:
- (a) The retirement of like-for-like biodiversity credits or the funding of a biodiversity conservation action in accordance with the offset rules that would benefit the relevant threatened species or ecological community.
  - (b) The retirement of biodiversity credits in accordance with the variation rules for any threatened species or ecological community (other than those provisions of the variation rules relating to taking reasonable steps to apply like-for-like requirements).
  - (c) The funding of biodiversity conservation action, otherwise than in accordance with the offset rules, that would benefit the relevant threatened species or ecological community.
  - (d) The retirement of biodiversity credits in accordance with the variation rules for any threatened species or ecological community (other than those provisions of the variation rules relating to taking reasonable steps to apply like-for-like requirements or those provisions relating to the location of the threatened species or ecological community).
- (2) The order in which the Biodiversity Conservation Trust is to consider the appropriate option under subclause (1) is the descending order in which those options are set out in that subclause.
- (3) The annual report of the Biodiversity Conservation Trust is to include details of how the Trust has applied the offset rules and variation rules under subclause (1) in securing biodiversity offsets (including reasons for the use of offsets that are not like-for-like).

## **6.7 Principles applicable to determination of "serious and irreversible impacts on biodiversity values" (section 6.5 (1))**

- (1) This clause applies for the purposes of determining whether an impact on diversity values is a serious and irreversible impact for the purposes of the biodiversity offsets scheme.
- (2) An impact is to be regarded as serious and irreversible if it is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct because:
  - (a) it will cause a further decline of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline, or
  - (b) it will further reduce the population size of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very small population size, or
  - (c) it is an impact on the habitat of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very limited geographic distribution, or
  - (d) the impacted species or ecological community is unlikely to respond to measures to improve its habitat and vegetation integrity and therefore its members are not replaceable.
- (3) For the purpose of this clause, a *decline* of a species or ecological community is a continuing or projected decline in:
  - (a) an index of abundance appropriate to the taxon, or
  - (b) the geographic distribution and habitat quality of the species or ecological community.

## **Division 6.2 Biodiversity assessment reports**

### **6.8 Content of biodiversity development assessment reports (section 6.16)**

A biodiversity development assessment report must include:

- (a) the number and classes of biodiversity credits required to be retired in accordance with the like-for-like requirements of the offset rules, and
- (b) details of any proposal to fund a biodiversity conservation action in accordance with the offset rules, and
- (c) details of any proposed rehabilitation biodiversity conservation action in accordance with the offset rules, and
- (d) the date of the report and the requisite certification under section 6.15 of the Act, and
- (e) details of the qualifications and experience of the accredited person preparing the report and any other person commissioned to conduct research or investigations that are relied on in preparing the report.

### **6.9 Content of biodiversity certification assessment reports (section 6.16)**

A biodiversity certification assessment report must include:

- (a) the number and classes of biodiversity credits required to be retired (or, in the case of a strategic biodiversity certification application, proposed to be retired) in accordance with the offset rules, and
- (b) details of any use of the variation rules and the reasonable steps taken to use like-for-like offsets, and



- (c) in the case of a strategic biodiversity certification application—details of any other approved conservation measures that are to be taken, and
- (d) the date of the report and the requisite certification under section 6.15 of the Act, and
- (e) details of the qualifications and experience of the accredited person preparing the report and any other person commissioned to conduct research or investigations that are relied on in preparing the report.

## **6.10 Content of biodiversity stewardship site assessment reports (section 6.16)**

A biodiversity stewardship site assessment report must include:

- (a) details of the management actions proposed to be carried on the proposed biodiversity stewardship site, and
- (b) the number and classes of biodiversity credits that may be created in respect of those management actions, and
- (c) the date of the report and the requisite certification under section 6.15 of the Act, and
- (d) details of the qualifications and experience of the accredited person preparing the report and any other person commissioned to conduct research or investigations that are relied on in preparing the report.

## **Division 6.3 Creation, transfer etc of biodiversity credits**

### **6.11 Change of class of biodiversity credit (section 6.4 (2) (a))**

If a class of biodiversity credits is changed under section 6.17 (3) of the Act, a requirement to retire biodiversity credits of the former class under the Act or any other Act (including under an instrument, approval or agreement) may be satisfied by the retirement of biodiversity credits that would, on the advice of the Environment Agency Head, have been described as a credit of the former class prior to the change.

### **6.12 Deferral of payment of total fund deposit until subsequent transfer (section 6.21 (6))**

An amount payable under section 6.21 of the Act before a first transfer of a biodiversity credit is registered may be deferred until the second transfer of the credit:

- (a) if the initial holder of the biodiversity credit is a natural person who has died and the first transfer is part of the distribution of the estate of the person and not part of a sale of the credit, or
- (b) if the initial holder of the biodiversity credit sells all of the credits, and all of the land in respect of which they were created, to the same person.

### **6.13 Determination of total fund deposit (section 6.21 (6) and (7))**

- (1) For the purposes of the definition of *total Fund deposit* in section 6.21 (7) of the Act, a scheduled management payment is the amount specified in the relevant biodiversity stewardship agreement as a management payment in respect of the relevant period if all conditions precedent to the payment that are specified in the agreement are met.
- (2) If the total Fund deposit under section 6.21 of the Act in respect of a biodiversity stewardship site increases after an amount is paid into the Biodiversity Stewardship Payments Fund under that section (because, for example, the relevant biodiversity stewardship agreement is varied to increase the management actions under or land subject to the agreement), then the total Fund deposit is to be recalculated.

- (3) In that case, section 6.21 of the Act applies again on the basis of the recalculated total Fund deposit to the first transfer of biodiversity credits not yet transferred or retired (or their retirement without having been transferred), but the total re-calculated amount payable into the Biodiversity Stewardship Payments Fund is to be reduced by the amount previously paid in respect of the biodiversity stewardship site.

## Division 6.4 Biodiversity Stewardship Payments Fund

### 6.14 Definitions

In this Division:

***biodiversity stewardship site account*** means the separate account kept by the Fund Manager under this Division in relation to a biodiversity stewardship site.

***Fund*** means the Biodiversity Stewardship Payments Fund.

***management payment*** means a payment from the Fund to the owner of a biodiversity stewardship site in respect of management actions in relation to the site as referred to in section 6.34 (3) (a) of the Act.

***scheduled management payment*** in respect of any period, means the amount specified in a biodiversity stewardship agreement as a management payment in respect of that period if all conditions precedent to the payment that are specified in the agreement are met.

### 6.15 Separate accounts to be kept in relation to each biodiversity stewardship site (sections 6.34 and 6.36)

- (1) The Fund Manager is to keep a separate account in relation to each biodiversity stewardship site (a ***biodiversity stewardship site account***) that records the following:
- (a) payments paid into the Fund in respect of a transfer or retirement of biodiversity credits created in respect of that biodiversity stewardship site (as referred to in section 6.34 (2) (a) of the Act),
  - (b) management payments paid out of the Fund in respect of the biodiversity stewardship site.
- (2) Money held in each biodiversity stewardship site account may be invested as a common pool. The proceeds of investment are to be distributed among the biodiversity stewardship site accounts that contributed to the common pool according to the amount contributed, or in such other manner as the Minister directs.
- (3) The Fund Manager may keep one or more other accounts (referred to in this Division as a ***general account***) in relation to any amounts paid into or out of the Fund that are not recorded in a biodiversity stewardship site account.
- (4) Payments made into or out of the Fund that are not referred to in subclauses (1) and (2) are to be recorded in the accounts of the Fund in accordance with the directions of the Minister.

### 6.16 Account balances (sections 6.34 and 6.36)

- (1) The Fund Manager is to advise the Minister, at the end of each financial year and at such other times as may be required by the Minister, of the following:
- (a) the balance of each biodiversity stewardship site account,
  - (b) any operational deficit or operational surplus in a biodiversity stewardship site account.
- (2) For the purposes of this Division, a biodiversity stewardship site account has an ***operational deficit*** if the balance of the account is less than the total present value of all scheduled management payments in respect of the biodiversity stewardship site

for the period starting from the most recent anniversary of the date on which the biodiversity stewardship agreement was entered into and extending to perpetuity. The amount of the shortfall is referred to as the *operational deficit amount*.

- (3) For the purposes of this Division, a biodiversity stewardship site account has an *operational surplus* if the balance of the account exceeds the total present value of all scheduled management payments in respect of the biodiversity stewardship site for the period starting from the most recent anniversary of the date on which the biodiversity stewardship agreement was entered into and extending to perpetuity. The amount of the excess is referred to as the *operational surplus amount*.

## **6.17 Payments from biodiversity stewardship site account that has an operational deficit (sections 6.34 and 6.36)**

- (1) The Minister may direct the Fund Manager that management payments for a biodiversity stewardship site not be made from the Fund, or be reduced, for any specified period or until further notice, if:
- (a) the biodiversity stewardship site account for that biodiversity stewardship site has an operational deficit, and
  - (b) the operational deficit amount exceeds the operational deficit threshold for the biodiversity stewardship site account.
- (2) The *operational deficit threshold* for a biodiversity stewardship site account is:
- (a) 20% of the total present value of all scheduled management payments in respect of the biodiversity stewardship site for the period starting from the most recent anniversary of the date on which the biodiversity stewardship agreement was entered into and extending to perpetuity, or
  - (b) such other amount as the Minister determines, having regard to the advice of the Fund Manager.
- (3) This clause is subject to clause 6.19 (Payments from biodiversity stewardship site account that has insufficient funds to cover payment) and to any provision of the biodiversity stewardship agreement that prevents a direction under subclause (1) in the circumstances specified in the agreement.

## **6.18 Payments from biodiversity stewardship site account that has an operational surplus (sections 6.34 and 6.36)**

- (1) The Minister may, in addition to directing any management payment to be paid from the Fund, direct the Fund Manager to pay from the Fund to the owner of a biodiversity stewardship site any amount standing to the credit of the biodiversity stewardship site account for that biodiversity stewardship site if:
- (a) the biodiversity stewardship site account has an operational surplus, and
  - (b) the operational surplus amount exceeds the maximum operational surplus for the biodiversity stewardship site account, and
  - (c) the amount that the Minister directs to be paid from the Fund does not exceed the difference between the operational surplus amount and the maximum operational surplus.
- (2) The *maximum operational surplus* for a biodiversity stewardship site account is:
- (a) 30% of the total present value of all scheduled management payments in respect of the biodiversity stewardship site for the period starting from the most recent anniversary of the date on which the biodiversity stewardship agreement was entered into and extending to perpetuity, or
  - (b) such other amount as the Minister determines, having regard to the advice of the Fund Manager.

- (3) The Fund Manager is to adjust the balance of the biodiversity stewardship site account concerned to reflect a payment made out of the Fund under this clause.
- (4) For the purposes of section 6.34 (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.

**6.19 Payments from biodiversity stewardship site account that has insufficient funds to cover payment (sections 6.34 and 6.36)**

- (1) If there are no funds available in a biodiversity stewardship site account for a biodiversity stewardship site, no management payments are to be paid from the Fund in respect of that biodiversity stewardship site.
- (2) If the balance of a biodiversity stewardship site account for a biodiversity stewardship site is insufficient to cover any scheduled management payment, any management payment paid from the Fund in respect of that biodiversity stewardship site is to be reduced so that the balance of the biodiversity stewardship site account is sufficient to cover the payment.

**6.20 Termination of biodiversity stewardship site account (sections 6.34 and 6.36)**

- (1) If a biodiversity stewardship agreement is terminated, the Minister may direct the Fund Manager to close the biodiversity stewardship site account that relates to the biodiversity stewardship site concerned and to transfer the balance of that account (if any) to a general account.
- (2) The Minister may, at any time, direct the Fund Manager:
  - (a) to distribute all or part of the proceeds of a closed biodiversity stewardship site account among any biodiversity stewardship site accounts in respect of which the total Fund deposit (referred to in section 6.21 of the Act) has been paid but which have an operational deficit, or
  - (b) to pay out of the Fund, to the Minister or a person or body specified by the Minister, all or part of the proceeds of a closed biodiversity stewardship site account, for the purpose of facilitating the purchase by the Minister, and retirement, of any biodiversity credits, or
  - (c) to pay out of the Fund, to the owner of the biodiversity stewardship site to which the closed biodiversity stewardship site account relates, any part of the proceeds of the closed account that is an operational surplus amount, but only if the biodiversity stewardship agreement relating to the biodiversity stewardship site was terminated by the Minister under section 5.16 (6) or 5.18 (1) of the Act.
- (3) If a biodiversity stewardship site account to which an amount is distributed under subclause (2) (a) subsequently ceases to have an operational deficit, the Minister may direct the Fund Manager to deduct from that biodiversity stewardship site account the amount distributed to it and transfer that amount to a general account.
- (4) For the purposes of determining an operational surplus amount for a closed biodiversity stewardship site account, the present value of all scheduled management payments in respect of the biodiversity stewardship site is to be calculated as if the biodiversity stewardship agreement had not been terminated and had continued to have effect in perpetuity.
- (5) For the purposes of section 6.34 (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.
- (6) This clause does not apply in respect of a biodiversity stewardship agreement that is terminated because the land established as a biodiversity stewardship site under the

agreement is reserved under Part 4 or 4A of the *National Parks and Wildlife Act 1974* (as referred to in section 5.15 of the Act).

## **6.21 Biodiversity stewardship sites that become national parks or other reserves (sections 6.34 and 6.36)**

- (1) If a biodiversity stewardship agreement is terminated because the land established as a biodiversity stewardship site under the agreement is reserved under Part 4 or 4A of the *National Parks and Wildlife Act 1974* (as referred to in section 5.15 of the Act), the Fund Manager is to continue to keep a separate account that records the payments into or out of the Fund that relate to that former biodiversity stewardship site.
- (2) The Minister may direct the Fund Manager to pay out of the Fund to any person or body responsible for the care, control or management of the former biodiversity stewardship site any amount held in the Fund that is credited to that account. That amount may be used for the purpose of assisting the person or body to manage the reserve in which the former site is situated in a manner that is consistent with the objects of the *National Parks and Wildlife Act 1974* and the management principles of the reserve.
- (3) For the purposes of section 6.34 (3) (d) of the Act, the payment out of the Fund of an amount in accordance with a direction given by the Minister under this clause is authorised.
- (4) The Fund Manager may continue to deduct from an account relating to a biodiversity stewardship site referred to in subclause (1) any periodic management fee payable to the Fund Manager.
- (5) If an account relating to a biodiversity stewardship site referred to in subclause (1) has no remaining funds, the Minister may direct the Fund Manager to close the biodiversity stewardship site account that relates to the biodiversity stewardship site concerned.

## **6.22 Fund to be kept separate from other accounts (section 6.36)**

The Fund Manager is to keep a separate account in relation to money held in the Fund (including the investments of the Fund).

## **6.23 Winding up of Fund (section 6.34 (5))**

- (1) The Minister may direct the Fund Manager to wind up the Fund if the Minister is of the opinion that the balance of the Fund is insufficient to meet Fund Manager liabilities.
- (2) For the purposes of this clause, *Fund Manager liabilities* are:
  - (a) the remuneration of the Fund Manager, and
  - (b) any liabilities incurred by the Fund Manager in the exercise of its functions as Fund Manager.
- (3) For the purposes of winding up the Fund, the Fund Manager is to close all accounts in the Fund and distribute the proceeds of the Fund in accordance with this clause and any directions of the Minister.
- (4) Priority in the distribution of the proceeds of the Fund is to be given to the payment of Fund Manager liabilities.
- (5) The proceeds of a biodiversity stewardship site account (after payment of Fund Manager liabilities) are to be paid to the owner of the biodiversity stewardship site.
- (6) The proceeds of a general account (after payment of Fund Manager liabilities) may be either distributed among owners of biodiversity stewardship sites or used for the

purpose of facilitating the purchase and retirement of biodiversity credits, or both, as directed by the Minister.

**6.24 Establishment of committees to advise and oversee Fund Manager (section 6.36)**

- (1) The Minister may establish one or more committees, in such manner as the Minister considers appropriate, to advise the Fund Manager on the exercise of the Fund Manager's functions under the Act or to oversee the exercise of those functions.
- (2) A committee has such functions in relation to the Fund and Fund Manager as are conferred or imposed on it by the Minister.

**6.25 Directions to fund Manager by Minister (section 6.36)**

- (1) Directions by the Minister to the Fund Manager under this Division are to be made in writing.
- (2) Any such direction may be amended, replaced or revoked by the giving of a further direction to the Fund Manager.
- (3) The Fund Manager is to act in accordance with any direction given by the Minister under this Division.

## **Division 6.5 Fees and administration costs**

**6.26 Fees payable in connection with biodiversity offsets scheme**

**(1) Registration of transfer of biodiversity credit (section 6.20 (3) (b))**

An application for the transfer of a biodiversity credit must be accompanied by an application fee of 15 fee units.

**(2) Retirement of biodiversity credit (section 6.27 (3) (b))**

An application to retire a biodiversity credit must be accompanied by a fee of 15 fee units.

**6.27 Biodiversity offsets scheme administration cost recovery from participants in scheme (section 6.38)**

The owner of a biodiversity stewardship site is required to pay to the Minister an annual contribution of 15 fee units. If there is more than one owner of the site, each owner is jointly liable to pay the fee and the biodiversity stewardship agreement may set out the proportion of the fee for which each owner is liable.

**Note.** The contribution is payable in accordance with an invoice issued to the owner by the Environment Agency Head.

**6.28 Additional money required to be paid into the Biodiversity Stewardship Operations Account (section 6.39 (3) (e))**

There is to be paid into the Biodiversity Stewardship Operations Account any money received by the Minister for the disposal of property:

- (a) that was acquired by the Minister under section 148 of the *National Parks and Wildlife Act 1974* for the purposes of the *Threatened Species Conservation Act 1995* or of the biodiversity offsets scheme, or
- (b) that was acquired by the Minister for the purposes of Part 7A of the *Threatened Species Conservation Act 1995* or of the biodiversity offsets scheme, or
- (c) that was acquired by the Minister by purchase with money from the Biodiversity Banking Account under the *Threatened Species Conservation Act 1995* or from the Biodiversity Stewardship Operations Account.

**6.29 Fees for services provided by staff of Environment Agency Head or Biodiversity Conservation Trust (section 6.6 (2))**

The Environment Agency Head and the Biodiversity Conservation Trust may charge fees for services provided by their staff to persons requesting assessments and reports under the biodiversity assessment method for proposed biodiversity stewardship sites or requesting management plans in connection with those sites.

**Division 6.6 Miscellaneous**

**6.30 Proof of retirement of biodiversity credits (section 6.6 (2))**

The retirement of a biodiversity credit is to be conclusively presumed for the purposes of the biodiversity offsets scheme if a record of the retirement is included in the public register of biodiversity credits under Division 2 of Part 9 of the Act.

## Part 7 Biodiversity assessment and approvals under Planning Act

### 7.1 Biodiversity offsets scheme threshold (section 7.4)

- (1) Proposed development exceeds the biodiversity offsets scheme threshold for the purposes of Part 7 of the Act if it is or involves:
  - (a) the clearing of native vegetation of an area declared by clause 7.2 as exceeding the threshold, or
  - (b) the clearing of native vegetation, or other action prescribed by clause 6.1, on land included on the Sensitive Biodiversity Values Land Map published under clause 7.3, or
  - (c) the clearing of native vegetation, or other action prescribed by clause 6.1, on land not included on that Sensitive Biodiversity Values Land Map but which is authorised to be so included by clause 7.3 (3) (a), (b) or (c).
- (2) If proposed development is only the subdivision of land, the subdivision is taken to involve the clearing of native vegetation that, in the opinion of the relevant consent authority or other planning approval body, is required or likely to be required for the purposes for which the land is to be subdivided.

**Note.** A State Environmental Planning Policy will require approval under the Policy for the clearing of native vegetation that exceeds the biodiversity offsets scheme threshold in the areas of the State that are not rural areas to which Part 5A of the Local Land Services Act 2013 (and are not national park estate and other conservation areas or State forestry land). The Policy will apply the approval process of the Native Vegetation Panel under that Part.

### 7.2 Clearing of area of land that exceeds threshold

- (1) Clearing of native vegetation is declared by this clause to exceed the biodiversity offsets scheme threshold if the area proposed to be cleared is the area set out in Column 2 of the Table to this clause opposite the minimum lot size applicable to the land to be cleared in Column 1 of that Table.

**Note.** Section 7.4 of the Act provides that any part of development that involves the clearing of native vegetation on category 1-exempt land (within the meaning of Part 5A of the Local Land Services Act 2013) is to be disregarded for the purposes of determining whether proposed development exceeds the threshold.

- (2) The minimum lot size applicable to any land being cleared is as follows:
  - (a) if an environmental planning instrument under the *Environmental Planning and Assessment Act 1979* prescribes a standard minimum lot size in relation to the land on which the proposed development is to be carried out—that minimum lot size,
  - (b) in any other case—the actual size of the allotment of land on which the proposed development is to be carried out.

For the purposes of paragraph (a), the standard minimum lot size is the minimum lot size that applies to development generally on the land, and not any different minimum lot size that applies to particular development or in particular circumstances.

- (3) In the application of the Table to this clause:
  - (a) if the proposed development does not comprise only the clearing of native vegetation—the area of clearing is the total area of proposed clearing irrespective of the number of lots concerned or the ownership of those lots, and
  - (b) if the proposed development comprises only the clearing of native vegetation—the area of clearing is the total area of proposed clearing:



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- (i) over the lots in the same ownership (unless subparagraph (ii) applies), or
  - (ii) over the lots that are worked or operated as a single property (whether or not they are in the same ownership), and
  - (c) if the land on which the proposed development is to be carried out comprises different areas of land with different minimum lot sizes—the minimum lot size is the smaller or smallest of those minimum lot sizes, and
  - (d) if the proposed development comprises or involves the clearing of more than one patch of native vegetation—the area of clearing is the total cumulative area cleared.
- (4) The Environment Agency Head is to publish a method (which may include computer programs) for the purpose of calculating the total area of clearing for proposed development.

**Table**

<b>Column 1</b>	<b>Column 2</b>
<b>Minimum lot size of land</b>	<b>Area of clearing</b>
Less than 1 hectare	0.25 hectare or more
Less than 40 hectares but not less than 1 hectare	0.5 hectare or more
Less than 1,000 hectares but not less than 40 hectares	1 hectare or more
1,000 hectares or more	2 hectares or more

### 7.3 Clearing within sensitive biodiversity values land map exceeds threshold

- (1) In this clause:  
*the Map* means the Sensitive Biodiversity Values Land Map published, from time to time, on an appropriate Government website under this clause.
- (2) The Environment Agency Head is to prepare and publish a Sensitive Biodiversity Values Land Map. The Environment Agency Head may, from time to time, amend or replace the Map.
- (3) The Map may include the following land:
- (a) land that is the coastal wetlands and littoral rainforest area of the coastal zone referred to in the *Coastal Management Act 2016*,  
**Consultation note.** If that Act has not commenced when this Regulation commences, a transitional regulation will provide that references to those areas in the above provision (and in proposed 60I of the Local Land Services Act 2013) will be construed as references to land to which SEPPs 14 and 26 apply.
  - (b) land identified as koala habitat in a plan of management made under *State Environmental Planning Policy No 44-Koala Habitat Protection*, being land that in the opinion of the Environment Agency Head is core koala habitat,  
**Consultation note.** This Regulation will be revised after public consultation to identify consistent and reliable standards for identifying core koala habitat—see [www.landmanagement.nsw.gov.au](http://www.landmanagement.nsw.gov.au) for further information.
  - (c) land that is a declared Ramsar wetland within the meaning of the *Environmental Protection and Biodiversity Conservation Act 1999* of the Commonwealth,
  - (d) land that, in the opinion of the Environment Agency Head, contains any threatened species or threatened ecological communities that are identified in

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- a list of potential serious and irreversible impacts on biodiversity values under section 6.5 (2) of the Act,
- (e) land that is designated on a transitional native vegetation regulatory map under section 60F (2) (c) of the *Local Land Services Act 2013* as protected riparian land,
  - (f) land that is shown on the native vegetation regulatory map under Part 5A of the *Local Land Services Act 2013* as protected riparian land,
  - (g) land containing high conservation value grasslands (being native grasslands that are not low conservation value grasslands as determined by the regulations under Part 5A of the *Local Land Services Act 2013*),
  - (h) land that is identified by the Environment Agency Head as containing old growth forests, on the basis of:
    - (i) the mapping of old growth forests for the purposes of the Comprehensive Regional Assessment under the National Forestry Policy Statement (being the agreement between the Commonwealth, State and Territory governments made in 1992 and so described), and
    - (ii) any changes to that mapping based on the land meeting the definition of **old growth forest** under the *Private Native Forestry Code of Practice Guideline No. 2: Protocol for re-evaluating old-growth forest on private property*, published by Department of Environment and Climate Change in August 2007,
  - (i) land that is identified by the Environment Agency Head as containing rainforests, on the basis of:
    - (i) the mapping of rainforests for the purposes of the Comprehensive Regional Assessment under the National Forestry Policy Statement (being the agreement between the Commonwealth, State and Territory governments made in 1992 and so described), and
    - (ii) any changes to that mapping based on the land meeting the definition of **rainforest** under the *Private Native Forestry Code of Practice Guideline No. 3: Protocol for re-evaluating rainforest on private property*, published by Department of Environment and Climate Change in August 2007,
  - (j) land subject to conservation projects for site-managed species under the Biodiversity Conservation Program under Division 6 of Part 4 of the Act,
  - (k) land that is a declared area of outstanding biodiversity value,
  - (l) land that, in the opinion of the council of the local government area concerned, contains vegetation connectivity features or threatened species habitat and whose inclusion in the Map will, in the opinion of the Minister, conserve biodiversity at a bioregional or State scale,
  - (m) any other land that, in the opinion of the Environment Agency Head, is of sufficient biodiversity value to be included in the Map.

**Note.** Section 6.8 (3) of the Act provides that the biodiversity assessment method is to exclude the assessment of the impacts of clearing of native vegetation and loss of habitat on category 1-exempt land (within the meaning of the *Local Land Services Act 2013*), other than impacts prescribed by the regulations under section 6.3 of the Act.

## 7.4 Amendments to list of vulnerable threatened species or ecological communities (section 7.10)

- (1) This clause applies to a biodiversity assessment under Part 7 of the Act for the purposes of Part 5 of the *Environmental Planning and Assessment Act 1979* where the proponent obtains a species impact statement and not a biodiversity assessment report.

- (2) The species impact statement is not required to consider the listing under Part 4 of the Act of a vulnerable species or vulnerable ecological community after the principal author signs the statement.
- (3) This clause ceases to apply to a species impact statement if the relevant activity subject to biodiversity assessment has not been commenced or approved within 12 months after the statement has been publicly notified by the determining authority.

## **7.5 Modification of Part 5 activity (sections 7.8 and 7.17)**

- (1) This clause applies to a modification of an activity under Part 5 of the *Environmental Planning and Assessment Act 1979* where the proponent obtained a species impact statement or a biodiversity assessment report for the purposes of biodiversity assessment under section 7.8 of the Act.
- (2) Section 7.8 of the Act does not apply in relation to any such modification that will reduce the overall impact of the activity on biodiversity values.
- (3) Section 7.8 of the Act applies in relation to any such modification that will increase the overall impact of the activity on biodiversity values, and for that purpose the proponent may elect to have the impacts of the modification assessed by a species impact statement or a biodiversity development assessment report.
- (4) The determining authority is required to take into account, in connection with the assessment of the modification, measures taken to avoid or minimise the impact on biodiversity values in connection with the original activity (including any measures calculated in terms of the retirement of biodiversity credits).

## **7.6 Modification of activity where proponent obtained biodiversity development assessment report (section 7.17 (4))**

- (1) This clause applies to a biodiversity assessment under Part 7 of the Act for the purposes of Part 5 of the *Environmental Planning and Assessment Act 1979* where the proponent obtains a biodiversity assessment report and not a species impact statement.
- (2) Section 7.8 of the Act does not apply in relation to a modification of an activity under Part 5 of that Act if the modification will reduce the overall impact of the activity on biodiversity values.
- (3) If the modification of an activity under Part 5 of that Act will increase the overall impact of the activity on biodiversity values, section 7.8 of the Act applies .

## Part 8 Biodiversity certification of land

### 8.1 Avoiding or minimising impacts of clearing and loss of habitat may be specified as related other approved conservation measures in order conferring biodiversity certification (section 8.3 (3) (c))

Measures to avoid or minimise the impacts on biodiversity values of the clearing of native vegetation and the loss of habitat on biodiversity certified land are related matters that may be specified as approved conservation measures in the order conferring biodiversity certification.

### 8.2 Criteria to be taken into account by Minister when declaring strategic application (section 8 (2))

The following criteria are to be taken into account by the Minister when declaring that an application for biodiversity certification of land is a strategic application:

- (a) the size of the area of the land,
- (b) any regional or district strategic plan under the *Environmental Planning and Assessment Act 1979* that applies to the area in which the land is situated,
- (c) advice provided by the Minister for Planning regarding the proposed biodiversity certification,
- (d) the economic, social or environmental outcomes that the proposed biodiversity certification could facilitate.

### 8.3 Consultation with local councils on biodiversity certification applications (section 8.26 (6))

- (1) This clause applies for the purposes of consultation under section 8.6 (1) of the Act by the applicant for biodiversity certification with the local council of the area to which the application relates.

**Note.** Section 8.6 (1) of the Act requires an applicant for biodiversity certification who is not a planning authority (or who is Local Land Services) to consult the local council of the area before undertaking public consultation on the application.

- (2) The applicant is to provide the local council with a copy of the application and give the local council at least 42 days to make any submission to the applicant about the application.
- (3) The applicant is required to provide any such submission received from a local council to the Minister, together with a response to the submission.

### 8.4 Publication of biodiversity certification agreements (section 8.20)

- (1) A copy of each biodiversity certification agreement is to be published on a government website maintained by the Environment Agency Head.
- (2) However, the Environment Agency Head is to restrict access to any personal information (within the meaning of the *Privacy and Personal Information Protection Act 1998*) if its disclosure would contravene that Act.

### 8.5 Additional grounds for suspension or revocation of biodiversity certification (sections 8.21 (2) (d) and 8.22 (4) (d))

The Minister may suspend or revoke a biodiversity certification of land under section 8.21 of the Act, or modify a biodiversity certification of land on the Minister's own initiative under section 8.22 of the Act, if the Minister is no longer satisfied that the approved conservation measures under the biodiversity certification adequately address the likely impacts on biodiversity values of the biodiversity certification of the land.

**8.6 Consultation with planning authorities on proposed suspension or revocation of biodiversity certification following strategic application for certification (section 8.21 (3))**

Before suspending or revoking under section 8.21 of the Act the biodiversity certification of land that was conferred following a strategic application for biodiversity certification made by a planning authority, the Minister must consult:

- (a) that planning authority, and
- (b) any other planning authority that is a party to the biodiversity certification or that is a party to a biodiversity certification agreement in connection with the biodiversity certification.

**8.7 Currency of biodiversity certification assessment report (section 8.26 (6))**

A biodiversity certification assessment report cannot be submitted in connection with an application for biodiversity certification, or for an extension or modification of biodiversity certification, unless the accredited person certifies in the report that the report has been prepared on the basis of the requirements of (and information provided under) the biodiversity assessment method as at a specified date and that date is within 28 days of the date the report is so submitted.

**8.8 Extension of period or modification of biodiversity certification (section 8.26 (6))**

- (1) The Minister may, when determining whether to extend the period for which any biodiversity certification remains in force or whether to modify any biodiversity certification, have regard to any ground on which the Minister may suspend or revoke a biodiversity certification under section 8.21 of the Act.

**Note.** The grounds on which section 8.21 authorises the suspension or revocation of biodiversity certification include non-compliance with approved conservation measures under the certification.

- (2) An application to modify a biodiversity certification to extend the area of land to which the certification applies must:
  - (a) identify the area of land proposed to be added to the biodiversity certification, and
  - (b) identify whether any of that land was subject to approved measures under the biodiversity certification to avoid or minimise the impacts on biodiversity values of the clearing of native vegetation and the loss of habitat on the biodiversity certified land.

**8.9 Fees payable in connection with biodiversity certification (section 8.26 (6) (a))**

An application for biodiversity certification is to be accompanied by:

- (a) a fee of 50 fee units, and
- (b) if the area of land proposed to be certified exceeds 100 hectares—an additional fee of 10 fee units plus 10 fee units for each 100 hectares that exceeds 100 hectares.

**Consultation note.** The Environment Agency Head may waive any of the above fees under section 14.6 of the Act.

## **Part 9 Public consultation and public registers**

### **Division 9.1 Public consultation**

#### **9.1 Exclusion of Christmas/New Year period (section 9.6)**

- (1) This clause applies to the minimum public exhibition period of 4 weeks in respect of a public consultation document that is required by section 9.2 of the Act.
- (2) The period between 20 December and 10 January (inclusive) is excluded from the calculation of the minimum period of public exhibition.

### **Division 9.2 Public registers**

#### **9.2 Public register of biodiversity conservation licences (sections 9.7 (1) (a) and 9.11)**

Information relating to an existing licence under an Act or provision of an Act repealed by the Act (being a licence that is taken under the Act to be a biodiversity conservation licence) is not required to be included in the public register of biodiversity conservation licences.

#### **9.3 Register of private land conservation agreements (sections 9.7 (1) (c) and 9.11)**

- (1) The following information is required to be included in the public register of private land conservation agreements:
  - (a) whether the agreement is a biodiversity stewardship agreement, a conservation agreement or a wildlife refuge agreement,
  - (b) the names of the current and previous owners of the land to which the agreement relates during any period the agreement is in force,
  - (c) the lot and deposited plan numbers of the land to which the agreement relates,
  - (d) the local government area in which the land to which the agreement relates is situated,
  - (e) any Interim Biogeographic Regionalisation of Australia subregion in which the land to which the agreement relates is situated,
  - (f) a copy of the agreement (and any variation of the agreement),
  - (g) a copy of the biodiversity assessment report that relates to the agreement,
  - (h) a copy of any management plan prepared under the agreement (and any variation of the plan),
  - (i) in the case of a biodiversity stewardship agreement—the number and class of biodiversity credits created in relation to the agreement.
- (2) If a private land conservation agreement ceases to be in force, the public register of private land conservation agreements is to continue to contain the information relating to the agreement immediately before it ceased to be in force. The information is to be kept separately from information about agreements that are in force.

#### **9.4 Public register of biodiversity credits (sections 9.7 (1) (d) and 9.11)**

The following information is required to be included in the public register of biodiversity credits:

- (a) the name of the credit (and any former name),
- (b) the contact details of the current holder of the credit (or of the agent of the holder),
- (c) the lot and deposited plan numbers of the land comprising the biodiversity stewardship site in respect of which the credits were created,

- (d) the local government area in which that land is situated,
- (e) the status of the credit (for example, whether available, retired or committed),
- (f) the profile attributes of the credit identified in the Biodiversity Assessment Method,
- (g) in the case of a transfer of biodiversity credits—the credits transferred, the amount paid to the existing holder of the credits for the transfer and the date of the transfer (including, if disclosed, whether the transfer was made for philanthropic reasons),
- (h) in the case of a retirement of biodiversity credits:
  - (i) the credits retired, and
  - (ii) the amount paid to the holder of the credits if the credits have not previously been traded, and
  - (iii) the reference number and date of the consent, approval, biodiversity obligation or other instrument that imposed the obligation to retire the credits (if any), and
  - (iv) the address and local government area of the land to which that instrument applies,
- (i) in the case of a suspension of biodiversity credits—the date the suspension took effect and the date the suspension ends,
- (j) in the case of the cancellation of biodiversity credits—the date the cancellation took effect and the reasons for the cancellation provided under section 6.23 (3) (b) of the Act.

**Consultation note.** Under the savings and transitional provisions to be made by the regulations, biodiversity credits created under the Threatened Species Conservation Act 1995 will be deemed to be biodiversity credits created under the Biodiversity Conservation Act 2016 and will be recorded on the public register of credits and be able to be traded under the biodiversity offsets scheme accordingly. The savings and transitional regulations will authorise the Environment Agency Head to alter the number of credits registered (and not yet retired) so that they are equivalent to the numerical value of the credits that would have been created under the biodiversity offsets scheme.

## **9.5 Public register of accredited persons who apply BAM (sections 9.7 (1) (e) and 9.11)**

The following information is required to be included in the public register of accredited persons:

- (a) the name of the accredited persons whose accreditation is in force,
- (b) the date of accreditation of each such person,
- (c) the date the accreditation of each such person expires,
- (d) the contact details of each such person (but only if the person requests those details to be included in the register).

## **9.6 Public register of remediation orders (sections 9.7 (1) (h) and 9.11)**

Information relating to a remediation direction given under section 38 of the *Native Vegetation Act 2003* (being a direction that is taken under the Act to be a remediation order under section 11.15 of the Act) is not required to be included in the public register of remediation orders.

## **9.7 Public register of biodiversity credits wanted (sections 9.7 (1) (j) and 9.11)**

- (1) A public register is to be kept and made available under Division 2 of Part 9 of the Act of persons seeking biodiversity credits.
- (2) The following information is required to be included in the public register:

- (a) the name of any person seeking biodiversity credits who requests to be included in the register (or the nominated agent of the person),
- (b) contact details of the person (or the nominated agent of the person),
- (c) the number and class of credits (or range) sought by the person,
- (d) the date the person requested to be included in the register,
- (e) any additional information the Environment Agency Head considers appropriate.

**9.8 Public register of biodiversity stewardship site expressions of interest (sections 9.7 (1) (j) and 9.11)**

- (1) A public register is to be kept and made available under Division 2 of Part 9 of the Act of biodiversity stewardship site expressions of interest.
- (2) The following information is required to be included in the public register:
  - (a) the name of any landholder seeking to establish a biodiversity stewardship site who requests to be included in the register (or the nominated agent of the landholder),
  - (b) contact details of the landholder (or the nominated agent of the landholder),
  - (c) the local government area in which the proposed site is situated,
  - (d) any Interim Biogeographic Regionalisation of Australia subregion in which the proposed site is situated,
  - (e) the date the person requested to be included in the register,
  - (f) any additional information the Environment Agency Head considers appropriate.

**9.9 Correction of public registers (section 9.11)**

The Environment Agency Head may revise a public register kept under Division 2 of Part 9 of the Act to correct any error or out-of-date information in the register.

**9.10 Additional authority for restriction of access to information in public registers (section 9.10)**

The Environment Agency Head may restrict access to information in a public register kept under Division 2 of Part 9 of the Act if the Environment Agency Head is satisfied that:

- (a) in the case of the public register of biodiversity conservation licences—the information would identify the location of particular animals or plants (or the location of activities relating to particular animals or plants),
- (b) the information would disclose the name of the owner of the site to which a conservation agreement or wildlife refuge agreement applies,
- (c) the information would disclose the name or contact details of the current holder of a biodiversity credit (or the holder's agent) in any case in which the holder has not agreed to have that information disclosed,
- (d) the information would disclose the name or contact details of a former holder of a biodiversity credit (or the former holder's agent),
- (e) the information would disclose the land title information of land subject to a conservation agreement or wildlife refuge agreement in a case in which the landholder has requested that the information should not be disclosed,
- (f) the information in a private land conservation agreement that is identified in the agreement as information to which access on a public register is to be restricted,



- (g) the information is subject to an authorisation restricting access given under (or taken to be given under) section 4.20 of the Act.

**Note.** Section 9.10 also provides for the restriction of access to information in the public interest or if its disclosure would contravene privacy legislation.

**9.11 Transitional provision relating to information about licences, agreements and credits under repealed Act**

- (1) This clause applies to licence, agreement or biodiversity credit under the *Threatened Species Conservation Act 1995* that is continued in force under the Act.
- (2) Despite anything to the contrary in this Part, information relating to any such licence, agreement or credit is not required to be included in a public register under Division 2 of Part 9 of the Act if the information was not included in the corresponding register under the *Threatened Species Conservation Act 1995*.
- (3) Subclause (2) ceases to have effect in relation to any such licence, agreement or credit if a change is made in relation to the licence, agreement or credit under the Act.
- (4) Relevant information about any such licence, agreement or credit on the corresponding register under the *Threatened Species Conservation Act 1995* that was not kept in electronic form need not be kept in electronic form under Division 2 of Part 9 of the Act.

## Part 10 Biodiversity Conservation Trust

### 10.1 Preparation and publication of Trust business plan (section 10.7 (5))

- (1) The business plan of the Trust is to contain the following:
  - (a) the goals of the Trust (being goals that are consistent with its objects under section 10.4 of the Act) and its plans for achieving those goals,
  - (b) its plan for the investment of money of or under the control of the Trust and for the management of the proceeds of its investments,
  - (c) its plan for collecting and managing information for the exercise of its functions (including for the purposes of the biodiversity information programs of the Environment Agency Head under section 14.3 and of the evaluation of investment in biodiversity conservation on private land).
- (2) While the Trust continues to be the Fund Manager of the Biodiversity Stewardship Payments Fund, the business plan of the Trust extends to its functions as the Fund Manager.

### 10.2 Additional matters to be included in the annual report of Trust (section 10.12)

- (1) The annual report of the Trust under the *Annual Reports (Statutory Bodies) Act 1984* is to include the following additional matters:
  - (a) the progress in the reporting year on the achievement of the goals of the Trust set out in its approved business plan,
  - (b) the actions undertaken by the Trust during the reporting year to implement the plans in its approved business plan.
- (2) While the Trust continues to be the Fund Manager of the Biodiversity Stewardship Payments Fund, the annual report of the Trust extends to its activities as the Fund Manager.

### 10.3 Combination of Trust annual report with annual report as Fund Manager of the Biodiversity Stewardship Payments Fund (section 6.37)

- (1) The annual report of the Trust under the *Annual Reports (Statutory Bodies) Act 1984* may be combined with the annual report of the Trust under section 6.37 of the Act while it continues to be the Fund Manager of the Biodiversity Stewardship Payments Fund.
- (2) The combined report is to contain separate financial statements for the Biodiversity Stewardship Payments Fund and for other money or funds of or under the control or management of the Trust.

## Part 11 Regulatory compliance mechanisms

### 11.1 Terms of interim protection orders (section 11.9 (2))

- (1) An interim protection order may contain terms of either or both of the following kinds:
  - (a) terms prohibiting the owner or occupier of any land that is subject to the order from doing any of the activities referred to in subclause (2),
  - (b) terms allowing the owner or occupier of any land that is subject to the order to do any of those activities only with the consent of the Minister or only subject to other specified conditions.
- (2) The activities that may be prohibited or regulated are the following:
  - (a) the total or partial destruction, demolition, removal, damaging or defacing of any building, structure or work on any land,
  - (b) the damaging or despoiling of any land,
  - (c) the carrying out of development on any land,
  - (d) the clearing of native or other vegetation on any land,
  - (e) any other activity that may affect the preservation, protection or maintenance of any land, including any threatened species or ecological community (or its habitat) or any protected animal or protected plant.
- (3) In this clause, *doing* an activity includes causing or permitting the activity to be done.

### 11.2 Time for appeal against interim protection orders (section 11.13 (2))

An appeal by a landholder against an interim protection order is to be made within 30 days after the date the landholder is given notice of the order under section 11.11 of the Act.

## Part 12 Investigation powers

**Consultation note.** At this stage, no regulations are proposed to be made in connection with Part 12 of the Act.

## **Part 13 Criminal and civil proceedings**

### **13.1 Penalty notice offences (section 13.5)**

Schedule 1 contains provisions relating to penalty notice offences.

### **13.2 Certificate evidence of additional matters (section 13.31)**

The following additional matters may be certified under section 13.31 (1) of the Act:

- (a) that a specified animal or plant is a protected animal or protected plant,
- (b) that a specified animal or plant is an animal or plant of a specified species,
- (c) that a specified person was or was not the holder of biodiversity conservation licence at a specified time,
- (d) that a specified amount is payable or has been paid by a specified person under the Act or under Part 5A of the *Local Land Services Act 2013*,
- (e) that a document of a specified kind under the Act or under Part 5A of the *Local Land Services Act 2013*, a copy of which is attached to the certificate, was in effect at a specified date or during a specified period,
- (f) that a specified approval, certificate, order or other document was or was not given, issued, published or in force in respect of specified land or at a specified date or during a specified period,
- (g) that a specified animal or plant is classified in a specified manner on a specified official database of animals or plants.

## Part 14 Miscellaneous

### 14.1 Provisions relating to members and procedure of Biodiversity Conservation Advisory Panel (section 14.2)

Schedule 2 contains provisions relating to the members and procedure of the Biodiversity Conservation Advisory Panel.

### 14.2 Biodiversity information programs (section 14.3)

- (1) This clause applies to programs established by the Environment Agency Head under section 14.3 of the Act for the collection, monitoring and assessment of information on biodiversity.
- (2) The programs are to collect, monitor and assess information on the status and trends of biodiversity in New South Wales.
- (3) The programs are to use a method for that collection, monitoring and assessment which identifies key biodiversity indicators and sets out how data related to those indicators is to be collected and measured.
- (4) The Environment Agency Head is to publish from time to time on a website maintained by the Agency Head a NSW Biodiversity Outlook Report on the results of the programs (including the method used for the collection, monitoring and assessment of the biodiversity information).
- (5) The method for the collection, monitoring and assessment of information on biodiversity and the NSW Biodiversity Outlook Report are to be subject to peer review by at least 3 people who have, in the opinion of the Environment Agency Head, appropriate qualifications.

### 14.3 Additional persons to whom functions may be delegated by Minister or Agency Head (section 14.4)

The following persons or classes of persons are prescribed as additional persons or classes of persons to whom the exercise of the functions of the Minister or the Environment Agency Head may be delegated:

- (a) the Biodiversity Conservation Trust, a member or committee of the Board of the Trust or an employee of the Trust,
- (b) Local Land Services, a member of the Board of Chairs, the chair or any other member of a local board or a member of the staff of Local Land Services,
- (c) a local council or an employee of a local council,
- (d) a police officer or other member of the NSW Police Force,
- (e) the Environment Protection Authority, the Chairperson of the Authority or a person employed in the Environment Protection Authority Staff Agency,
- (f) a person employed in the Department of Planning and Environment.

## Schedule 1 Penalty notice offences

(clause 13.1)

For the purposes of section 13.5 of the Act:

- (a) each offence specified in this Schedule is a penalty notice offence for which a penalty notice may be issued, and
- (b) the amount payable under any such penalty notice is the amount specified in this Schedule for the offence, and
- (c) an authorised officer under Part 12 of the Act may issue any such penalty notice.

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision</b>	<b>Penalty-corporations</b>	<b>Penalty-individuals</b>
<b>Offences under the Act</b>		
Section 2.1 [in the case of an animal that is (or is part of) a threatened species or threatened ecological community (other than a vulnerable species or vulnerable ecological community)]	\$16,500	\$3,300
Section 2.1 [in the case of an animal that is (or is part of) a vulnerable species or vulnerable ecological community]	\$4,400	\$880
Section 2.1 [in any other case]	\$1,100	\$220
Section 2.2 [in the case of a plant that is (or is part of) a threatened species or threatened ecological community (other than a vulnerable species or community)]	\$16,500	\$3,300
Section 2.2 [in the case of a plant that is (or is part of) a vulnerable species or vulnerable ecological community]	\$4,400	\$880
Section 2.2 [in any other case]	\$1,100	\$220
Section 2.3	\$16,500	\$3,300
Section 2.4	\$16,500	\$3,300
Section 2.5 [in the case of an animal or plant that is (or is part of) a threatened species or threatened ecological community (other than a vulnerable species or vulnerable ecological community)]	\$16,500	\$3,300
Section 2.5 [in the case of an animal or plant that is (or is part of) a vulnerable species or vulnerable ecological community]	\$4,400	\$880
Section 2.5 [in any other case]	\$1,100	\$220
Section 2.6	\$4,400	\$880
Section 2.14 (4) [in the case of an animal or plant that is (or is part of) a threatened species or threatened ecological community (other than a vulnerable species or vulnerable ecological community)]	\$16,500	\$3,300
Section 2.14 (4) [in the case of an animal or plant that is (or is part of) a vulnerable species or vulnerable ecological community]	\$4,400	\$880
Section 2.14 (4) [in any other case]	\$1,100	\$220
Section 5.18 (6)	\$16,500	\$3,300

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Biodiversity Conservation Regulation 2017 [NSW]  
Schedule 1 Penalty notice offences

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision</b>	<b>Penalty-corporations</b>	<b>Penalty-individuals</b>
Section 6.29 (2)	\$16,500	\$3,300
Section 11.5	\$16,500	\$3,300
Section 11.12	\$16,500	\$3,300
Section 11.22	\$6,600	\$1,320
Section 11.27	\$6,600	\$1,320
Section 11.36 [in the case of an animal that is (or is part of) a threatened species or threatened ecological community (other than a vulnerable species or vulnerable ecological community)]	\$6,600	\$1,320
Section 11.36 [in the case of an animal that is (or is part of) a vulnerable species or vulnerable ecological community]	\$4,400	\$880
Section 11.36 [in any other case]	\$1,100	\$220
Section 12.22 (1)	\$6,600	\$1,320
Section 12.22 (2)	\$1,100	\$220
Section 12.22 (3)	\$16,500	\$3,300
Section 12.22 (4)	\$16,500	\$3,300
Section 12.22 (5)	\$16,500	\$3,300
Section 12.22 (6)	\$6,600	\$1,320
Section 13.10	\$16,500	\$3,300

## **Offences under this Regulation**

Clause 2.2 (Interfering with marine mammals)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.3 (Approaching marine mammals)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.4 (Operation of prohibited vessels approached by marine mammals)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.5 (Operation of vessels that are not prohibited vessels)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.6 (Operation of aircraft in vicinity of marine mammals)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.7 (Feeding marine mammals)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)



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# public consultation draft

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Biodiversity Conservation Regulation 2017 [NSW]  
Schedule 1 Penalty notice offences

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<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision</b>	<b>Penalty-corporations</b>	<b>Penalty-individuals</b>
Clause 2.8 (Swimming with whales, dolphins or dugongs)	\$6,600 (or \$16,500 if offence committed in the course of a commercial operation)	\$1,320 (or \$3,300 if offence committed in the course of a commercial operation)
Clause 2.37 (Offences relating to registration, tagging and record keeping)	\$1,100	\$220
Clause 2.38 (Prohibition on breeding native waterfowl with non-native waterfowl)	\$1,100	\$220
Division 3.2 (Little Penguin declared area)	\$1,100	\$500
Division 3.3 (Wollemi Pine declared area)	\$1,100	\$500
<b>Offences under Part 5A of Local Land Services Act 2013</b>		
Section 60N [in relation to land to which section 60K (9) applies]	\$4,400	\$880
Section 60N [in any other case]	\$15,000	\$5,000
Section 60X (1)	\$1,100	\$220
Section 60ZC (6)	\$15,000	\$3,300
<b>Offences under Regulations under Part 5A of Local Land Services Act</b>		
Clause 135 (Offence of contravening certain requirements of approvals or certificates)	\$2,200	\$440

## **Schedule 2 Provisions relating to members and procedure of the Biodiversity Conservation Advisory Panel**

(clause 14.1)

### **Part 1 Preliminary**

#### **1 Definitions**

In this Schedule:

*member* means the chairperson or other member of the Panel.

*Panel* means the Biodiversity Conservation Advisory Panel established under section 14.2 of the Act.

### **Part 2 Provisions relating to members of Panel**

#### **2 Terms of office of members**

- (1) A member of the Panel holds office, subject to this Schedule, for such period (not exceeding 3 years) as is specified in the member's instrument of appointment.
- (2) A member is eligible (if otherwise qualified) for re-appointment.

#### **3 Part-time office**

The office of a member is a part-time office.

#### **4 Remuneration of members**

A member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the member.

#### **5 Alternate members**

- (1) The Minister may, from time to time, appoint a person to be the alternate of a member, and may revoke any such appointment.
- (2) In the absence of a member, the member's alternate may, if available, act in the place of the member.
- (3) While acting in the place of a member, a person has all the functions of the member and is taken to be a member.
- (4) A person while acting in the place of a member is entitled to be paid such remuneration (including travelling and subsistence allowances) as the Minister may from time to time determine in respect of the person.
- (5) The alternate of a member who is the chairperson has the member's functions as chairperson.

#### **6 Removal from office of members**

The Minister may remove a member from office at any time for any reason and without notice.

#### **7 Vacancy in office of member**

- (1) The office of a member becomes vacant if the member:
  - (a) dies, or

- (b) completes a term of office and is not re-appointed, or
  - (c) resigns the office by instrument in writing addressed to the Minister, or
  - (d) is removed from office under this or any other Act, or
  - (e) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
  - (f) becomes a mentally incapacitated person, or
  - (g) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable.
- (2) If the office of a member becomes vacant, a person may, subject to the Act and this Schedule, be appointed to fill the vacancy.

## **Part 3 Provisions relating to procedure of Panel**

### **8 General procedure**

The procedure for the calling of meetings of the Panel and for the conduct of business at those meetings is, subject to the Act and this Schedule, to be as determined by the Panel.

### **9 Quorum**

The quorum for a meeting of the Panel is a majority of its members for the time being.

### **10 Presiding member**

- (1) The chairperson (or, in the absence of the chairperson, a member elected by the members of the Panel who are present at a meeting of the Panel) is to preside at a meeting of the Panel.
- (2) The person presiding at a meeting has a deliberative vote and, in the event of an equality of votes, has a second or casting vote.

### **11 Voting**

A decision supported by a majority of the votes cast at a meeting of the Panel at which a quorum is present is the decision of the Panel.

### **12 Disclosure of pecuniary interests**

- (1) If:
  - (a) a member has a pecuniary interest in a matter being considered or about to be considered at a meeting of the Panel, and
  - (b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter,the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the Panel.
- (2) A member has a pecuniary interest in a matter if the pecuniary interest is the interest of:
  - (a) the member, or
  - (b) the member's spouse or de facto partner or a relative of the member, or a partner or employer of the member, or

- (c) a company or other body of which the member, or a nominee, partner or employer of the member, is a member.
- (3) However, a member is not taken to have a pecuniary interest in a matter as referred to in subclause (2) (b) or (c):
  - (a) if the member is unaware of the relevant pecuniary interest of the spouse, de facto partner, relative, partner, employer or company or other body, or
  - (b) just because the member is a member of, or is employed by, a council or a statutory body or is employed by the Crown, or
  - (c) just because the member is a member of a company or other body that has a pecuniary interest in the matter, so long as the member has no beneficial interest in any shares of the company or body.
- (4) A disclosure by a member at a meeting of the Panel that the member, or a spouse, de facto partner, relative, partner or employer of the member:
  - (a) is a member, or is in the employment, of a specified company or other body, or
  - (b) is a partner, or is in the employment, of a specified person, or
  - (c) has some other specified interest relating to a specified company or other body or to a specified person,is a sufficient disclosure of the nature of the interest in any matter relating to that company or other body or to that person which may arise after the date of the disclosure and which is required to be disclosed under subclause (1).
- (5) Particulars of any disclosure made under this clause must be recorded by the Panel and that record must be open at all reasonable hours to inspection by any person.
- (6) After a member has disclosed the nature of an interest in any matter, the member must not, unless the Minister or the Panel otherwise determines:
  - (a) be present during any deliberation of the Panel with respect to the matter, or
  - (b) take part in any decision of the Panel with respect to the matter.
- (7) For the purposes of the making of a determination by the Panel under subclause (6), a member who has a direct or indirect pecuniary interest in a matter to which the disclosure relates must not:
  - (a) be present during any deliberation of the Panel for the purpose of making the determination, or
  - (b) take part in the making by the Panel of the determination.
- (8) A contravention of this clause does not invalidate any decision of the Panel.

### **13 Provision of information by Panel**

The Panel must provide the Minister with such information and reports as the Minister may, from time to time, request.

**Note.** See section 14.5 of the Act for the exclusion of personal liability of a member of the Panel acting in good faith in the exercise of the member's functions.