



ENVIRONMENTAL DEFENDER'S OFFICE (ACT)

Biodiversity law

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*The key legislation for protection of the ACT's biodiversity is the **Nature Conservation Act 1980 (ACT)**. It requires development of a Nature Conservation Strategy, creates a Conservator of Flora and Fauna, an ACT Parks and Conservation Service, and has various mechanisms to identify and protect species and ecological communities at risk including through action plans.*

Nature Conservation Act 1980 (ACT)

The purpose of the *Nature Conservation Act 1980 (ACT)* (Nature Conservation Act) is to: “make provision for the protection and conservation of native animals and native plants, and for the reservation of areas for those purposes”. Key elements of the Nature Conservation Act are that it:

- creates the office of Conservator of Flora and Fauna [Div 2.1];
- creates the ACT Parks and Conservation Service [Div 2.1];
- requires development of a Nature Conservation Strategy [Div 3.1];
- establishes a Flora and Fauna Committee [Div 2.2];
- provides for declarations identifying species and ecological communities at risk [Div 3.2 and 3.3];
- requires action plans for declared threatened species or ecological communities [Div 3.4];
- provides a regime of offences [Parts 4, 5 and 8], licences [Part 11] and penalties; and
- has capacity for land management agreements [Part 10] and conservation directions [Part 7].

The Act and its subordinate legislation also provide for monitoring, compliance and enforcement activities.

It should be noted that at the time of writing the Act was being reviewed, and amendments or replacement legislation was expected to follow the completion of the review.

The Nature Conservation Act does not address the reservation of public land, for example as National Park or nature reserve. This is covered separately through the National Capital Plan or Territory Plan made under the *Australian Capital Territory (Planning and Land Management) Act 1988 (Cth)* and the *Planning and Development Act 2007 (ACT)* respectively.

What is the role of the Conservator of Flora and Fauna?

The Nature Conservation Act creates the office of Conservator of Flora and Fauna [Div 2.1]. The Conservator of Flora and Fauna (Conservator) is a public servant appointed under the Act [s.7].

The Conservator is currently the Chief Executive of the Department of the Environment, Climate Change, Energy and Water. The Conservator:

- administers the licensing system for the taking of native plants and animals [Part 11];
- manages the nature reserve system in the ACT [Part 8];
- develops the ACT Nature Conservation Strategy [Div 3.1]; and
- makes declarations about special protection status and protected and exempt flora and fauna [Div 3.2].



The Nature Conservation Act also gives power to the Conservator to regulate access to reserved areas in the ACT for public safety or conservation management purposes [Div 8.1].

The Conservator has a range of powers and functions under other legislation such as the *Planning and Development Act (2007)* and the *Tree Protection Act 2005*.

Australian Capital Territory Parks and Conservation Service

The Australian Capital Territory Parks and Conservation Service (the Service) is created under the Nature Conservation Act [s.12]. The Service comprises conservation officers, including rangers in parks and reserves [s.8].

The role of the Service is to assist the Conservator in the exercise of his or her functions under the Nature Conservation Act. The Conservator may delegate any of his or her functions under the Act to conservation officers [s.11], who also have specified investigation and enforcement powers. A conservation officer can ask a person to leave a reserved area if they are acting in an offensive manner, or are reasonably suspected of having acted in an offensive manner, or if they are creating a public nuisance [s.69].

A conservation officer may enter land and carry out investigations and examinations in relation to native animals or plants if he or she thinks that it is necessary or desirable to ensure their protection and conservation. However, the officer must receive written permission from the occupier to do this or give the occupier 24 hours written notice [s.59].

Conservation officers also have powers of inspection, search and seizure in relation to land, premises, vehicles and vessels [ss.130–133]. They can serve infringement notices under the *Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005* for certain breaches of the Nature Conservation Act.

The Service also does research and monitoring work, and assists the many volunteer environment and conservation organisations that contribute to biodiversity conservation in the ACT, including organisations in the Parkcare network.

What is included in the Nature Conservation Strategy?

The Nature Conservation Strategy is a policy document required by the Nature Conservation Act [Div 3.1]. It includes chapters on:

- the conservation of biological diversity – through bioregional planning, reservation, off-reserve conservation, conservation of threatened species and communities, and monitoring of biodiversity;
- the management of ecological threats – pest plants and animals, changed fire regimes, degradation of aquatic systems, and decline and loss of native vegetation;
- community involvement; and
- implementation.

Flora and Fauna Committee

The Flora and Fauna Committee is established under the Nature Conservation Act [s.13]. It provides advice to the Minister for the Environment, Climate Change and Water on nature conservation [s.14].

A bi-annual report of the committee's activities is accessible on the web, and more information is available from the committee secretary.

The Minister can give the committee written general directions. The Conservator has to include a copy of these, and information about the actions taken to implement them, in his or her annual report [s.15].

Appointees to the Flora and Fauna Committee are people with expertise in ecology or biodiversity, and at least two must not be public servants [s.17]. Seven members are appointed by the Minister on a part-time basis and hold office for up to three years, but can be reappointed.

How are species and communities at risk identified?

The Flora and Fauna Committee can recommend that a species should be declared as endangered or vulnerable:

- **endangered** – if it is likely to become extinct in the ACT region unless the threats to its abundance, survival or evolution cease, or if its numbers or habitats have been reduced to such a level that the species is in immediate danger of extinction in the ACT region; or
- **vulnerable** – if within the next 25 years it is likely to become endangered in the ACT

region unless threats to its abundance, survival or evolution cease [ss.35 and 38; *Nature Conservation (Criteria and Guidelines for Declaring Threatened Species and Communities) Determination 2008 (No 1)* DI2008–170].

An ecological community may be recommended to be declared as endangered if it is in immediate danger of extinction in the ACT region unless the threats to its distribution, composition and viability as an ecological unit cease.

The Flora and Fauna Committee can also recommend that a process be declared threatening if it threatens the survival, abundance or evolution of a species or community in the ACT region.

Any person or organisation may make a written nomination, on an approved form, requesting that the committee recommend the declaration of a species, ecological community or threatening process. The request must be accompanied by a statement containing the reasons why the applicant considers that the declaration should be made [s.39]. Nominations for the committee's consideration are considered in accordance with the criteria and guidelines in DI2008–170. The criteria for assessing nominations can only be on the grounds of nature conservation issues [s.35(2)].

The Flora and Fauna Committee assesses the application and may then make a recommendation to the Minister that he or she make a declaration. If the recommendation is accepted the Minister makes a declaration under the Nature Conservation Act [s.38] that the species or ecological community is vulnerable or endangered.

The most recent list of declarations is the *Nature Conservation (Species and Ecological Communities) Declaration 2008 (No 2)* DI2008–53. It includes two threatened ecological communities: Natural Temperate Grassland, and Yellow Box/Red Gum Grassy Woodland. There are currently 17 declared endangered species including the superb parrot and the striped legless lizard, and 14 vulnerable species including the golden sun moth and the grassland earless dragon. No threatening processes have yet been declared.

Recovery teams consisting of government agencies, experts and community representatives, may be established to identify, protect, manage and recover threatened ecological communities and species.

What is the effect of being declared a vulnerable or endangered species?

If a species or ecological community is declared to be vulnerable or endangered or a threatening process is declared then an action plan must be prepared [s.40]. The Act also provides for a range of offences to protect animals and plants.

Declarations of protected and exempt flora and fauna

The Conservator may, under the Nature Conservation Act [s.34], declare that certain fish, invertebrates, animals and plants are protected, and that certain animals are exempt from protection.

In making such a declaration the Conservator takes into account the need to protect and ensure the welfare of native plants and animals in the ACT, to conserve the significant ecosystems of the ACT, New South Wales and Australia, and to safeguard the specialised welfare and security requirements of the animal, plant, fish or invertebrate (except in relation to exempt animals).

The most recent declaration is the *Nature Conservation Declaration of Protected and Exempt Flora and Fauna 2002 (No. 2)* DI2003-6. Included as protected animals and plants are the peruga grasshopper and the small purple pea while galahs and crimson rosellas are examples of exempt animals.

What is the effect of being a protected or exempt animal or plant?

Part 4 sets out certain protections for native animals (except in some cases exempt animals), including protected animals. These include protections relating to interfering with nests, killing, taking, selling or importing or exporting animals, except in accordance with a licence [ss.43-48].



If a plant is protected then Part 5 sets out certain protections, such as a prohibition on taking, selling or importing or exporting the plant except in accordance with a licence [s.51 and 53].

If an animal is declared to be exempt then certain offences such as the prohibition on keeping, selling and importing and exporting animals without a licence do not apply [s.46, 47 and 48].

Declaration of prohibited and controlled organisms

The Conservator may declare organisms of a particular kind to be prohibited or controlled [Part 6]. In making the declaration, the Conservator has to consider the need to protect native animals and plants in the territory and to conserve significant ecosystems in the ACT, New South Wales and Australia. Penalties apply to the possession of a prohibited organism without a licence.

Declaration of special protection status

The Conservator must make a written declaration of special protection status for native plants and animals if they are declared endangered by the Minister under s.38 or if the Conservator believes on reasonable grounds they are threatened with extinction [s.33].

The Conservator may also make such a declaration about members of a migratory species whose protection is the object of an Act of the Commonwealth or an international agreement entered into by the Commonwealth [s.33]. The list of species with special protection status includes migratory animals and birds, marine and land mammals, birds, amphibians, fish and reptiles that are threatened with extinction, including the ACT's endangered species such as the regent honeyeater. The most recent declaration is the *Nature Conservation (Special Protection Status) Declaration 2005 (No 1)* DI2005-64.

What is the effect of a species having special protection status?

A declaration of special protection status is the highest level of statutory protection that can be given to flora and fauna under the Nature Conservation Act, and provides for increased penalties for unauthorised activities and tighter licensing constraints.

How do action plans operate?

The Nature Conservation Act requires the Conservator to prepare a draft action plan for each declared threatened species, ecological community, or threatening process [Div 3.4].

Action plans include proposals to ensure, as far as is practicable, the identification, protection and survival of the species, or the ecological community; or proposals to minimise the effect of any process which threatens any species or ecological community.

For example, action plans include the criteria for the declaration, a scientific description of the species or community, information on its distribution, conservation status locally, nationally and internationally, plus the conservation objectives and proposed protection measures.

Each action plan is first released as a draft for public comment. The Conservator has to publish a notice of the development of a draft action plan in the ACT Legislation Register and a newspaper, including information on where the drafts are available for public inspection. The consultation period has to be at least 21 days but can be longer [s.41].

The Conservator then prepares the final action plan, taking into account any comments, and puts a notice in the ACT Legislation Register and the Canberra Times, stating that copies of the final plan are available and accessible on the web.

Several important action plans have been released in recent years, including:

- Woodlands for Wildlife: ACT Lowland Woodland Conservation Strategy (Action Plan No.27);
- ACT Lowland Native Grassland Conservation Strategy (Action Plan No.28); and
- ACT Aquatic Species and Riparian Zone Conservation Strategy (Action Plan No.29).

What activities are an offence?

The Nature Conservation Act protects animals and fish by setting up a range of offence provisions [Part 4]. Some offences relate to native animals only and others apply more generally. For example, a person must not, except in accordance with a licence or pursuant to a valid defence:

- interfere with the nest of a native animal, or with anything in the immediate environment of such a nest, so that the interference places the animal or its progeny in danger of death or not being able to breed [s.43];

- kill or take a native animal whether dead or alive [s.44-45];
- keep, sell, import or export an animal (other than an exempt animal) or live fish [s.46–48]; or
- release a native animal from captivity if the release places the animal in greater danger of injury or death than if it had been kept in captivity, or release a native or other animal that threatens the survival, abundance or evolution of any species of native animal (animal in this context includes a fish) [s.49].

Offence provisions also apply for the protection of plants [Part 5]. For example, a person must not, except in accordance with a licence, take a plant that has special protection status, or which is a protected native plant or a native plant growing on unleased land [s.51].

It is also an offence to sell a protected native plant, or import into or export from the territory a protected native plant for the purposes of sale or trade, without a licence or under an exception in the Nature Conservation Act [s.53].

Native timber is also protected, and subject to certain exceptions, where it is standing on unleased land, or on leased land outside the urban area, it must not be felled without a licence or without a reasonable excuse (s.52). Nor must fallen native timber on unleased land be damaged without reasonable excuse.

Exceptions and defences to prosecution are available under the Nature Conservation Act. For example, it is a defence to a prosecution for interfering with a nest of a native animal if the defendant believed, on reasonable grounds, that the danger of death or not being able to breed did not exist, or that the place, structure or object alleged to have been interfered with was not a nest, or was not in the immediate environment of a nest [s.43(3) and (4)]. It is not an offence to kill an animal if it is endangering a person [s.44(2)].

In addition, the offences in the Nature Conservation Act do not apply where a member of the fire brigade, rural fire service or a police officer exercises functions under the *Emergencies Act 2004* (ACT) for the purpose of protecting life or property, or controlling, extinguishing or preventing the spread of fire [s.5].

Are there penalty provisions in the Act?

The Nature Conservation Act includes various penalty provisions, with penalties being potentially substantial. For example, the maximum penalty for interfering with a native animal nest, is 100 penalty units, or imprisonment for one year, or both, if the animal has special protection status. A penalty unit is currently \$110 for an individual and \$550 for a corporation (s.133 *Legislation Act 2001* (ACT)). If the animal does not have special protection status, the maximum penalty can be up to 50 penalty units, imprisonment for six months or both. The maximum penalties for clearing native vegetation in a reserved area which causes serious harm may vary. For example, if the offender was:

- reckless – the penalty can be up to 2,000 penalty units, imprisonment for five years or both; or
- negligent – the penalty can be up to 1,500 penalty units, imprisonment for three years, or both [s.77].

If charged with a strict liability offence, the maximum penalty can be 1,000 penalty units. A strict liability offence is one where proof of a fault element is not required and the defence of mistake of fact may be available. The *Magistrates Court (Nature Conservation Infringement Notices) Regulation 2005* (ACT) enables infringement

notices to be issued and penalties applied for many of the offences in the Nature Conservation Act. Infringement notices are intended to provide a quicker and more effective alternative to prosecution in court. The various offence provisions and penalties are prescribed in Schedule 1 to the regulation. Penalties are generally about five times less than the maximum penalties if a matter goes to court.





Are licences issued to allow certain activities?

The Nature Conservation Act enables the Conservator to licence various activities which would otherwise be prohibited under the Act [Part 11].

The Minister can determine criteria for granting or refusing a licence, imposing conditions on a licence, or determining the duration of a licence. No licence can be granted, or have conditions imposed or varied, except in accordance with these criteria [s.106]. The current licensing criteria are set out in the *Nature Conservation (Licensing Criteria) Determination 2001* DI2001–47. One of the criteria that the Conservator must consider when deciding whether to grant a licence is the effect the activity will have on a species of native animal or native plant already found in the Territory; the significant ecosystems of the Territory; and if the activity is proposed to be undertaken on public land, the effect of the activity on that land.

The Act also provides the Minister with the power to determine licence fees [s.139]. The current fees are prescribed under the *Nature Conservation (Fees) Determination 2010 (No 1)*, DI2010–8.

The Nature Conservation Act requires a licence for keeping any parts of animals or whole animals, dead or alive, unless the animals are exempt, or being treated for illness, disease or injury, for up to 48 hours [s.46]. Licences are renewable and can be of variable

duration, as specified [s.107].

A licence is not required to keep, possess, breed, buy, sell or dispose of species listed on the exempt list [s.34]. However, the animals must come from a legal source, and may not be taken, or come from the wild. Licensed keepers of animals must maintain prescribed records of any non-exempt animals, protected native animals, or special protection status animals [s.112] and produce them as required [s.113].

Licence conditions can require private keepers to inform the licensing officer prior to importing or exporting any animal into or out of the ACT, and prior to selling, trading, or disposing of any animals in the ACT (including by donation).

Penalties can apply for non-compliance with a licence.

What is a land management agreement?

The Conservator has the power under the Nature Conservation Act to enter into a land management agreement with an agency such as a gas, water or electricity utility [s.99]. These may deal with any or all of the following issues:

- access to land;
- fire management;
- drainage;
- management and maintenance of public or private facilities;
- rehabilitation of land or public or private facilities;
- indemnities;
- emergency procedures;
- internal stockpiling;
- fencing; or
- feral animals and weed control.

In addition, under the *Planning and Development Act 2007* (ACT), a rural lease will only be granted, renewed, varied or assigned if the person whose lease is renewed or varied, or the person to whom the lease is being assigned or granted, has entered into a management agreement with the ACT government, through the Conservator [s.283].

What is a conservation direction?

The Conservator can give the occupier of land directions for the protection or conservation of native animals, plants and timber on the land [Part 7]. Directions must specify a time limit on compliance, and they must accord with any criteria established [s.62]. The Conservator can also direct the owner of a diseased native animal or plant to treat the animal or plant.

Where the owner does not comply with the notice, or does, but the animal or plant does not respond satisfactorily, the Conservator can require the animal or plant to be delivered up or destroyed. If the owner does not comply, a conservation officer may enter the land or premises where the animal is kept and seize it and then carry out treatment or dispose of or destroy the animal as he or she thinks fit.

Criteria for issuing directions are set out in the *Nature Conservation Criteria Determination* DI2001–59.

Penalties apply for failure to comply with a direction, without reasonable excuse. Issues, however, have generally been managed through management agreements or by negotiation.

What if a proposed development affects a protected species?

If a proposal is likely to:

- adversely impact on the conservation status of a specially protected, protected, endangered or vulnerable species or an endangered ecological community;
- contribute to a threatening process in relation to a species or an ecological community; or
- adversely impact on the conservation status of certain species under the *Threatened Species Conservation Act 1995* (NSW);

it generally must be considered in the impact track assessment under the *ACT Planning and Development Act 2007*.

This assessment track requires the highest level of assessment and requires an environmental impact statement to be prepared [s.123(b) and Schedule 4 of the Planning Act].

These proposals must be referred to the Conservator of Flora and Fauna for advice [s.148 Planning Act and Regulation 26]. Only in certain circumstances can the ACT Planning and Land Authority (or the Minister) approve a development proposal if the approval would be inconsistent with the Conservator's advice [s.128(2) Planning Act].

Can decisions be reviewed by the ACT Civil and Administrative Tribunal?

The ACT Civil and Administrative Tribunal (ACAT) can review specified decisions made by the Conservator. Part 12 of Schedule 1 of the Nature Conservation Act sets out which decisions are reviewable. Reviewable decisions include those concerning directions, licences, refusals, prohibitions, restrictions and conditional approvals [Part 12, Schedule 1].

EDO (ACT)

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