



# Protecting Native Animals, Plants, Threatened Species & Ecological Communities

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Sydney: 02 9262 6989  
Rest of NSW: 1800 626 239

## Overview

Native animals (fauna - including mammals, birds, reptiles and amphibians) and many species of native plants (flora) are protected in NSW. Further protections exist for flora and fauna that are listed as threatened species.<sup>2</sup>

For information on how threatened species are protected nationally, see our [Fact Sheet on Commonwealth Threatened Species Law](#).

Habitat loss through land clearing is one of the key threatening processes leading to loss of biodiversity in NSW. For more information on clearing, see our [Fact Sheets on Clearing Vegetation](#).

If you are interested in how you can protect native animals and plants on your own land, see our [Fact Sheet on Conservation on Private Land](#).

## Contents

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<sup>1</sup> [http://www.edonsw.org.au/legal\\_advice](http://www.edonsw.org.au/legal_advice)

<sup>2</sup> Threatened species are listed under the *Biodiversity Conservation Act 2016* (NSW) and *Fisheries Management Act 1994* (NSW).

- **Protection of Native Plants, Animals and Threatened Species**
  - Who is responsible for protecting native animals, plants and threatened species?
  - Protected native animals
  - Protected native plants
  - Threatened species and ecological communities
  - Key threatening processes
  - Areas of Outstanding Biodiversity Value
  - Offences and defences
  - Biodiversity Conservation Licences
  - Management plans
  - Biodiversity Conservation Program
  - Threatened species and development
  - Biodiversity Offsets Scheme
  - Biodiversity certification of land
- **Compliance and Enforcement**
- **Threatened Fish and Marine Vegetation**
- **Glossary**

## **PROTECTION OF NATIVE PLANTS, ANIMALS AND THREATENED SPECIES**

All native mammals, birds, reptiles and amphibians and many species of native plants are protected in NSW, even if they are not threatened species.<sup>3</sup>

There are both national and State laws protecting threatened species. This fact sheet will focus on the NSW laws.

- The [Biodiversity Conservation Act 2016 \(NSW\)](#) (the BC Act) sets out protections for native plants and animals, the process for listing threatened species (including the lists themselves), contains criminal offences, allows for licensing of certain activities and provides for the Biodiversity Offsets Scheme to apply to certain developments.
- The [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (EP&A Act) imposes obligations on developers and consent authorities to assess and consider the impacts of proposed development on threatened species during the development assessment process, including under the Biodiversity Offset Scheme.

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<sup>3</sup> Under the *Biodiversity Conservation Act 2016 (NSW)*, Sch 5 and Sch 6 and *Biodiversity Conservation Regulation 2017 (NSW)*.

- There is a separate legal framework for threatened fish (both saltwater and freshwater) and their habitat and threatened marine vegetation, under the [Fisheries Management Act 1994 \(NSW\)](#).

## Who is responsible for protecting native animals, plants and threatened species?

The [NSW Environment Minister](#) and the NSW Office of Environment and Heritage (OEH) are responsible for protecting [native animals and plants](#), as well as threatened species and ecological communities in NSW. The OEH is part of the Department of Planning and Environment.

Suspected breaches of the laws protecting native plants, animals and threatened species can be reported to the OEH by calling 131 555 or by emailing [info@environment.nsw.gov.au](mailto:info@environment.nsw.gov.au). The OEH should provide an incident report number and follow the matter up.

### Commonwealth threatened species laws

A threatened species or ecological community may be protected under both NSW law and Commonwealth law at the same time if the species is considered to be threatened at both levels. For example, the koala is [listed](#) as a vulnerable species under the BC Act and is also listed as a vulnerable species under the *Environment Protection and Biodiversity Conservation Act* (Cth).

To find out the conservation status of a particular species, it is important to check both the [Commonwealth threatened species database](#)<sup>4</sup> and the [NSW threatened species database](#).<sup>5</sup>

The Australian Minister for the Environment and the [Australian Department of the Environment and Energy](#) are responsible for Federally listed threatened species.

Suspected breaches of the national threatened species law, can be [reported](#) to the Australian Environment Department by calling the Compliance and Enforcement Branch on 1800 110 395 or by emailing [compliance@environment.gov.au](mailto:compliance@environment.gov.au).

See our [Fact Sheet on Commonwealth threatened species law](#) for more information.

## Protected native animals

Information about native animals is contained in the OEH native animal [Fact Sheets](#).

<sup>4</sup> <http://www.environment.gov.au/topics/threatened-species-ecological-communities>

<sup>5</sup> <http://www.environment.nsw.gov.au/threatenedspeciesapp/>

## Which animal species are protected?

### **Protected animals**

There is no list of specific native animals that are protected because all native animals, including mammals, birds, reptiles and amphibians (as well as their young and eggs) are protected in NSW.<sup>6</sup> This includes animals that periodically migrate to Australia. They are all referred to as 'protected animals' under the BC Act.

Additional protections apply to threatened species.

### **Marine mammals**

Marine mammals include whales, dolphins, seals and dugongs.<sup>7</sup> Depending on where they are found, marine mammals may be protected by either NSW or Commonwealth law. For information on how marine mammals are protected in Commonwealth waters, see our [Fact Sheet on Commonwealth threatened species law](#).

Marine mammals receive the same general protection as other native animals plus some additional protection, namely restrictions on approaching or interfering with marine mammals.<sup>8</sup>

### **Non-native animals**

Non-native animals are not protected under the BC Act, but they may still be protected by other legislation.<sup>9</sup>

## How are native animals protected?

There are a range of offences set out in the BC Act that aim to protect native animals.

## Protected native plants

### Which plant species are protected?

Unlike native animals, not all native plants are protected. The BC Act includes a [list of over 100 native plant species](#) that are protected in NSW.<sup>10</sup> These include the Sturt's Desert Pea, Christmas Bell, Maidenhair Fern and the Waratah.

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<sup>6</sup> *Biodiversity Conservation Act 2016* (NSW), Schedule 5.

<sup>7</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.7.

<sup>8</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.7; *Biodiversity Conservation Regulation 2017* (NSW), Part 2, Div 2.1.

<sup>9</sup> This includes the *Prevention of Cruelty to Animals Act 1979* (NSW), *Companion Animals Act 1998* (NSW), *Exhibited Animals Protection Act 1986* (NSW), and the *Game and Feral Animal Control Act 2002* (NSW).

## How are native plants protected?

There are a range of offences set out in the BC Act that aim to protect native plants.

### Forestry

See our [Fact Sheet on Forestry](#) for more information about how forestry is regulated in NSW.

## Threatened species and ecological communities

Native plants, animals and ecological communities that are at risk of extinction receive additional legal protection. This additional protection is only afforded to species and ecological communities that are listed as threatened under the BC Act.

### Eligibility for listing

In NSW the following may be listed as threatened:<sup>11</sup>

- Individual species;
- Ecological communities; and
- Populations of species in limited circumstances.

There are various list categories, depending on the status of the species or ecological community. [The listings](#) are collectively known as ‘threatened species and ecological communities’, and are often simply referred to as ‘threatened species’.

To be eligible for listing, the [NSW Scientific Committee](#) must be of the opinion that the plant or animal species is native to NSW.<sup>12</sup>

### ***Listing of species and ecological communities***

A species or ecological community may be listed in one of the following categories if it meets the eligibility requirements to the satisfaction of the Scientific Committee:

- *Vulnerable*: facing a high risk of extinction in Australia in the medium-term future.<sup>13</sup>

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<sup>10</sup> *Biodiversity Conservation Act 2016* (NSW), Schedule 6.

<sup>11</sup> *Biodiversity Conservation Act 2016* (NSW), Part 4, Div 2; *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.1(5).

<sup>12</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.3.

<sup>13</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.4(3), 4.5(3); *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.1(3).

- *Endangered*: facing a very high risk of extinction in Australia in the near future.<sup>14</sup>
- *Critically endangered*: facing an extremely high risk of extinction in Australia in the immediate future.<sup>15</sup>
- *Extinct species*: no reasonable doubt that the last member of the species in Australia has died.<sup>16</sup>
- *Extinct species in the wild*: known only to survive in Australia in cultivation or captivity, or it has not been recorded in its known or expected habitat in Australia over an appropriate time frame.<sup>17</sup>
- *Collapsed ecological community*: all occurrences of the ecological community have moved outside the natural range of spatial and temporal variability in terms of its composition, structure or function.<sup>18</sup>

If a species or ecological community is not eligible to be listed in any category on the basis of the risk of extinction in Australia, then it is eligible to be listed on the basis of the risk of extinction in NSW.<sup>19</sup>

There are specific criteria for listing threatened species<sup>20</sup> and ecological communities.<sup>21</sup> For example, evidence of a reduction in geographic distribution or population size, environmental degradation of the ecological community, low numbers of mature individuals of a species and quantitative analysis of extinction probability or probability of collapse of the ecological community.

Current listed species of threatened animals and plants are set out in [Schedule 1](#) to the BC Act. Current listed threatened ecological communities are set out in [Schedule 2](#). A list of extinct species, species extinct in the wild and collapsed ecological communities is in [Schedule 3](#).

### ***Listing of a population***

A population of a species is only eligible to be listed if:<sup>22</sup>

- the species to which the population belongs is not separately listed as a threatened species; and

<sup>14</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.4(1), 4.5(1); *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.1(2).

<sup>15</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.4(2), 4.5(2); *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.1(1).

<sup>16</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.6(1).

<sup>17</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.6(2).

<sup>18</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.6(4).

<sup>19</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.4(4), 4.5(4).

<sup>20</sup> *Biodiversity Conservation Regulation 2017* (NSW), Part 4, Div 4.1.

<sup>21</sup> *Biodiversity Conservation Regulation 2017* (NSW), Part 4, Div 4.2.

<sup>22</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.4(5); *Biodiversity Conservation Act 2016* (NSW), s. 4.4(5).

- 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 a number of other species.

A number of endangered populations are listed in [Schedule 1](#) of the BC Act, including the:

- Gang-gang Cockatoo population in the Hornsby and Ku-ring-gai areas;
- Little Penguin in the Manly Point Area; and
- Koalas at Hawks Nest and Tea Gardens.

## Procedure for listing threatened species and ecological communities

### ***Who may initiate a listing?***

Any person can nominate a species or ecological community for listing under the BC Act.<sup>23</sup> The [Threatened Species Scientific Committee](#) (Scientific Committee) or the Environment Minister may also initiate a listing.<sup>24</sup>

Those wishing to [nominate a species or ecological community](#) need detailed evidence to support their nomination which must be made in writing to the Scientific Committee.<sup>25</sup>

Some conservation groups are experienced in preparing nominations for threatened species, including:

- [Humane Society International](#): (02) 9973 1728 or toll free 1800 333 737, Email: [admin@hsi.org.au](mailto:admin@hsi.org.au)
- [Nature Conservation Council of NSW](#): (02) 9516 1488, Email: [ncc@nature.org.au](mailto:ncc@nature.org.au)

### ***NSW Threatened Species Scientific Committee***

The [Threatened Species Scientific Committee](#) is an independent committee of 11 scientists appointed by the Environment Minister and is responsible for determining whether a particular species or ecological community should be listed.<sup>26</sup>

After a nomination for listing is made, the Scientific Committee must:<sup>27</sup>

- Make a preliminary determination as to whether or not the proposal should be supported;
- Notify the Environment Minister of the proposal;

<sup>23</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.10(2)(b).

<sup>24</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.10.

<sup>25</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.12(1).

<sup>26</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.9 & Part 4, Div 7.

<sup>27</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.13 – 4.16.

- Publish notice of, and invite submissions on, its preliminary determination for a period of at least 4 weeks;<sup>28</sup> and
- Consider submissions received, as well as the assessment criteria and procedures under the [common assessment method](#) agreed between the Commonwealth, States and Territories.

The Scientific Committee's final determination must either accept or reject a proposal for listing a species or ecological community and must give reasons for its determination.<sup>29</sup> The final determination of the Scientific Committee may differ from its preliminary determination.

The Scientific Committee must make a final determination within 6 months of calling for submissions on its preliminary determination. However, failure to make a final determination within this period does not mean the determination is invalid.<sup>30</sup>

Final determinations are made once they are published on the [NSW legislation website](#). Once a final determination is made, the Scientific Committee must, as soon as practicable, notify the person who made the nomination (if applicable) and notify the OEH. . The validity of a final determination can be challenged by any person in the Land and Environment Court within 6 months after its publication.<sup>31</sup>

### Emergency listings

In some circumstances, the Scientific Committee can provisionally list a species as critically endangered or endangered on an emergency basis, without going through the public consultation process.<sup>32</sup>

Anyone can nominate a species to be [listed provisionally on an emergency basis](#).<sup>33</sup> A species may be provisionally listed as endangered or critically endangered if the species:<sup>34</sup>

- although not previously known to have existed in NSW, is believed on current knowledge to be native to NSW; or
- is subject to an immediate and significant threat of extinction; or
- was presumed extinct or extinct in the wild but has been rediscovered.

Determinations for provisional listings are published on the [NSW legislation website](#).<sup>35</sup>

<sup>28</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.13(3); *Biodiversity Conservation Regulation 2017* (NSW), cl. 4.22.

<sup>29</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.15.

<sup>30</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.15.

<sup>31</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.16(3).

<sup>32</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.22.

<sup>33</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 4.24 & 4.25.

<sup>34</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.23.



## How are threatened species and ecological communities protected?

Once a species or ecological community has been listed, it may trigger the following actions:

- There are additional offences relating to threatened species and higher penalties for those offences (see below);
- The Chief Executive of the OEH must prepare a strategy under the [Biodiversity Conservation Program](#) (see below) for the species or ecological community within 2 years of it being listed;<sup>36</sup>
- The Environment Minister may declare the habitat of the threatened species or ecological community as an [area of outstanding biodiversity value](#) (see below);<sup>37</sup> and
- Developments which are likely to significantly affect threatened species, ecological communities, or their habitat will need to be assessed under the BC Act and may trigger the Biodiversity Offsets Scheme (see below).<sup>38</sup>

## Key threatening processes

In addition to listing threatened species and ecological communities, [key threatening processes](#) may be listed if, in the opinion of the Scientific Committee, the process:

- Adversely affects threatened species or ecological communities; or
- Could cause species or ecological communities that are not threatened to become threatened.<sup>39</sup>

The listing process for key threatening processes is the same as listing threatened species.<sup>40</sup>

- Any person can [nominate a key threatening process](#) for listing.
- After a nomination is made, the Scientific Committee must:
  - make a preliminary determination as to whether or not the listing should be supported;
  - notify the Environment Minister of the proposed listing;
  - publish notice of, and invite submissions on, its preliminary determination for a period of at least 4 weeks; and
  - consider submissions received, as well as the assessment criteria and procedures under the [common assessment method](#) agreed between the Commonwealth, States and Territories.

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<sup>35</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.27.

<sup>36</sup> *Biodiversity Conservation Act 2016* (NSW), Part 4, Div 6 & s. 4.36(3).

<sup>37</sup> *Biodiversity Conservation Act 2016* (NSW), Part 3.

<sup>38</sup> *Biodiversity Conservation Act 2016* (NSW), Part 7, Div 2.

<sup>39</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.32.

<sup>40</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.33.

- The Scientific Committee’s final determination must either accept or reject the proposed listing and give reasons for the determination. The final determination may differ from the preliminary determination.
- Final determinations are to be published on the [NSW legislation website](#).

The validity of a final determination can be challenged by any person in the Land and Environment Court within 6 months after its publication.

Where a nominated key threatening process is likely to have an impact on both terrestrial and aquatic environments, it is possible it can also be listed as a key threatening process under the *Fisheries Management Act 1994*.<sup>41</sup>

There are over 30 key threatening process listed under [Schedule 4](#) to the BC Act, including:

- Pests and weeds;
- Habitat alteration due to subsidence caused by longwall mining;
- Clearing native vegetation;
- Climate change; and
- Loss of hollow-bearing trees.

## Areas of outstanding biodiversity value

[Areas of outstanding biodiversity value](#) (AOBV) are special areas that contain irreplaceable biodiversity values that are important to the whole of NSW, Australia or globally. These areas will be a priority for investment in private land conservation. See our [Fact Sheet on Conservation on Private Land](#) for more information.

Declared critical habitats under the now-repealed *Threatened Species Conservation Act 1995* (NSW) (TSC Act) are now known as AOBV.<sup>42</sup>

The Environment Minister may declare any area in NSW to be an AOBV if he or she is of the opinion that:

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<sup>41</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.33; *Fisheries Management Act 1994* (NSW), Part 7A.

<sup>42</sup> *Biodiversity Conservation (Savings and Transitional) Regulation 2017* (NSW), cl. 8.

- The area is important at a State, national or global scale, and
- The area makes a significant contribution to the persistence of:<sup>43</sup>
  - multiple species, or at least one threatened species or ecological community;
  - irreplaceable biological distinctiveness;
  - ecological processes or ecological integrity; or
  - outstanding ecological value for education or scientific research.

The proposed declaration of the AOBV is open for public comment for at least 4 weeks and anyone can make a submission during that time.<sup>44</sup>

After an area is declared as an AOBV, the Environment Minister must take steps to enter into a private land conservation agreement with any landholders whose land is within the area.<sup>45</sup>

A declaration of an AOBV can be amended or revoked by the Environment Minister by a notice published on the NSW legislation website.<sup>46</sup> There are currently two [declared AOBVs](#) in NSW.<sup>47</sup>

- Little Penguin declared area – the area of land declared to be the critical habitat of the endangered population of Little Penguins at North Harbour; and
- Wollemi Pine declared area - the area of land declared to be the critical habitat of the endangered species *Wollemia nobilis* (Wollemi Pine).

## Offences and defences

### Offences relating to native animals and threatened species

#### **Offence – harming protected animals**

It is an offence to harm or attempt to harm a protected animal.<sup>48</sup> ‘Harm’ includes killing, injuring or capturing the animal, but does not include harm caused by changing the habitat of the animal.<sup>49</sup> The maximum penalty is \$22,000 for an individual or \$110,000 for a corporation.<sup>50</sup> An additional penalty applies for each animal.

<sup>43</sup> *Biodiversity Conservation Act 2016* (NSW), Part 3, s. 3.2(1).

<sup>44</sup> *Biodiversity Conservation Act 2016* (NSW), Part 9, Div 1, s. 3.3(1)(d).

<sup>45</sup> *Biodiversity Conservation Act 2016* (NSW), Part 3, s. 3.4(1)(b).

<sup>46</sup> *Biodiversity Conservation Act 2016* (NSW), s. 3.5(1).

<sup>47</sup> These were areas of declared critical habitat under the now-repealed *Threatened Species Conservation Act 1995*. See *Biodiversity Conservation Regulation 2017* (NSW), Part 3, Div 3.2 & Div 3.3.

<sup>48</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.1(c). All native animals are protected, including those that migrate to Australia.

<sup>49</sup> *Biodiversity Conservation Act 2016* (NSW), s. 1.6.

<sup>50</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.1(1)(c) & 13.1(5).

It is not an offence to harm a snake if the snake is endangering a person or property.<sup>51</sup> Certain bird species are also excluded from this offence.<sup>52</sup>

In the case of an animal that is a threatened species (other than a vulnerable species), the maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation, or imprisonment for 2 years, or both.<sup>53</sup>

In the case of an animal that is a vulnerable species, the maximum penalty is \$88,000 for an individual or \$440,000 for a corporation.<sup>54</sup>

### **Offence – dealing in animals**

It is an offence to deal or attempt to deal in a protected animal.<sup>55</sup> The offence applies whether the animal is dead or alive, and to any part of an animal.<sup>56</sup> A person ‘deals in’ animals if the person:

- Buys, sells, or trades the animals<sup>57</sup>, or
- Imports or exports the animals to/from NSW, or
- Possesses the animals.<sup>58</sup>

The maximum penalty is \$22,000 for an individual or \$110,000 for a corporation.<sup>59</sup> An additional penalty applies for each animal.

It is defence in certain circumstances if the dealing is in any meat or a product derived from a protected animal that was lawfully killed for the purposes of sale.<sup>60</sup>

Several bird species are excluded from the offence, including the Sulphur-crested cockatoo, galah and cockatiel.<sup>61</sup>

In the case of an animal that is a threatened species (other than a vulnerable species), the maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation, or imprisonment for 2 years, or both.<sup>62</sup>

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<sup>51</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.12.

<sup>52</sup> See *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.21.

<sup>53</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.1(1)(a) & 13.1(2).

<sup>54</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.1(1)(b) & 13.1(4).

<sup>55</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.5(1).

<sup>56</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.5(3).

<sup>57</sup> ‘Buy’, ‘sell’, ‘trade’, ‘import’ or ‘export’ includes: advertise or hold out as being prepared to buy, sell, trade, import or export animals, and deliver or receive animals for the purpose of their purchase, sale, trade, import or export.

<sup>58</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.5(2).

<sup>59</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(c) & 13.1(5).

<sup>60</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.20.

<sup>61</sup> The list of 41 excluded species is set out in *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.22.

<sup>62</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(a) & 13.1(2).

In the case of an animal that is a vulnerable species, the maximum penalty is \$88,000 for an individual or \$440,000 for a corporation.<sup>63</sup>

It is a defence to possessing a protected or threatened animal if the person shows that the animal was not capable of fending for itself, and gave written notice to the OEH of their possession of it within 3 days to the OEH.<sup>64</sup>

For more information on rehabilitating native animals, see the [OEH website](#).

### **Rescuing injured native animals**

If you are rescuing a native animal and require assistance, contact WIRES on 1300 094 737.

Useful information may also be found on the [WIRES website](#)

### **Offence – liberating animals**

It is an offence to liberate a captured protected animal in a place other than the place of its capture, or otherwise to liberate any other animal in NSW without a biodiversity conservation licence.<sup>65</sup>

The maximum penalty is \$88,000 for an individual or \$440,000 for a corporation.<sup>66</sup>

It is not an offence to liberate a homing pigeon.<sup>67</sup>

### **Defences**

Someone charged with an offence relating to protected or threatened animals may have a defence if the offending activity was in some way authorised.<sup>68</sup> For example, a person will not be liable for an offence listed above if they can show that:

- They had a biodiversity conservation licence (explained below);<sup>69</sup>
- They had planning approval – the act was necessary for the carrying out of development in accordance with a development consent;<sup>70</sup>
- The act was an emergency fire-fighting act or bush fire hazard reduction work;<sup>71</sup>

<sup>63</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(b) & 13.1(4).

<sup>64</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.15.

<sup>65</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.6.

<sup>66</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.6 & 13.1(4).

<sup>67</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.11.

<sup>68</sup> *Biodiversity Conservation Act 2016* (NSW), Part 2, Div 2.

<sup>69</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.10.

<sup>70</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(a).

<sup>71</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(d); *Rural Fires Act 1997* (NSW).

- The act was done by an Aboriginal person for his or her own domestic purposes;<sup>72</sup> or
- The act was authorised by a code of practice published by the Environment Minister.<sup>73</sup>

## Offences relating to marine mammals

### **Offence – interfering with marine mammals**

It is an offence to interfere with a marine mammal. 'Interfere' includes harass, chase, herd, tag, mark and brand.<sup>74</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>75</sup>

### **Offence – approaching marine mammals**

It is also an offence to approach a marine mammal any closer than the following distances.<sup>76</sup> If approaching a whale, dolphin or dugong:

- Using a motorised water craft (including jet skis) - 300 metres
- Using a non-motorised vessel (e.g. yachts)
  - 100 metres - if approaching a whale
  - 50 metres - if approaching a dolphin or dugong
- Swimmers - 30 metres
- Using an unmanned aircraft (e.g. drone) - 100 metres above
- Using a fixed wing aircraft - 300 metres above
- Using a helicopter or gyrocopter - 500 metres above

If approaching seals and sea lions, the prescribed distances are:

- Person in vessel, seal in the water - 10 metres
- Person swimming or pedestrian, seal in the water - 10 metres
- A seal hauled out on land - 40 metres
- A seal pup or sea lion pup - 80 metres

The distances are further if a whale, dolphin or dugong is predominantly white in colour<sup>77</sup> and the Chief Executive of the OEH can order a special protection approach distance applies in certain circumstances.<sup>78</sup>

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<sup>72</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(k). This defence does not apply if the animal was a parrot, raptor or a threatened species or part of a threatened ecological community: *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.24.

<sup>73</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.9; *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.9.

<sup>74</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.2.

<sup>75</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.2; *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

<sup>76</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.3(2).

<sup>77</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.3(3).

The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>79</sup> There are certain circumstances where the offence does not apply such as if the person is approaching to prevent risk to human health or deal with a serious threat to human life or property.<sup>80</sup>

### ***Offence – operating prohibited vessels approached by marine mammals***

It is an offence not to move away when being approached by a whale, dolphin or dugong when using a motorised water craft.<sup>81</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>82</sup>

### ***Offence – operating vessels***

Vessels within the ‘caution zone’ (for a dolphin or dugong: 150 metres, whale: 300 metres) must move away at a constant speed and in a manner that consistently minimises noise. They must also post a look-out for whales, dolphins and dugongs and must not get in their path.<sup>83</sup> There must be no more than 2 vessels within a caution zone to prevent crowding.<sup>84</sup> There are additional restrictions if a calf approaches a vessel.<sup>85</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>86</sup>

### ***Offence – swimming with whales, dolphins or dugongs***

Swimmers must not enter the water if there is a whale within 100 metres or a dolphin or dugong within 50 metres. If a whale, dolphin or dugong comes within 30 metres of a person in the water, the person must move slowly to avoid startling the animals and must not touch or move towards them.<sup>87</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>88</sup>

### ***Offence – operating an aircraft***

<sup>78</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.3(4).

<sup>79</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.3(1); *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

<sup>80</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.3(6).

<sup>81</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.4.

<sup>82</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.4; *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

<sup>83</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.5(2).

<sup>84</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.5(5).

<sup>85</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.5(4).

<sup>86</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.5; *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

<sup>87</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.8.

<sup>88</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.8; *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

It is an offence to hover above, or approach head-on, a marine mammal in an aircraft, or to land an aircraft on water to observe a marine mammal.<sup>89</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>90</sup>

### ***Offence – feeding marine mammals***

It is an offence to intentionally feed or attempt to feed a marine mammal in its natural environment. 'Feed' includes throwing food or rubbish in the water near a marine mammal.<sup>91</sup> The maximum penalty is \$132,000 for an individual or \$660,000 for a corporation.<sup>92</sup>

### ***Offence – threatened marine mammals***

If the species of marine mammal is also listed as threatened, additional protections will apply. In NSW, the following marine mammals are listed threatened species:

- Endangered: Dugong, Southern Right Whale, Blue Whale.<sup>93</sup>
- Vulnerable: New Zealand Fur-seal, Australian Fur-seal, Sperm Whale, Humpback Whale.<sup>94</sup>

### **Defences**

It is a defence to one of the above offences if:

- The act was an emergency response under the authority of an authorised officer under the BC Act, the *Fisheries Management Act 1994* or the *Marine Estate Management Act 2014*,<sup>95</sup> or
- The person had a biodiversity conservation licence.<sup>96</sup> However, a licence cannot be issued to authorise a person to harm or obtain a marine mammal for exhibition or other purposes, unless the person issuing the licence is satisfied that it is necessary for genuine scientific, educational or conservation purposes.<sup>97</sup>

<sup>89</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.6.

<sup>90</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.6; *Biodiversity Conservation Act 2016* (NSW), s. 13.1(3).

<sup>91</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.7.

<sup>92</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.7; *Biodiversity Conservation Act 2016* (NSW), 13.1(3).

<sup>93</sup> *Biodiversity Conservation Act 2016* (NSW), Sch. 1, Part 2.

<sup>94</sup> *Biodiversity Conservation Act 2016* (NSW), Sch. 1, Part 3.

<sup>95</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.10. This may include intervention to provide 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.

<sup>96</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.10.

<sup>97</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.7(5).



## Offences relating to native plants and threatened species/ecological communities

### **Offence – picking plants**

It is an offence to pick or possess<sup>98</sup> a protected plant.<sup>99</sup> ‘Pick’ includes gather, take, cut, remove from the ground, destroy, poison, crush or injure the plant or any part of the plant.<sup>100</sup>

The maximum penalty is \$22,000 for an individual or \$110,000 for a corporation.<sup>101</sup> An additional penalty applies for each plant.

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 ecological community), the maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation or imprisonment for 2 years, or both.<sup>102</sup>

In the case of a plant that is (or is part of) a vulnerable species or vulnerable ecological community, the maximum penalty is \$88,000 for an individual or \$440,000 for a corporation.<sup>103</sup>

### **Offence – dealing in plants**

It is an offence to deal or attempt to deal in a protected plant, including a dead plant or a part of a plant.<sup>104</sup> A person ‘deals in’ plants if the person:<sup>105</sup>

- Buys, sells, or trades the plants;<sup>106</sup> or
- Imports or exports the plants to/from NSW; or
- Possesses the plants.

The maximum penalty is \$22,000 for an individual or \$110,000 for a corporation.<sup>107</sup> An additional penalty applies for each plant.

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 ecological community),

<sup>98</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.2(2).

<sup>99</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.2.

<sup>100</sup> *Biodiversity Conservation Act 2016* (NSW), s. 1.6.

<sup>101</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.2(1)(c) & 13.1(5).

<sup>102</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.2(1)(a) & 13.1(2).

<sup>103</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.2(1)(b) & 13.1(4).

<sup>104</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1) & (3).

<sup>105</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.5(2).

<sup>106</sup> ‘Buy’, ‘sell’, ‘trade’, ‘import’ or ‘export’ includes: advertise or hold out as being prepared to buy, sell, trade, import or export plants, and deliver or receive plants for the purpose of their purchase, sale, trade, import or export.

<sup>107</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(c) & 13.1(5).

the maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation, or imprisonment for 2 years, or both.<sup>108</sup>

In the case of a plant that is (or is part of) a vulnerable species or vulnerable ecological community, the maximum penalty is \$88,000 for an individual or \$440,000 for a corporation.<sup>109</sup>

### ***Offence – damaging habitat of threatened species or ecological community***

It is an offence to knowingly damage any habitat of a threatened species or threatened ecological community.<sup>110</sup> ‘Damage’ habitat includes damage caused by:

- Removing or relocating any part of the habitat; and
- Activities that prevent the continued use of the habitat by animals.<sup>111</sup>

The maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation, or imprisonment for 2 years, or both.<sup>112</sup>

### ***Offence – damaging an area of outstanding biodiversity value***

It is an offence to damage a declared AOBV.<sup>113</sup> The maximum penalty is \$333,000 for an individual or \$1,650,000 for a corporation, or imprisonment for 2 years, or both.<sup>114</sup> There are also several specific offences and restrictions relating to each of the declared areas.<sup>115</sup>

## **Defences**

Someone charged with an offence relating to protected or threatened plants or ecological communities may have a defence if the offending activity was in some way authorised.<sup>116</sup> For example, a person will not be liable for an offence listed above if they can show that:

- The act was clearing of native vegetation in a rural area and was authorised under the NSW land clearing laws (e.g as an allowable activity, under a code, or under an approval to clear native vegetation);<sup>117</sup>
- The act was clearing of native vegetation on exempt land, unless the person knew the clearing would harm a protected animal or its habitat;<sup>118</sup>

<sup>108</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(a) & 13.1(2).

<sup>109</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.5(1)(b) & 13.1(4).

<sup>110</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.4(1).

<sup>111</sup> *Biodiversity Conservation Act 2016* (NSW), s. 1.6.

<sup>112</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.4(1) & 13.1(2).

<sup>113</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 1.6 & 2.3.

<sup>114</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 2.3 & 13.1(2).

<sup>115</sup> See *Biodiversity Conservation Regulation 2017* (NSW), Part 3, Div 3.2 & Div 3.3.

<sup>116</sup> *Biodiversity Conservation Act 2016* (NSW), Part 2, Div 2.

<sup>117</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(b); *Local Land Services Act 2013* (NSW), Part 5A.

- They had a biodiversity conservation licence to take the plant (see below);<sup>119</sup>
- They had planning approval and complied with any conditions;<sup>120</sup>
- The act was an emergency fire-fighting act or bush fire hazard reduction work;<sup>121</sup>
- The picking of the plant was authorised by a private conservation agreement;<sup>122</sup>
- They are an authorised commercial plant grower;<sup>123</sup> or
- The act was a forestry operation in a State Forest and an integrated forestry operations approval applies, or the act was part of a private native forestry operation.<sup>124</sup>

## Biodiversity Conservation Licences

The Chief Executive of the OEH may grant a biodiversity conservation licence to authorise activities that would otherwise be an offence, such as to harm or keep protected fauna or pick threatened flora.<sup>125</sup>

There are a range of [scientific activities](#) including research, education or conservation for which one or more licenses may be needed. A number of [activities relating to wildlife](#) such as keeping a native animal as a pet, carving of emu eggs and taxidermy also require a biodiversity conservation licence. For plants, [cut-flower licences](#) and [whole-plant licences](#) are available.

There is a [public register of biodiversity conservation licences](#) that have been issued to cover a range of activities involving wildlife. There is also a public register of licences to [harm protected animals](#), [threatened species](#), and [harvest kangaroos](#). There is no public register of licenses to pick or harm native plants.

### **Applying for a licence**

Applications for a biodiversity conservation licence can be made [online](#) for a \$30 fee.<sup>126</sup> A licence will only be granted if the Chief Executive is satisfied that the applicant is a fit and proper person to hold the licence.<sup>127</sup>

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<sup>118</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(b); *Local Land Services Act 2013* (NSW), Part 5A.

<sup>119</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.10.

<sup>120</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(a).

<sup>121</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(d); *Rural Fires Act 1997* (NSW).

<sup>122</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(i).

<sup>123</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(m).

<sup>124</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.8(1)(h).

<sup>125</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.11.

<sup>126</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.12; *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.28.

<sup>127</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.27.

The application is generally to be determined within 28 days.<sup>128</sup> A licence may be granted subject to conditions such as standards relating to the humane treatment of animals, the places where animals must be kept and record keeping.<sup>129</sup>

It is an offence to contravene a condition of a biodiversity conservation licence and there are significant monetary penalties, as well as possible imprisonment in certain circumstances.<sup>130</sup>

A biodiversity conservation licence may require compliance with a management plan in relation to an activity authorised by the licence.<sup>131</sup> For example, a biodiversity conservation licence granted to authorise the selling of protected animals or plants may require the animal or plant to be tagged in accordance with a management plan.

### ***Appeals against licensing decisions***

A person whose application for a licence is refused, is unhappy with a condition of the licence, or whose licence is suspended or cancelled can appeal to the Land and Environment Court.<sup>132</sup> The appeal must be commenced within 28 days of the date the applicant or licence holder is notified of the decision.<sup>133</sup>

### **Management plans**

The Chief Executive of the OEH can make or adopt a management plan for protected animals and plants (including threatened species and ecological communities) that may be negatively affected by a commercial activity.<sup>134</sup>

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<sup>128</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.29.

<sup>129</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.14(2).

<sup>130</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.14(4).

<sup>131</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.33.

<sup>132</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.16.

<sup>133</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.30.

<sup>134</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.19(2)(d); *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.31.

A management plan is open for public comment for at least 4 weeks and anyone can make a submission during that time.<sup>135</sup> A biodiversity conservation licence may require compliance with a management plan in relation to an activity authorised by the licence<sup>136</sup> such as the [management plan](#) for the sustainable management of cut flowers or whole plants.

## Biodiversity Conservation Program

The [NSW Biodiversity Conservation Program](#) is established by the Chief Executive of the OEH and outlines strategies for assisting threatened species and ecological communities. The program's objectives are:

- To maximise the long-term security of threatened species and threatened ecological communities in nature; and
- To minimise the impacts of key threatening processes on biodiversity and ecological integrity.<sup>137</sup>

The Biodiversity Conservation Program replaces the Priorities Action Statement under the now-repealed TSC Act.<sup>138</sup> Existing [threat abatement plans](#) and [recovery plans](#) have been carried over into the new program.

The Biodiversity Conservation Program consists of:

- Strategies to achieve the objectives of the Program in relation to each threatened species and threatened ecological community;
- A framework to guide the setting of priorities for implementing the strategies; and
- A process for monitoring and reporting on the overall outcomes and effectiveness of the Program.<sup>139</sup>

Through the Biodiversity Conservation Program, the [Saving our Species](#) program implements strategies through conservation projects. A strategy in relation to a threatened species or threatened ecological community must be included in the Program within 2 years after the species or ecological community is listed as threatened.<sup>140</sup>

Any new strategy proposed to be included in the Biodiversity Conservation Program is open for public comment for at least 4 weeks and anyone can make a

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<sup>135</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.32; *Biodiversity Conservation Act 2016* (NSW), Part 9, Div 1.

<sup>136</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 2.33.

<sup>137</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.35.

<sup>138</sup> Any strategy that was in place for a species or ecological communities under the previous Threatened Species Priorities Action Statement is now taken to be a strategy under the Biodiversity Conservation Program

<sup>139</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.36(1).

<sup>140</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.36(3).

submission during that time.<sup>141</sup> There is a [public register](#) of all the strategies included in the Program.<sup>142</sup> Strategies to minimise the impacts of key threatening processes may, but are not required to, be included in the Program.<sup>143</sup>

The Chief Executive of the OEH is required to review the outcomes and effectiveness of the Biodiversity Conservation Program every 5 years and prepare and publish a report of the review.<sup>144</sup>

## Threatened species and development

Threatened species laws do not protect threatened species absolutely. Rather, the laws set up administrative procedures to guide decision-making where threatened species are concerned. For example, the law requires developers and consent authorities to assess the likely impact of the development on threatened species. The critical question is whether the development is likely to significantly affect threatened species. Where a development or activity is likely to significantly affect threatened species, the Biodiversity Offsets Scheme applies.

## The Biodiversity Offsets Scheme

The Biodiversity Offsets Scheme is a system for offsetting the impacts associated with development or clearing through the purchase and retirement of 'biodiversity credits'. The credits are generated by people who have entered Stewardship Agreements to conserve and enhance the biodiversity values of their land.

See our [Fact Sheet on Conservation on Private Land](#) for more information on Stewardship Agreements.

The Chief Executive of the OEH maintains a [public register](#) of biodiversity credits that have been created under the Biodiversity Offset Scheme.<sup>145</sup>

The Biodiversity Offsets Scheme is underpinned by the [Biodiversity Assessment Method](#).<sup>146</sup> The Biodiversity Assessment Method is a [scientific tool](#)<sup>147</sup> that enables accredited assessors to identify the biodiversity values of a piece of land and assess the impacts of proposed clearing or development on those values. Any impacts that cannot be avoided or minimised must be offset. The details of the assessment are contained in a Biodiversity Development Assessment Report (BDAR).

<sup>141</sup> *Biodiversity Conservation Act 2016* (NSW), s. 9.1(1)(c).

<sup>142</sup> *Biodiversity Conservation Act 2016* (NSW), s. 9.7(1)(i).

<sup>143</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.36(2).

<sup>144</sup> *Biodiversity Conservation Act 2016* (NSW), s. 4.37.

<sup>145</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.17 and Part 9. See:

<http://www.environment.nsw.gov.au/bimsprapp/BiobankingPR.aspx>

<sup>146</sup> See: <http://www.environment.nsw.gov.au/biodiversity/assessmentmethod.htm>

<sup>147</sup> See: <https://www.lmbc.nsw.gov.au/bamcalc>

Assessors must be accredited by the OEH which maintains a list of [accredited assessors](#).

For more information about how the Biodiversity Offsets Scheme applies to vegetation clearing, see our [Facts Sheets on this topic](#).

### Does the Biodiversity Offsets Scheme apply?

Only developments that are likely to significantly affect threatened species will trigger the Biodiversity Offsets Scheme. A development or activity is 'likely to significantly affect threatened species' if:

1. [The 5-part test](#) is applied and shows that the development or activity is likely to significantly affect threatened species or ecological communities, or their habitats; or
2. The development exceeds the Biodiversity Offsets Scheme threshold;<sup>148</sup>  
or
3. The development is proposed to be carried out in a declared area of outstanding biodiversity value.<sup>149</sup>

#### ***The 5-part test***

The [5-part test](#) is designed to determine whether a proposed development or activity is likely to significantly affect threatened species, ecological communities or their habitats. It takes into account the following questions:

1. Whether the proposed development is likely to result in a viable local population of a **species** being placed at risk of extinction;
2. Whether the proposed development is likely to place an **endangered ecological community** at risk of extinction by reducing its extent or modifying its composition;
3. Whether the **habitat** of a threatened species or ecological community will be removed, modified, fragmented, or isolated and the importance of that habitat to the long term survival of the species or ecological community;
4. Whether the proposed development is likely to have an adverse effect on any declared **area of outstanding biodiversity value**; and
5. Whether the proposed development is or is part of a **key threatening process** or is likely to increase the impact of a key threatening process.

#### ***The Biodiversity Offsets Scheme threshold***

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<sup>148</sup> Note that this does not apply to development that is subject to assessment under Part 5 of the EP&A Act.

<sup>149</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.2.

The Biodiversity Offsets Scheme threshold (BOS threshold) is the point at which proposed clearing of native vegetation will trigger the Biodiversity Offsets Scheme.

There are two ways that clearing can exceed the BOS threshold:<sup>150</sup>

1. The area of clearing exceeds the limit for the lot size<sup>151</sup>

Minimum lot size of land	Area of clearing
Less than 1 hectare	0.25 hectares or more
Less than 40 hectares but not less than 1 hectare	0.5 hectares 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

For example, if a person owns 20 hectares of land and they wish to clear 0.25 hectares, their proposal will *not* exceed the BOS threshold. But if they wish to clear 1 hectare, their proposal will exceed the BOS threshold.

2. The clearing is proposed over land within the Biodiversity Values Map

The [Biodiversity Values Map](#)<sup>152</sup> identifies land with high biodiversity value such as coastal and Ramsar wetlands, littoral rainforest, koala habitat and land containing rainforest or old growth forest.

### **Areas of outstanding biodiversity value**

If development is proposed over an [AOBV](#) it will trigger the Biodiversity Offsets Scheme. It is an offence to harm an AOBV unless the harm is authorised through a planning approval, such as a development consent.<sup>153</sup>

AOBV's are recorded on a [public register](#).

### **Implications for developments trigger the Biodiversity Offsets Scheme**

<sup>150</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.4; *Biodiversity Conservation Regulation 2017* (NSW), cl. 7.1.

<sup>151</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 7.2.

<sup>152</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 7.3. See:

<https://www.lmbc.nsw.gov.au/Maps/index.html?viewer=BVMap>

<sup>153</sup> *Biodiversity Conservation Act 2016* (NSW), s. 2.3 and 2.8(1)



Once it is established that a development or activity has triggered the Biodiversity Offsets Scheme, the implications vary according to the type of development proposed.

### ***Local development***

For proposed local development (including designated development but *not* complying development), the development application must be accompanied by a biodiversity development assessment report (BDAR).<sup>154</sup>

When determining the development application, the consent authority must consider the likely impact of the proposed development on biodiversity values as assessed in the BDAR.<sup>155</sup>

If the consent authority decides to grant consent, it must attach conditions requiring the proponent to offset the impacts of the development on biodiversity by purchasing and retiring biodiversity credits of the number and class specified in the BDAR.<sup>156</sup> However, the consent authority can reduce or increase the number of biodiversity credits required to be retired if it determines that the reduction or increase is justified having regard to the environmental, social and economic impacts of the proposed development.<sup>157</sup>

The proponent must comply with the condition to retire biodiversity credits before undertaking the development but has the option to make use of variation rules outlined below.<sup>158</sup>

If the consent authority believes that the development will have serious and irreversible impacts<sup>159</sup> on biodiversity values, the consent authority must refuse the application.<sup>160</sup>

### ***Major Projects***

For proposed State Significant Development or State Significant Infrastructure, the proponent's development application must be accompanied by a BDAR, unless the Secretary of the Department of Planning and Environment and the Chief Executive of OEH both determine that the proposed development is not likely to have any significant impact on biodiversity values.<sup>161</sup> The application

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<sup>154</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.7.

<sup>155</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.13 (2).

<sup>156</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.13 (3).

<sup>157</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.13 (4).

<sup>158</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.13 (5).

<sup>159</sup> See the Glossary for a definition of serious and irreversible impacts on biodiversity values.

<sup>160</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.16.

<sup>161</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.9.

must also include any biodiversity assessment set as an environmental assessment requirement by the Secretary of Planning.<sup>162</sup>

When determining the application, the consent authority must consider the likely impact of the proposed development on biodiversity values as assessed in the BDAR (if provided).<sup>163</sup>

If the consent authority decides to grant consent or approval it can (but does not have to) attach a condition requiring the proponent to offset the impacts of the development on biodiversity by purchasing and retiring biodiversity credits (whether of the number and class specified in the BDAR or other number and class).<sup>164</sup>

Any condition to retire biodiversity credits is required to be complied with before any development is carried out that would impact on biodiversity values.<sup>165</sup>

If the consent authority believes that the development is likely to have ‘serious and irreversible impacts’ on biodiversity values,<sup>166</sup> it is required to take those impacts into consideration and determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is granted.<sup>167</sup> In other words, there is no obligation to refuse major projects that will have serious and irreversible impacts on biodiversity values.

### **Part 5 activities**

Certain developments and some activities do not require development consent so no development application is necessary. These are known as Part 5 activities,<sup>168</sup> and include developments or activities that are being carried out by public authorities. However, the environmental impacts of the development or activity still need to be assessed.

Applications for Part 5 activities that are likely to significantly affect threatened species must be accompanied by a species impact statement or a BDAR (the proponent can choose which one).<sup>169</sup>

If the Part 5 activity is likely to significantly affect the environment (outside its effect on threatened species) an environmental impact statement is also required.<sup>170</sup>

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<sup>162</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.9 (3).

<sup>163</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.14 (2).

<sup>164</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.14 (3).

<sup>165</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.14 (4).

<sup>166</sup> See the Glossary for a definition of serious and irreversible impacts on biodiversity values.

<sup>167</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.16 (3).

<sup>168</sup> Because they are assessed under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW).

<sup>169</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.8.

<sup>170</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.8.

When determining whether to approve or carry out the Part 5 activity, the determining authority must consider the likely impact of the proposed activity on biodiversity values as assessed in the BDAR.<sup>171</sup>

If the determining authority decides to approve or carry out the Part 5 activity, it *may* attach conditions requiring the proponent to offset the impacts of the activity on biodiversity by purchasing and retiring biodiversity credits of the number and class specified in any BDAR.<sup>172</sup>

If the determining authority determines the number of biodiversity credits required to be retired is less than that specified in the BDAR, the determining authority must give reasons for the decision.<sup>173</sup> The proponent must comply with the condition to retire biodiversity credits before undertaking the development.<sup>174</sup>

### Biodiversity Development Assessment Reports

A Biodiversity Development Assessment Report (BDAR) is a report that is prepared by an accredited assessor to:<sup>175</sup>

- Identify the biodiversity values of the land;
- Identify the impacts of the proposed development or activity;
- Outline the actions proposed by the proponent to avoid or minimise the impacts of the development or activity; and
- Specify the number and class of biodiversity credits that are required to be retired to offset the residual impacts on biodiversity values.

### Serious and irreversible impacts

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:<sup>176</sup>

- 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
- 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

<sup>171</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.15(2).

<sup>172</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.15 (3).

<sup>173</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.15 (4).

<sup>174</sup> *Biodiversity Conservation Act 2016* (NSW), s. 7.15 (5).

<sup>175</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.12.

<sup>176</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.5; *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.7.

- 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
- 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.

### Meeting offset obligations

The BDAR will predict the impact of the proposal on biodiversity values and the number and class of biodiversity credits required to be retired to offset the impacts on biodiversity.

The applicant then has options as to how to offset the impacts. They can:<sup>177</sup>

- Purchase and retire like-for-like biodiversity credits;
- Purchase and retire biodiversity credits under variation rules;
- Fund a biodiversity conservation action that would benefit the relevant threatened species or ecological community being impacted;
- Undertake mine site rehabilitation; or
- Pay money into the Biodiversity Conservation Fund.

### ***Retire like-for-like biodiversity credits***

Like-for-like biodiversity credits are the same as those being impacted. So, if clearing will impact a species of plant or animal, its habitat, or an ecosystem, then the impact will be directly offset by protecting and improving the same species, kind of habitat, or ecosystem somewhere else.

The distance of the offset site from the impact site varies. A threatened ecological community can be offset with the same ecological community up to 100km from the impact site.<sup>178</sup>

It is possible to offset impacts on an animal species (e.g. the koala) with the same species at an offset site anywhere in NSW.

### ***Retire biodiversity credits under variation rules***

If like-for-like offsets cannot be secured, it's possible to use the variation rules.

Variation can be relied on if reasonable steps are first taken to find like-for-like offsets.<sup>179</sup> Proponents would need to check the [biodiversity credits register](#),<sup>180</sup> and list credits on the [credits wanted register](#).<sup>181</sup>

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<sup>177</sup> Biodiversity Conservation Act 2016 (NSW), s. 6.4; *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.2.

<sup>178</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.3.

Variation rules can result in impacts on one threatened ecological community being offset with a different ecological community in a nearby bioregion.<sup>182</sup>

The clearing of hollow bearing trees can be offset with artificial hollows.<sup>183</sup>

Impacts on a threatened plant or animal species can be offset with a different plant or animal species of the same or higher risk of extinction (plants for plants and animals for animals) as long as they are in the same or a nearby bioregion.<sup>184</sup>

***Fund a biodiversity conservation action that would benefit the relevant threatened species or ecological community***

The Chief Executive of the OEH has prepared ‘[ancillary rules](#)’ for interpreting and applying the offset rules.<sup>185</sup> The ancillary rules set out the biodiversity conservation actions that will qualify as offsets.<sup>186</sup> For example, impacts on a threatened species can be offset by funding targeted surveys across the entire predicted range of the species to identify locations and populations. Or the proponent could be asked to fund research to understand the threats to the species and its management needs.

The funding of the conservation action must be equivalent to the cost of acquiring the required like-for-like biodiversity credits. This can be determined by applying the [biodiversity offsets payment calculator](#).<sup>187</sup>

***Mine site rehabilitation***

For state significant mining developments such as coal mines, the proponent can undertake ecological rehabilitation of the impacted site that has the same credit value as the retirement of like-for-like credits.

***Pay money into the Biodiversity Conservation Fund***

A developer can satisfy a requirement to retire biodiversity credits by paying an amount into the Biodiversity Conservation Fund.<sup>188</sup>

<sup>179</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.4. See the Glossary for definition of reasonable steps.

<sup>180</sup> See: <http://www.environment.nsw.gov.au/bimsprapp/SearchBiodiversityCredit.aspx?Start=1>

<sup>181</sup> See: <http://www.environment.nsw.gov.au/bimsprapp/SearchCWR.aspx?Start=1>

<sup>182</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.4(b).

<sup>183</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.4(b).

<sup>184</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.4(c).

<sup>185</sup> See: <http://www.environment.nsw.gov.au/resources/bcact/ancillary-rules-biodiversity-actions-170496.pdf>

<sup>186</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.2(4) and 6.5.

<sup>187</sup> See: <http://www.environment.nsw.gov.au/biodiversity/paymentcalculator.htm>

<sup>188</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.30.

The amount to be paid is determined by applying the [biodiversity offsets payment calculator](#).<sup>189</sup>

The [Biodiversity Conservation Trust](#)<sup>190</sup> manages the Biodiversity Conservation Fund and must use funds received to secure biodiversity offsets either through the retirement of biodiversity credits or payment for other biodiversity conservation actions (explained above).<sup>191</sup>

### Where the Biodiversity Offset Scheme does not apply

A development or activity is not likely to significantly affect threatened species if:

1. [The 5-part test](#) is applied and shows that the development or activity is not likely to significantly affect threatened species or ecological communities, or their habitats; or
2. The development does not exceed the Biodiversity Offsets Scheme threshold; and
3. The development is not proposed to be carried out in a declared AOBV.

These developments do not trigger to Biodiversity Offsets Scheme. They will not require a BDAR, but they will still require environmental assessment according to the type of development – for example, a statement of environmental effects, an environmental impact statement and/or a species impact statement. See our [Fact Sheets on Developments, Planning and Heritage](#) for more information.

#### ***NSW Bilateral Agreement relating to environmental impact assessment***

The Australian and NSW governments have signed a [bilateral assessment agreement](#) which means that the NSW Government is responsible for assessing projects that are likely to impact matters of national environmental significance.

In practice, the proponent will refer projects to the Australian Government, which will determine whether the project is a [controlled action](#), and then notify the NSW Government that a referral has been made. The NSW Government will then assess the project, and as part of its usual State processes (e.g. development assessment) it will undertake an [assessment for the Australian Government](#) using its own assessment processes under the bilateral agreement.<sup>192</sup>

<sup>189</sup> See: <http://www.environment.nsw.gov.au/biodiversity/paymentcalculator.htm>

<sup>190</sup> See: <https://www.bct.nsw.gov.au/>

<sup>191</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.31.

<sup>192</sup> <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

The final decision remains with the Australian Minister for Environment who will make a decision based on the assessment by the NSW Government.<sup>193</sup>

## Biodiversity certification of land

Biodiversity certification of land, or 'Biocertification' is the strategic environmental assessment of areas marked for development with the aim of designating upfront the areas that are suitable for development and the areas that are to be conserved (and subject to conservation measures) to offset the impacts of development.<sup>194</sup>

Once biocertification is conferred, individual site-based environmental assessments relating specifically to biodiversity are no longer required for developments.<sup>195</sup>

There are two types of biocertification:

- Standard – available to land holders and planning authorities;
- Strategic – available only to planning authorities e.g. local councils or the Minister for Planning.

### **Strategic biocertification**

The Environment Minister may declare that an application by a planning authority is a strategic application by taking into account the size of the area, regional or district strategic plans that apply and the economic, social or environmental outcomes that biocertification would support.<sup>196</sup>

### Applying for biocertification

Any planning authority or landholder can [apply to the Environment Minister](#)<sup>197</sup> for biocertification of an area.<sup>198</sup> Applicants who are not planning authorities must consult with the relevant local council early in the process before any public consultation occurs.<sup>199</sup>

An application for biodiversity certification must:

- Identify the land proposed for biocertification;

<sup>193</sup> <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw>

<sup>194</sup> *Biodiversity Conservation Act 2016* (NSW), Part 8.

<sup>195</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.4.

<sup>196</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.5(2); *Biodiversity Conservation Regulation 2017* (NSW), cl. 8.3.

<sup>197</sup> <http://www.environment.nsw.gov.au/resources/biocertification/120044biocertapp.pdf>

<sup>198</sup> *Threatened Species Conservation Act 1995* (NSW), s. 126I(1), (2).

<sup>199</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.6(1).

- Identify the land on or in respect of which proposed conservation measures are to be implemented; and
- Identify any person or body proposed as a party to the conservation measures (and who will be responsible for the implementation of the proposed conservation measures).

The application must be accompanied by a Biodiversity Certification Assessment Report (BCAR).<sup>200</sup> This will require the assistance of an [accredited assessor](#) to apply the [Biodiversity Assessment Method](#) to the proposed biocertification area. The BCAR will.<sup>201</sup>

- Assess the biodiversity values of the land proposed for biocertification;
- Assess the impacts on biodiversity values of the proposed actions;
- Specify the number and class of biodiversity credits that would be required to offset those impacts; and
- Specify other proposed conservation measures on other land to offset the impacts on biodiversity values.

Applicants must publish a notice of the application for biocertification in a newspaper circulating throughout the State, as well as on an approved website, inviting the public to comment on the application. The public must be given at least 30 days from the date of the notification to comment on the application.<sup>202</sup> The applicant must then provide a report to the Environment Minister showing the applicant's responses to submissions received.<sup>203</sup>

### ***Transitional provisions***

Transitional arrangements have been put in place regarding biocertification to accommodate applications made before the BC Act commenced.<sup>204</sup> [Existing applicants for biocertification](#) under the now-repealed TSC Act who need more information should contact the OEH.<sup>205</sup>

### **Conferring biodiversity certification**

In conferring biocertification, the Environment Minister can identify the party or parties to the biodiversity certification. This may be the applicant or any other person or body proposed by the applicant as a party to the biocertification.<sup>206</sup>

If the Minister is of the opinion that land clearing and habitat loss on land proposed for biocertification is likely to have serious and irreversible impacts on

<sup>200</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.5(4); *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.9.

<sup>201</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.13

<sup>202</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.6(3)(a)-(c).

<sup>203</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.6(3)(d).

<sup>204</sup> *Biodiversity Conservation (Savings and Transitional) Regulation 2017* (NSW), Part 8.

<sup>205</sup> Contact OEH on 131 55 or email to [biocertification@environment.nsw.gov.au](mailto:biocertification@environment.nsw.gov.au)

<sup>206</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.9.



biodiversity values,<sup>207</sup> the Minister is required to consider those impacts and any additional measures to minimise them, when determining whether to confer biocertification.<sup>208</sup>

Once the biocertification has been conferred by an order made in the NSW Government Gazette,<sup>209</sup> individual site assessments specifically relating to biodiversity are no longer required.

### **Conservation measures**

The order conferring biocertification must specify ‘approved conservation measures’ to offset the impacts on biodiversity values.

For standard biocertification, the conservation measures will be the requirement to retire biodiversity credits in accordance with the BCAR.<sup>210</sup> For strategic biocertification, there are more options, including the reservation of land under the *National Parks and Wildlife Act 1974*, the adoption of development controls (or State infrastructure contributions) under the *Environmental Planning and Assessment Act 1979* that conserve or enhance the natural environment or any other measure determined by the Minister.<sup>211</sup>

The Environment Minister can only grant biocertification over land if the Minister is satisfied that the ‘approved conservation measures’ adequately address the likely impacts on biodiversity values with regard to the biodiversity certification assessment report.<sup>212</sup>

### **Enforcement of approved conservation measures**

The Minister can order a party to a biocertification to rectify any failure to comply with the approved conservation measures under the biocertification.<sup>213</sup> Penalties apply if the order is not complied with.<sup>214</sup>

The person served with an order can appeal to the Land and Environment Court within three months of the decision to issue the order.<sup>215</sup>

### **Biocertification agreements**

The Environment Minister can enter into a biocertification agreement with any person associated with biocertification requiring the person to.<sup>216</sup>

<sup>207</sup> See Glossary for definition of serious and irreversible impacts

<sup>208</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.8(2).

<sup>209</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.2.

<sup>210</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.3(2)(a).

<sup>211</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.3(2)(b).

<sup>212</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.7.

<sup>213</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.13(1).

<sup>214</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.13(2).

<sup>215</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.15.

- Make monetary or biodiversity credit contributions to the Minister for the purpose of improving biodiversity;
- Dedicate land for conservation;
- carry out specified actions, or restrict specified actions, on land;
- Make monetary or biodiversity credit contributions to a planning authority for the purpose of reimbursing the costs incurred in a biocertification proposal; and
- Carry out monitoring, reporting and audits.

A biocertification agreement that is registered on the title of land will be binding on future owners of that land, depending on the length of the agreement.<sup>217</sup>

Biocertification agreements are required to be published on a government website maintained by the OEH.<sup>218</sup> The Minister can order a biocertification agreement holder to carry out work by a certain date to rectify a contravention of the agreement.<sup>219</sup> Penalties apply if the order is not complied with.<sup>220</sup>

## COMPLIANCE AND ENFORCEMENT

The OEH is responsible for enforcing laws that protect native animals, plants, threatened species and threatened ecological communities. This can be done by taking Court action – either criminal prosecutions or civil enforcement proceedings - although the OEH may consider using other enforcement powers before taking a matter to Court. These other powers include the power to issue penalty notices, warning letters, stop work orders and interim protection orders.

Members of the public can report suspected unlawful activity to the NSW Government's [Environment Line](#).<sup>221</sup>

### Investigation Powers

Authorised officers are appointed by the Chief Executive of the OEH<sup>222</sup> and have broad powers to determine whether there has been a breach of the BC Act, BC Regulation, a biodiversity conservation licence, orders or measures required under biocertification.<sup>223</sup> This includes:

- Powers to require information and records,<sup>224</sup>
- Powers of entry and to search premises,<sup>225</sup>

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<sup>216</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.16.

<sup>217</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.17.

<sup>218</sup> *Biodiversity Conservation Regulation 2017* (NSW), cl. 8.5.

<sup>219</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.18(1).

<sup>220</sup> *Biodiversity Conservation Act 2016* (NSW), s. 8.18(3).

<sup>221</sup> Toll free: 131 555 (24 hours) or by email to [info@environment.nsw.gov.au](mailto:info@environment.nsw.gov.au). See <http://www.epa.nsw.gov.au/contact/environmentline.htm>

<sup>222</sup> *Biodiversity Conservation Act 2016* (NSW), s. 12.4.

<sup>223</sup> *Biodiversity Conservation Act 2016* (NSW), s. 12.2(1).

<sup>224</sup> *Biodiversity Conservation Act 2016* (NSW), Part 12, Div 3.

- Powers to question and identify persons;<sup>226</sup> and
- Special powers to enforce native vegetation clearing on rural land.<sup>227</sup>

It is an offence not to comply with a request made by an authorised officer. The maximum penalty (for an individual) is \$132,000 with an additional daily penalty.<sup>228</sup>

### Penalty Notices

Many of the offences under the BC Act are penalty notice offences meaning that a fine can be given.<sup>229</sup>

### Animal Protection Directions

An OEH authorised officer can give a direction to someone to stop any activity that is causing or might cause distress to native animals, including threatened species.<sup>230</sup>

An authorised officer can also give a direction to someone who is lawfully keeping a native animal in captivity in relation to feed, shelter and care of the animal.<sup>231</sup>

A person who is given a direction may appeal to the Environment Minister against the direction within 14 days after the direction is given.<sup>232</sup>

Failure to comply with an animal protection direction could result in a maximum penalty of between \$22,000 and \$132,000 (for an individual) depending on whether the animal is (or is part of) a threatened species.<sup>233</sup>

### Stop work orders

The Chief Executive of the OEH (through an authorised officer) can issue a stop work order if he or she is of the opinion that an activity is being, or is about to be, carried out that is likely to result in a breach of the BC Act.<sup>234</sup>

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<sup>225</sup> *Biodiversity Conservation Act 2016* (NSW), Part 12, Div 4.

<sup>226</sup> *Biodiversity Conservation Act 2016* (NSW), Part 12, Div 5.

<sup>227</sup> *Biodiversity Conservation Act 2016* (NSW), s. 12.2(2) & Part 12, Div 7. The clearing is regulated under the *Local Land Services Act 2013* (NSW) but the enforcement provisions are in the *Biodiversity Conservation Act 2016* (NSW).

<sup>228</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 12.22(1) & 13.1(3).

<sup>229</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.5. *Biodiversity Conservation Regulation 2017* (NSW), Schedule 1.

<sup>230</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.31.

<sup>231</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.32.

<sup>232</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.34.

<sup>233</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 11.36 & 13.1. The penalty is much higher for a corporation.

<sup>234</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.3.

A stop work order takes effect from when it is affixed in an obvious place in the area where the action is occurring (or will occur), or given to the person carrying out the activity. A verbal order lasts for 72 hours unless it is confirmed in writing.<sup>235</sup>

After making a stop work order, the Chief Executive must immediately consult with the person to see if the activity can be modified, or to determine whether a biodiversity conservation licence should be issued to authorise the work.<sup>236</sup> If the Chief Executive of the OEH is of the opinion that satisfactory arrangements cannot be made to prevent a contravention of the law, he or she must recommend that the Environment Minister make an interim protection order (see below).<sup>237</sup>

It is an offence to contravene a stop work order. The maximum penalty is (for an individual) \$333,000 with an additional daily penalty.<sup>238</sup> The person against whom an order is made can appeal against the order to the Land and Environment Court.<sup>239</sup>

### Interim protection orders

After receiving a recommendation from the Chief Executive of the OEH, the Environment Minister can make an interim protection order over land that:

- Has natural or scientific significance;
- Has native animals and plants, or threatened species or ecological communities; or
- Is a declared AOBV or habitat for threatened species.<sup>240</sup>

An interim protection order may contain terms relating to the preservation, protection and maintenance of the land, its fauna, plants, threatened species, and ecological communities.<sup>241</sup>

The Minister is not required to notify anyone who will be affected by an interim protection order.<sup>242</sup> An interim protection order has effect from when it is published in the NSW Government Gazette for the period specified in the order (but not longer than 2 years) unless revoked beforehand.<sup>243</sup> Current interim protection orders may be found on the [NSW Government Gazette](#).

<sup>235</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.4.

<sup>236</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 11.7.

<sup>237</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 11.8(2).

<sup>238</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 11.5 & 13.1(2). The maximum penalty for a corporation is \$1,650,000.

<sup>239</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.6.

<sup>240</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.8.

<sup>241</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.9(2).

<sup>242</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.9(3).

<sup>243</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.10.

It is an offence to contravene an interim protection order. The maximum penalty is (for an individual) is \$333,000 with an additional daily penalty.<sup>244</sup> An owner of land subject to an interim protection order can appeal against the order to the Land and Environment Court within 30 days of receiving the order.<sup>245</sup>

### Remediation orders

The Chief Executive of the OEH can issue an order to carry out remediation work if the Chief Executive is satisfied that any of the following has been unlawfully damaged:<sup>246</sup>

- Any declared AOBV;
- Any plant or animal that is, or is part of, a threatened species or threatened ecological community, or their habitat; or
- Any native vegetation on category 2-regulated land.<sup>247</sup>

A remediation order must be served in writing on the landholder or the person responsible for the damage.<sup>248</sup> The type of remediation work required by the order may include:<sup>249</sup>

- Work to control, abate or mitigate the damage to the area, habitat, plant, animal or vegetation concerned;
- Work to remediate or restore the damaged area, habitat, plant, animal or vegetation concerned (including replacing removed or dead plants or animals);
- Engaging a suitably qualified person to plan or carry out the work required by the order;
- Providing progress reports, monitoring, or sampling;
- Vacating the land concerned; or
- Construction or removal of anything (including plants and structures).

Development consent is not required to carry out remediation work.<sup>250</sup>

If a person fails to comply with a remediation order, the Chief Executive can authorise someone else to carry out the works and then recover those costs from the person to whom the order was given.<sup>251</sup>

<sup>244</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.12 & 13.1(2).

<sup>245</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.13; *Biodiversity Conservation Regulation 2017* (NSW), cl. 11.2.

<sup>246</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.17.

<sup>247</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.15(1). See *Local Land Services Act 2013* (NSW), Part 5A for category 2 regulated land.

<sup>248</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.15(3).

<sup>249</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.16.

<sup>250</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.19.

<sup>251</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.18.

It is an offence not to comply with a remediation order without a reasonable excuse. The maximum penalty (for an individual) is \$132,000 with an additional daily penalty.<sup>252</sup> A person who is given a remediation order can appeal against the order to the Land and Environment Court within 30 days of receiving the order.<sup>253</sup>

### ***Transitional provisions***

Existing stop work orders and remediation orders issued under the old laws continue to remain in force and effective under the BC Act.<sup>254</sup>

### **Civil enforcement**

Any person can bring a case in the Land and Environment Court to remedy or restrain a breach<sup>255</sup> of the BC Act, BC Regulation or the rural land clearing laws in the *Local Land Services Act 2013*.<sup>256</sup>

The Court can make such orders as it thinks fit to remedy or restrain the breach.<sup>257</sup> This may include an order to suspend a biodiversity conservation licence, an injunction to stop an activity that is causing harm, or making a declaration that an offence has been committed.

Read more about civil enforcement in our [Land and Environment Court Fact Sheet](#).

### ***Civil proceedings for enforcement of biodiversity certification agreements***

The Environment Minister, or a person acting with their consent, may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of a biocertification agreement.<sup>258</sup> The Court has discretion to make such orders as it thinks fit to remedy or restrain the breach.<sup>259</sup>

### **Criminal prosecutions**

Only the Chief Executive of the OEHL, a police officer or a person authorised by the Chief Executive can commence criminal proceedings for an alleged offence under the BC Act.<sup>260</sup> Criminal proceedings must be commenced within 2 years of

<sup>252</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.22 & 13.1(3).

<sup>253</sup> *Biodiversity Conservation Act 2016* (NSW), s. 11.23.

<sup>254</sup> *Biodiversity Conservation (Savings and Transitional) Regulation 2017* (NSW), cl. 52-53.

<sup>255</sup> This includes a threatened or apprehended breach.

<sup>256</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.14(1).

<sup>257</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.14(3).

<sup>258</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.16(1).

<sup>259</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.16(3).

<sup>260</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.3(1).

the date of the alleged offence, or within 2 years of the date the offence came to the attention of an investigation officer.<sup>261</sup>

For offences committed by a corporation, directors of the company may also be liable.<sup>262</sup> A person who causes or permits, aids or abets or conspires to commit an offence under the BC Act may also be guilty of the offence.<sup>263</sup>

In imposing a penalty for an offence, the Court must take into account matters including:

- The extent of the harm caused or likely to be caused by the commission of the offence;
- The extent to which the person who committed the offence could reasonably have foreseen the harm;
- The extent to which the person who committed the offence had control over the causes of the offence; and
- Whether the offence was committed for commercial gain.<sup>264</sup>

The Land and Environment Court may impose significant fines and terms of imprisonment on offenders.

## THREATENED FISH AND MARINE VEGETATION

Threatened species of fresh and saltwater fish and marine vegetation are protected under the *Fisheries Management Act 1994* (NSW). The Minister for Primary Industries and the [Department of Primary Industries](#) are responsible for the protection of [threatened marine species and marine vegetation](#).

### How are fish listed as threatened?

Any person can [nominate](#) a species, population or ecological community for listing.<sup>265</sup> The [categories](#) are the same as those for land-based species and ecological communities (see above).<sup>266</sup>

The [Fisheries Scientific Committee](#) is responsible for determining which fish species, populations, ecological communities or threatening processes should be listed.<sup>267</sup> Within two months of receiving notice from the Committee of a proposed final determination, the Minister for Primary Industries can either accept the

<sup>261</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.4.

<sup>262</sup> *Biodiversity Conservation Act 2016* (NSW), ss. 13.6 & 13.7.

<sup>263</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.9.

<sup>264</sup> *Biodiversity Conservation Act 2016* (NSW), s. 13.12.

<sup>265</sup> *Fisheries Management Act 1994* (NSW), s. 220H(2)(b).

<sup>266</sup> *Fisheries Management Act 1994* (NSW), s. 220F.

<sup>267</sup> *Fisheries Management Act 1994* (NSW), s. 220G.

Committee's nomination or refer it back to the Committee for scientific reasons.<sup>268</sup>

Habitat that is critical to the survival of endangered or critically endangered marine species may be declared as [critical habitat](#).<sup>269</sup>

Threatened species, ecological communities or their habitat are protected through a number of offences, including the offence of harming any listed marine species or damaging its habitat.<sup>270</sup>

### Threatened fish and development

A development application which is likely to significantly affect a threatened fish species will require a Species Impact Statement to accompany the development application.<sup>271</sup> Consultation with, or concurrence of, the Minister for Primary Industries will also be required.<sup>272</sup>

### Key threatening processes for fish

Processes which threaten the survival of species are [listed](#).<sup>273</sup> Eight key threatening processes are currently listed, including degradation of native riparian vegetation, hook and line fishing in areas important for the survival of threatened fish species, climate change and the shark meshing program in NSW waters.

### Licences and Permits

Licences and [permits](#) concerning threatened fish species and marine vegetation are issued by the Department of Primary Industries. There is a [public register](#) of licences.

## GLOSSARY

**Area of Outstanding Biodiversity Value (AOBV)** means an area of NSW that has been declared by the Environment Minister as an area of outstanding biodiversity value by virtue of its biodiversity significance.<sup>274</sup>

**Authorised Officer** means an officer appointed by the Chief Executive of the Office of Environment and Heritage as an authorised officer.<sup>275</sup>

**BC Act** means the *Biodiversity Conservation Act 2016* (NSW).

<sup>268</sup> *Fisheries Management Act 1994* (NSW), s. 220M.

<sup>269</sup> *Fisheries Management Act 1994* (NSW), s. 220P.

<sup>270</sup> *Fisheries Management Act 1994* (NSW), Part 7A, Div 4.

<sup>271</sup> *Fisheries Management Act 1994* (NSW), s. 221ZW.

<sup>272</sup> *Fisheries Management Act 1994* (NSW), ss. 221ZY & 221ZZ.

<sup>273</sup> *Fisheries Management Act 1994* (NSW), Sch. 6.

<sup>274</sup> *Biodiversity Conservation Act 2016* (NSW), Part 3.

<sup>275</sup> *Biodiversity Conservation Act 2016* (NSW), s. 12.4.



**BC Regulation** means the *Biodiversity Conservation Regulation 2017* (NSW).

**BDAR** means a Biodiversity Development Assessment Report.

**Biocertification** means the strategic environmental assessment of areas marked for development with the aim of designating upfront areas that are suitable for development and areas to offset the impacts of that development.<sup>276</sup>

**Chief Executive** means the Chief Executive of the OEH.

**Environment Minister** means the NSW Minister for the Environment.

**EP&A Act** means the [Environmental Planning and Assessment Act 1979 \(NSW\)](#).

**EPBC Act** means the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#).

**OEH** means the [NSW Office of Environment and Heritage](#).

**Serious and irreversible impact on biodiversity** means the impact is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct because:<sup>277</sup>

- 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
- 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
- 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
- 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.

**TSC Act** means the now-repealed *Threatened Species Conservation Act 1995* (NSW).

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<sup>276</sup> *Biodiversity Conservation Act 2016* (NSW), Part 8.

<sup>277</sup> *Biodiversity Conservation Act 2016* (NSW), s. 6.5; *Biodiversity Conservation Regulation 2017* (NSW), cl. 6.7.