

Australian Capital Territory

Nature Conservation (Protected Native Species) Criteria and Processes 2017

Disallowable instrument DI2017–294

made under the

Nature Conservation Act 2014, s113 (Minister to develop criteria and processes for protected native species list)

EXPLANATORY STATEMENT

This explanatory statement relates to the *Nature Conservation (Protected Native Species) Criteria and Processes 2017* instrument as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the disallowable instrument and to help inform debate on it. It does not form part of the disallowable instrument and has not been endorsed by the Assembly.

The statement must be read in conjunction with the disallowable instrument. It is not, and is not meant to be, a comprehensive description of the disallowable instrument. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Introduction

The *Nature Conservation Act 2014* (the NC Act) commenced on 11 June 2015 and is the primary ACT legislation for the protection and management of native plants and animals, the identification and protection of threatened native species and ecological communities, management of national parks and nature reserves and the conservation of the ACT's natural resources.

The main object of the NC Act (s. 6) is to protect, conserve and enhance the biodiversity of the ACT.

The NC Act provides for the listing of 'protected native species'. Protected native species are native species on the Protected Native Species List. The Minister is required to make a list of native species that are protected native species. The protected native species list must be divided into three categories: restricted trade; rare; and data deficient. Additional categories can be included if a regulation prescribes an additional category.

The NC Act requires the Minister to develop criteria to be used in deciding whether a species is eligible to be included in a category on the Protected Native Species List. In developing the criteria the Minister must have regard to the conservation of the species. The criteria must only include scientific matters.

The Minister is required to consult with the Scientific Committee in developing the Protected Native Species List criteria. The Minister has consulted the Scientific Committee on the criteria.

The Minister must also develop processes to be followed in deciding whether a species is to be included in a category on the Protected Native Species List.

There are a number of offences in the NC Act that apply to actions impacting protected species. There is a range of general exceptions to these offences and specific exceptions that apply to some offences. For example, having a nature conservation licence provides an exception to relevant offences. Fish and invertebrates become subject to a range of offences and penalties that apply to animals through their listing as protected species, or as species with special protection status (threatened species listed under the NC Act and threatened species and migratory species listed under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)).

Overview of the provisions

Protected Native Species – Eligibility Criteria (Schedule 1)

Under the instrument, species will need to satisfy the criteria in the instrument to be eligible for listing as a protected native species. The instrument provides that schedule 1 sets out the protected native species listing criteria for restricted trade, rare and data deficient species.

Restricted trade

A native species is eligible to be included in the restricted trade category on the protected native species list if unrestricted trade in the species is likely to have a negative impact on populations of the species in the wild.

The criteria for this category relate to scientific matters and include provisions for protection of native species listed as protected or rare in other Australian jurisdictions, or internationally.

The criteria include that the species may be an invertebrate or fish that is subject to collection or trade in the species and where, based on expert opinion, this is likely to have a negative impact on populations of the species in the wild. Native invertebrates and fish do not have ‘protection’ under the NC Act unless they are listed as protected or as threatened. Native animals (other than fish and invertebrates) are, by definition, ‘protected’ from being taken without a licence under the NC Act.

The criteria also include that the species may be a plant that is subject to collection or trade in the species and where, based on expert opinion, this is likely to have a negative impact on populations of the species in the wild.

Rare

Rarity is a measure of the current status of an extant (living) species restricted either in numbers or area to a level that is demonstrably less than the majority of other

organisms. Species that are restricted in numbers or spatial occurrence are considered to be rare relative to the distribution and abundance of other species¹.

A native species is eligible to be included in the rare category on the Protected Native Species List if it is not a threatened native species; and it does not have special protection status; and it is rare in the ACT.

Rare species are species which have a limited distribution. There may not be any particular current threat to their extent but because they are rare a precautionary approach needs to be taken for their management including consideration of licensing requirements and impacts from land use. Distribution of a species or ecological community within the region is a function of its extent of occurrence and/or area of occupancy.

Species with restricted distribution are subject to inherent risk where their small area of preferred habitat could potentially be destroyed by a catastrophic event or subject to other sudden processes capable of causing largely irreversible loss of individuals or habitat.

A species may also be rare if there is a single and/or small population in the ACT.

Species that are endemic to the ACT and/or bioregions of which the ACT is part are inherently rare because they do not occur elsewhere.

The importance of a species protection in the ACT increases where a significant portion of the known entire population occurs in the ACT. The indicative thresholds have been developed to take account of the International Union for Conservation of Nature (IUCN) criteria which uses the threshold of 10,000 individuals with continuing decline as a threshold for consideration as vulnerable. Where the ACT forms a significant component of the species extent of occurrence this could indicate that habitat in the ACT is significant for the conservation of the species overall.

Data deficient

A native species is eligible to be included in the data deficient category on the Protected Native Species list if there is insufficient information about the species in the ACT for the species to be eligible to be listed as a threatened native species or a rare species. For example, some cryptic species are not easily detected through surveys. A precautionary approach provides protection of these species in the absence of information. The listing of data deficient species can assist targeting of research and inventory effort.

Protected Native Species – Processes (Schedule 2)

The instrument provides that schedule 2 sets out the protected native species listing processes to be followed for restricted trade, rare and data deficient species.

The processes outlined in Schedule 2 reflect similar processes and roles and responsibilities as those contained within the NC Act relating to threatened species. The responsibility for assessment has been provided to the Scientific Committee with assistance from the Secretariat.

¹ Gaston, K. J. 1994. *Rarity*. London: Chapman and Hall.

Nominations would normally be made by Conservation Officers, or other Public Servants responsible for implementing the NC Act; the *Environment Protection Act 1997*; the *Fisheries Act 2000*; the *Water Resources Act 2007* or other environmental legislation, including Commonwealth and other jurisdictions' legislation. However, to avoid a restrictive approach the processes provide that nominations can be made by any person.

The processes provide that assessment of species can occur without nomination. Requiring nomination for those species listed in other jurisdictions or assessed through other processes would be unnecessary and duplicative.

Human rights impacts

The instrument does not engage or limit any person's human rights.

The instrument is consistent with the Legislative Assembly's Scrutiny of Bills Committee Terms of Reference. In particular, the instrument:

1. is made under a ministerial power found in the NC Act;
2. is in accord with the general objects of the Act under which it is made;
 - the criteria are consistent with the objects of the NC Act (s. 6) to protect, conserve and enhance the biodiversity of the ACT;
 - the processes are not discriminatory and are similar to processes for listing of threatened native species contained in the NC Act;
3. does not unduly trespass on rights previously established by law;
 - the listing of a species has a number of regulatory impacts including licensing of actions that would otherwise constitute an offence and also requiring an assessment of the species as part of an environmental impact assessment;
 - these regulatory impacts already exist and are not increased through the development of these criteria;
4. does not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - the criteria and processes do not directly impact on any rights, liberties and/or obligations of individuals. Regulatory impacts such as requirements for licensing relating to protected species are reviewable, and this instrument does not change those arrangements;
 - the criteria themselves do not remove or create rights, liberties or obligations except, for example, the obligation for the Scientific Committee to use the criteria in making an assessment and by the Minister in making a decision to list;
 - the processes do not create rights or liberties. The only obligation created is on people, the Scientific Committee and the Government to use the processes. The processes are similar to those contained within the NC Act relating to the nomination and assessment of threatened native species.

Costs and benefits

This disallowable instrument is not likely to impose appreciable costs on the community, or part of the community and therefore a regulatory impact statement is not required (*Legislation Act 2001* (s34)). Further, a regulatory impact statement is unnecessary, in accordance with of the Legislation Act (s36), as the disallowable instrument does not operate to the disadvantage of anyone by adversely affecting the person's rights, or imposing liabilities on the person.

This instrument has no significant revenue impacts or additional costs of administration. The provisions of the instrument are, in part, procedural. Many of the provisions are aimed at providing additional transparency and accountability of decision making in relation to the listing of protected native species. Associated costs of an administrative nature will be met from existing resources and budgetary allocations.

Provisions in detail

Clause 1 Name of Instrument

This clause provides the name of the instrument.

Clause 2 Commencement

This clause provides the date of commencement of the instrument.

Clause 3 Protected native species list criteria

This clause provides that schedule 1 sets out criteria to be used by the Minister in deciding whether a species is eligible to be included in a category on the protected native species list.

Clause 4 Protected native species list processes

This clause provides that schedule 2 sets out processes to be followed in deciding whether a species is to be included in a category on the protected native species list.