

Biodiversity (Priority Reforms) Bill 2014

EXPLANATORY MEMORANDUM

The legislation that guides Western Australia's approach to biodiversity protection is over sixty years old, and it is inconsistent with contemporary conservation practices. Combine this with a culture of improvised policy development and the result is fragmented biodiversity protection efforts that are neither appropriate nor effective. WA's current biodiversity laws fall way behind both the laws of other Australian jurisdictions, and community expectations.

The Western Australian Auditor General determined, in a 2009 report, that threatened species identification and recovery by the Department of Environment and Conservation (DEC) was taking place largely without any legislative backing. This caused problems of transparency and accountability, as well as delays in the processes of achieving threatened species listing decisions.

This Bill introduces a number of relatively simple amendments to both the *Wildlife Conservation Act 1950* and *Environmental Protection Act*.

This Bill addresses three key problems. Firstly, a simple statutory mechanism for listing threatened species is provided in the Bill. The process has reasonable but compelling timelines, to ensure decisions are actually taken, and not left to languish. Secondly, penalty levels are brought into line with comparable offences under the Act that contains the equivalent Commonwealth provisions – the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”). In situations where there is no equivalent Federal offence, this Bill raises the WA penalty by a factor of 11, which is the amount needed for the key “taking threatened species” offences to be raised to achieve parity with the EPBC Act.

Thirdly, for some years now it has not been possible to contemplate amending the WCA without thinking about consequentially amending at least the clearing provisions of the EP Act. This Bill makes such consequential changes, and the Bill has some additional reforms to the clearing rules. The Bill creates appeals to the State Administrative Tribunal (SAT) for the most environmentally significant clearing proposals. The SAT is a well-respected arbiter in a range of technically challenging areas – it is up to the task of taking on this additional jurisdiction.

Part 1 - Preliminary

Clause 1

Clause 1 provides that when enacted the short title of the Act will be the *Biodiversity Legislation (Priority Reforms) Act 2014*.

Clause 2

Clause 2 provides for the Act to come into operation in two parts. Sections 1 and 2 of the Act are to come into operation on the day the Act receives Royal Assent. The remainder of the Act will come into operation by proclamation.

Part 2 – *Wildlife Conservation Act 1950* amended

Clause 3

Clause 3 notifies that Part 2 provides for amendments to the WCA.

Clause 4

Clause 4 amends section 6 of the WCA, which contains the main terms used in that Act.

Subclause (1)

Subclause (1) adds the following terms to section 6: *ecological community*, *listed*, *listed ecological community*, *listed fauna*, *listed flora*, *taxon*, and *threatened list*. The following comments group those definitions logically rather than by alphabetical order.

The definition of “ecological community” is based closely upon the definition of the same term in section 528 of the EPBC. The subclause then goes on later to define “listed ecological community”, which is proposed to be the WA equivalent of the Federal notion of a “threatened ecological community.” The current WCA does not provide statutory recognition to the notion of ecological communities, threatened or otherwise, although departmental policy does recognise the importance of the need to conserve some parts of Western Australia’s environment at a community rather than individual taxa level.

The Bill seeks to bring consistency to the adjectives used in the WCA by referring to ‘listed’ fauna, flora and now ecological communities rather than the current: fauna to which a s 14(4) declaration applies (by convention, known as ‘threatened’ fauna); ‘rare’ flora (s 23F – by convention, known as ‘declared rare flora’ or ‘DRF’); and the current lack of recognition of the third concept.

The definition of “listed” means that for the purposes of the protection provided by those key ‘taking’ offence provisions in the WCA (which will become the amended sections 16(1) and 23F(4)), interim listing is equivalent to final listing of taxa or ecological communities (see more on the new listing regime later).

The definition of “taxon” is based closely on the definition of the same term in section 528 of the EPBC Act.

The definition of “threatened list” references proposed new listing provisions to be included as a schedule to the WCA.

Subclause (2)

This subclause adds a new subsection (2A), which clarifies that the notion of listed flora is a subset of the broader notion of “protected flora” under the WCA. It should be noted that listed fauna is a subset of protected fauna because of section 14. All fauna is protected under 14(1) unless the protection is removed under 14(2). Under the new section 14(4) – see further below – protection cannot be removed from listed fauna.

Also added is a new subsection (2B), clarifying that all taxa listed before this new Act becomes operative become the basis for the new “threatened list”.

Subclause (3)

This subclause adds a new subsection (7), which seeks to provide additional clarity to the scope of the WCA, particularly in relation to the definition of the key notion, “to take”, in section 6.

Also added is a new subsection (8), which achieves two key things. One is to add the notion of penalty units into the WCA, which will simplify the process of amending the maximum penalties over time as inflation has an impact on the deterrent effect of the financial consequences of breaching the offence provisions. The other purpose of subsection (8) is to link the penalty for taking listed taxa or ecological communities under the WCA to the equivalent penalty under the EPBC Act (namely, section 196). Other offences in the WCA before amendment are therefore, throughout this Bill, generally increased by a factor of 11 (as was required with the taking offence, moving it from \$10,000 to \$110,000).

It should also be added that there are moves afoot at the Australian Government level to increase the value of penalty units, which will have the effect of substantially increasing the maximum penalty associated with that EPBC Act section 196 offence, from \$110,000 to \$170,000.

Clause 5

This clause inserts a new section 7A. As with the new definition of “threatened list”, this section references the new listing provisions in proposed Schedule 1.

Clause 6

The small deletion in subclause (1), and the more significant deletions in subclause (2), have the effect of ensuring the Crown is bound by all aspects of the WCA. The current Act, which binds the Crown only in relation to flora, has long been considered fundamentally deficient. One of the most controversial consequences of this current loophole has been the fact that the current Forest Products Commission, and previously the department of Conservation and Land Management in its capacity as logger of native forests, were not bound by the provisions of the WCA that protected fauna.

Clause 7

The effect of subclauses (1) through to (3) is to ensure that for as long as fauna is listed fauna it will remain totally protected under section 14 and will not be affected by notices under that section. It should be noted that the deletion of section 14(4) has been offset by the proposed new section 16(1), discussed in connection with clause 9 below.

Clause 8

This minor correction to section 15A ensures that ducks, geese and quail cannot be affected by notices under section 14(2) or (3)

Clause 9

Subclause (1)

The proposed new section 16(1), to some extent, is just a modern redrafting of the original provision.

As anticipated in connection with clause 7, the new section also moves the original ‘taking threatened fauna’ offence provision from section 14(4) to section 16(1), where it will sit alongside the less serious offence of taking protected fauna.

Finally, as anticipated earlier, this new section 16(1) raises both the current taking ‘threatened’ and protected fauna maximum penalties by a factor of 11, such that the new taking “listed fauna” penalty matches the EPBC Act equivalent.

Subclause (2)

This minor amendment to section 16(1a) is consequential on the amendments in clause 7.

Subclause (3)

This minor amendment to section 16(2) is essentially just consequential on the amendments in clause 7, but Parliamentary Counsel has taken the opportunity to clean up the drafting as well.

Clause 10

Subclause (1)

The current WCA makes no distinction between whether, for example, the carcass referred to in section 16A(1) is that of ‘threatened’ fauna, or just protected fauna. The Bill takes the opportunity to tease this offence apart into different penalty maxima depending on whether the relevant fauna is protected fauna or listed fauna.

Subclause (2)

This change to section 16A(2) is similar to that in subclause (1) above.

Clause 11

This change to section 17(2) is similar to those changes in clause 10.

Clause 12

This clause increases the three relevant penalty levels in section 17A and converts them to penalty units.

Clause 13

This clause increases the relevant penalty in section 20 by a factor of 11.

Clause 14

This clause increases the relevant penalty in section 23B by a factor of 11.

Clause 15

This clause increases the relevant penalty in section 23D(1) by a factor of 11.

Clause 16

Subclause (1)

These deletions give effect to moving the listing provisions to the proposed Schedule 1, and the related change from “rare flora” to “listed flora”.

Subclauses (2), (3) and (4)

In addition to some drafting enhancement by Parliamentary Counsel, these subclauses just increase the old penalty for taking ‘DRF’ by a factor of 11, and move said penalty from section 23F(6) to section 23F(4).

Subclause (5)

A very minor change to continue the switch from ‘rare’ to ‘listed’ flora.

Clause 17

Clause 17 introduces sections 24 through 25I, which are a comprehensive set of provisions relating to listed ecological communities. In this respect the Bill departs to some extent from the EPBC Act, which fails to deal with the full scope of potential damage to what in WA the Bill proposes to call listed ecological communities. To some extent the following provisions are based upon Part V, Division 4 of the EP Act.

The Bill therefore offers provisions that will, by way of overview:

- provide a Ministerial power to authorise ‘modification’ of a listed ecological community (as the necessary counterpoint to the power to list it in the first place) [section 25A];
- provide the power to provide said authorisation subject to conditions, and outline a list of potential types of conditions [section 25B];
- describe the offence of ‘modifying’ a listed ecological community without the relevant authorisation [section 25C];
- require notification to the CEO of the relevant department if an owner or occupier of land has a listed ecological community on it, and has received an “LEC notice” because of that (see further below), and that owner or occupier then finds another incidence of the same listed ecological community [section 25D];
- require such notification be given by certain other persons, such as those conducting biological survey work [section 25E];
- provide a Ministerial power to notify owners and occupiers about the presence of listed ecological communities on their land [section 25F]
- provide for lodgement of notification documents with the Registrar of Titles [section 25G];
- requires the owner or occupier to take reasonable steps to protect the listed ecological community on their land from impacts from visitors to that land [section 25H]; and
- provide for compensation when an owner or occupier applies for permission to modify a listed ecological community and is dissatisfied with the Minister’s decision on that matter [section 25I].

In the main, the detail of the above provisions is self-explanatory, but the following specific comments should be made:

- it should be noted from proposed section 25A(3) that if a listed ecological community contains one or more listed flora and / or listed fauna, a separate authorisation to take those taxa will also be required; and
- as proposed section 25I(3) should make clear, the compensation provisions are largely based upon those that will be retained for listed flora [section 23F(7)].

Clause 18

Subclause (1)

This clause increases the relevant penalties in section 26(1) by a factor of 11.

Subclause (2)

Again by way of achieving a form of parity with the EPBC Act section 196, this subclause adds a potential two year period of imprisonment to any offence under the amended WCA where the offender is liable to a maximum penalty of 100 penalty units.

Clause 19

In adding proposed section 27CA, the effect of this clause is to bring in a suite of powers from the EP Act into the WCA, relating to prevention, restoration, remediation and recovery of costs.

Clause 20

This clause increases the relevant penalty in section 28(1)(h) by a factor of 11.

Clause 21

Clause 21 of the Bill introduces Schedule 1, incorporating ten clauses to that schedule. The schedule introduces a new regime for creating and maintaining the “threatened list.” This part of the Bill is another area in which relatively quick, urgent reform is the goal – in many ways this new regime is simpler than the EPBC Act equivalent (for example, in the absence of the full scope of “degrees of threat” like critically endangered, endangered etc.).

The Bill offers provisions that will, by way of overview:

- adopt the same basic criteria for the degree of threat [clause 4 of the schedule] but bring important new concepts into the listing decision, like the precautionary principle [clause 5] and the need to consider “relevant and detailed field survey evidence” [subclause 5(2)];
- allow the Minister or CEO to consult the existing (non-statutory – a position that this Bill does not seek to change) Threatened Species Scientific Committee [paragraph 5(2)(b) of the schedule]; and
- a process by which the public may nominate a taxon or ecological community for listing [clause 8 of the schedule] – a key feature of this process being the statutory deadlines within which the relevant evidence must be sought and decisions about listing must be made.

Part 3 – *Environmental Protection Act 1950* amended

Clause 22

Clause 22 notifies that Part 3 provides for amendments to the EP Act.

Clause 23

Clause 23 inserts s 51QA into the EP Act. This section has these key features:

- [s 51QA(2)] it confers a review jurisdiction to the SAT for situations where any person is dissatisfied with a decision to issue a clearing permit if the person alleges:
 - o the CEO wrongly considered the decision was not seriously at variance with the clearing principles; or
 - o the CEO acknowledged the decision was seriously at variance with the clearing principles but wrongly found there was a good reason for issuing the permit anyway; and

- [s 51QA(4)] the application for a fresh decision from the SAT must be submitted within 21 days of the publication of the relevant decision of the CEO, which is an identical period to the time within which an ‘appeal’ (it’s actually properly characterised as an internal review) against a clearing permit currently must be made to the Minister.

Clause 24

This Bill also takes the opportunity to make certain key amendments to the clearing principles that apply to the grant of all clearing permits under the EP Act. Proposed are three new clearing principles relating to:

- climate change refugia [clause 24(1)];

- clearing below 30% of the original extent of a particular ecological community [clause 24(3)]; and

- protection of areas significant for ecological connectivity [also in clause 24(3)].

The importance of two of the above notions is quite well-understood within various levels of Australian governments, but it should be noted that the second item in the above list is derived from the *National Objectives and Targets for Biodiversity Conservation 2001 – 2005*, which was signed by, among others, then Federal Liberal Environment Minister Robert Hill and then State Labor Environment Minister Judy Edwards.