

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**NATURE CONSERVATION (TRANSITIONAL PROVISIONS)
REGULATION 2015**

SL2015-26

Explanatory Statement

Presented by
Mr Simon Corbell MLA
Minister for the Environment

Outline

Terms

In this Explanatory Statement the following terms are used:

- *Act* means *Nature Conservation Act 2014*
- *Transitional regulation* means the proposed *Nature Conservation (Transitional Provisions) Regulation 2015* which is the subject of this explanatory statement
- *1980 Act* means the former *Nature Conservation Act 1980* repealed by the Act
- *Transitional list* means a list of threatened species or ecological communities to be made under section 63 or 69 of the Act derived from an existing list of species or ecological communities declared under the 1980 Act and carried over to the new Act in part through the operation of transitional sections 402, 403, 404 of the Act
- *Section []* is a reference to an existing section in the Act or 1980 Act
- *New section []* is a reference to a new section inserted into Chapter 20 of the Act as a result of the transitional regulation.

Background

The proposed transitional regulation modifies Chapter 20 of the Act. The modification is to clarify the effect of certain transitional provisions.

The Act came into effect on 11 June 2015. The Act replaced the former 1980 Act. The Act includes a number of transitional provisions to, among other things, permit the incorporation of existing declarations (lists) of threatened, endangered or vulnerable species under the 1980 Act to be carried across to the Act. Similar provision is made for ecological communities declared to be vulnerable under the 1980 Act. These lists carried over to the new Act are referred to in this explanatory statement as transitional lists. The relevant transitional provisions for the purposes of the transitional regulation are sections 402-404 of the Act. The details of these provisions is as follows.

Section 402 of the Act has the effect that a species declared to be an endangered species under the 1980 Act, section 38 (Declaration of species, community or process) is on the commencement day of the Act, taken to be eligible to be included in the endangered category on the threatened native species list under section 64 (4) (Threatened native species list—eligibility for categories) of the Act. In this case, the relevant declaration of endangered species is the *Nature Conservation (Species and Ecological Communities) Declaration 2015 (No 1)* DI2015-88.

Section 403 of the Act has the effect that a species declared to be a vulnerable species under section 38 of the 1980 Act is, on the commencement day of the Act, taken to be eligible to be included in the vulnerable category on the threatened native species list under section 64 (5) (Threatened native species list—eligibility for categories) of the Act. In this case, the relevant declaration of vulnerable species previously declared is also in the *Nature Conservation (Species and Ecological Communities) Declaration 2015 (No 1)*.

Section 404 of the Act provides that an ecological community declared to be an endangered ecological community under the 1980 Act, section 38 (Declaration of species, community or process) is on the commencement day of the Act, taken to be eligible to be

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included in the endangered category on the threatened ecological communities list under section 70 (2) (Threatened ecological communities list—eligibility for categories) of the Act. In this case, the relevant declaration of ecological communities is also in the *Nature Conservation (Species and Ecological Communities) Declaration 2015 (No 1)*.

Transitional regulation

Transitional sections 402-404 of the Act deem species or ecological communities in a declaration under the 1980 Act to be “eligible species” or “eligible communities” for the purpose of sections 63 and 69 respectively. This permits the Minister to make the relevant transitional lists under ss 63, 69 as threatened species/ecological communities list. The purpose of the transitional provisions is that the transitional lists constitute threatened native species lists or threatened ecological communities lists for the purposes of the Act as whole.

In preparing the transitional lists it became apparent that the achievement of this purpose is not beyond doubt because of an unintended break in the connection between relevant provisions and the definition of a “threatened species list” under section 62 of the Act.

Section 62 of the Act defines a “threatened species list” as a list notified under section 91 of the Act following the Minister’s consideration of recommendations by the Scientific Committee under section 87. The section 87 process clearly does not apply to the transitional list of threatened species and therefore section 91 does not apply. It is then arguable that the section 62 definition does not apply to this transitional list as intended.

To cover the above gap, the transitional regulation modifies chapter 20 of the Act by inserting new section 404A (refer to clause 5 of the transitional regulation). New section 404A deems a list made under section 63 of the Act to be a list notified under section 91 of the Act. This will ensure that the list meets the terms of the definition of a “threatened species list” under section 62 of the Act. Section 62 of the Act defines a threatened species list as a list notified under section 91.

Similar provision has been made in this transitional regulation for the threatened ecological communities transitional list in connection with sections 68, 69 and 91 of the Act.

As a result of this regulation the proposed transitional lists will be able to be made under a combination of the existing transitional provisions of the Act and new section 404A inserted by the transitional regulation.

Future processes

New section 404A is about the transitional list for threatened species only. This is because only species that are eligible are able to be listed under section 63 and the only species eligible are those deemed to be eligible under sections 402, 403 of the Act, ie the species on the transitional list carried over from the 1980 Act.

The possible eligibility of additional species in the future will be assessed through the standard process for listing eligible species/ecological communities. Specifically, part 4.4 of chapter 4 of the Act concerning nomination of items for possible inclusion in relevant lists,

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recommendations of the Scientific Committee, Minister assessment and decision on those recommendations and consequent notification under section 91 will apply to subsequent amendments to the transitional lists.

The transitional regulation will expire when chapter 20 of the Act expires (s 415 of the Act) which is two years after the commencement of the Act, that is, 11 June 2017.

Human rights analysis

This is a transitional regulation to clarify the effect of existing transitional provisions in the Act consistent with the overall transitional framework in the Act. There is no change in policy. Given the limited, transitional nature of the regulation it is considered that there are no significant human rights implications.

Financial implications

There are no financial implications with this measure.

Regulatory Impact Statement

A regulatory impact statement (RIS) is not required for the proposed transitional regulation because it is of a transitional character and as such a RIS is not required consistent with section 36(1)(f) of the Legislation Act.

Detailed explanation of clauses in the transitional regulation

Clause 1 – Name of regulation

Clause 1 names the instrument as the *Nature Conservation (Transitional Provisions) Regulation 2015* (transitional regulation).

Clause 2 – Commencement

Clause 2 states that the transitional regulation commences on the day after its notification.

Clause 3 – Dictionary

Clause 3 refers to the Dictionary at the end of the transitional regulation.

Clause 4 – Notes

Clause 4 inserts a provision to the effect that a note is explanatory only and not a part of the transitional regulation consistent with s127 of the Legislation Act.

Clause 5 – Schedule 1, section 1.14 (3), new definitions

Clause 5 is the main provision of the transitional regulation which modifies Chapter 20 (Transitional) of the Act. Clause 5 inserts new section 404A into Chapter 20.

New section 404A(1)

New section 404A(1) has the effect that a list made by the Minister under section 63 of the Act is a “threatened species list” for the purposes of the Act as a whole. New section 404A(1) deems a list made under section 63 of the Act to be a list notified under section 91 (2) (a). Section 62 of the Act defines a threatened species list as a list notified under section 91. A list made under section 63 is therefore a threatened species list consistent with the definition of such a list under section 62.

Section 63 of the Act permits the making of lists of species that are “eligible” for listing as threatened species. The criteria for eligibility are in section 64 of the Act. New section 404A(1) will in effect apply to transitional lists made under section 63 on the basis that the matters listed are deemed “eligible” for the purposes of section 64 as a result of transitional sections 402 and 403 of the Act.

New section 404A(2)

New section 404A(2) has a similar effect to new section 404A(1) except that it applies to a list of threatened ecological communities not threatened species. New section 404A(2) has the effect that a list made by the Minister under section 69 is a “threatened ecological communities list” for the purposes of the Act as a whole. New section 404A(2) deems a list made under section 69 to be a list notified under section 91 (2) (b) of the Act. Section 68 of the Act defines a threatened ecological communities list as a list notified under section 91. A list made under section 69 is therefore a threatened ecological communities list consistent with the definition of such a list under section 68.

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Section 69 of the Act permits the making of lists of species that are “eligible” for listing as threatened species. The criteria for eligibility are in section 70 of the Act. New section 404A(1) will in effect apply to transitional lists made under section 69 on the basis that the matters listed are deemed “eligible” for the purposes of section 70 as a result of transitional section 404 of the Act.