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

NATURE CONSERVATION AMENDMENT BILL 2016

Explanatory Statement

Presented by
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Explanatory Statement

Outline

This explanatory statement relates to the *Nature Conservation Amendment Bill 2016* as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Amendment Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Amendment Bill. It is not, and is not meant to be, a comprehensive description of the Bill. 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.

In this Explanatory Statement the following terms are used:

- *the Act* means *Nature Conservation Act 2014*;
- *IUCN* means *International Union for the Conservation of Nature*;
- *IUCN Species Guidelines* means *IUCN Red List Categories and Criteria*;
- *IUCN Ecological Communities Guidelines* means *IUCN Guidelines for the Application of IUCN Red List of Ecosystems Categories and Criteria*;
- *MOU CAM* means *Intergovernmental Memorandum of Understanding: Agreement on a Common Assessment Method for Listing of Threatened Species and Threatened Ecological Communities*;

Background

The Nature Conservation Act 2014 (the Act) commenced on 11 June 2015. The main object of the Act (s6) is to protect, conserve and enhance the biodiversity of the ACT. In relation to native species this is to be achieved by protecting, conserving, enhancing, restoring and improving their habitats. The objects of the Act are progressed through the listing of species and ecological communities that meet specific criteria as threatened as it assists decision makers to put in place adequate protections. This includes the development of conservation advices and action plans. The nature of any plans and advices and resulting management and monitoring may be determined, amongst other qualifiers, by the listing category in which the species or ecological community is assigned. Once a species has been listed on the threatened species list it has special protection status (SPS) which affords additional protection in terms of trade restrictions, licensing, offences and penalties.

Overview of provisions

Worldwide, many species of wildlife, both plants and animals, are in danger of extinction. Such losses of biodiversity are largely the direct or indirect result of human activities. This problem is being addressed globally and on a regional basis.

At an international level, organisations such as the International Union for the Conservation of Nature (IUCN) and the governments of numerous countries are working to document, assess and control threats to wildlife. Australia is party to many international agreements (e.g. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity) aimed at achieving a global approach to conservation. Australia has also developed national strategies for the protection of our unique flora and fauna.

All states and territories provide legislative protection for the wildlife with their respective jurisdiction. Currently state, territory and Australian governments all use slightly different criteria and categories for assessing and listing threatened matters. In April 2014, Environment Ministers agreed to the National Review of Environmental Regulation to identify unworkable, contradictory or incompatible regulation and identify opportunities to harmonise and simplify regulations. The assessment and listing of threatened matters (species and ecological communities) was identified as an area for possible reform. Most jurisdictions have agreed, or are in the process of agreeing, to an Intergovernmental Memorandum of Understanding: Agreement on a Common Assessment Method for Listing of Threatened Species and Threatened Ecological Communities (MOU–CAM) that sets out the reform measures and provides an implementation framework.

The main reforms to harmonise and simplify regulation, and included in this Bill, are:

- All jurisdictions adopting a common assessment method to assess nationally threatened matters based on the IUCN Categories and Criteria which may also be used to assess regionally threatened matters if chosen by jurisdictions.
- Mutual recognition of other jurisdictions assessments and listing decisions for nationally threatened matters, supported by enhanced information exchange and sharing between jurisdictions.
- A single operational list of nationally threatened/regionally threatened matters, whereby:
 - national and regional lists are mutually exclusive; and
 - the same species or ecological community on different jurisdictions' lists must have the same threat category.
- The common assessment method would be applied in a hierarchical way, so that the conservation status of a species or ecological community is first assessed at a national scale. Species and ecological communities that are assessed as nationally threatened would be listed in the same national threat category on the statutory lists of all relevant jurisdictions. If a species or ecological community is not eligible for listing as nationally threatened, a state or territory may elect to assess that species or ecological community and list it in a category of threat appropriate to its status in that jurisdiction.

- Species and ecological communities that are currently listed as threatened would be transitioned to an agreed threat category on the ACT threatened species list (either national or regional category).

The intent of the reform is that all jurisdictions use the Common Assessment Methodology, and allow for mutual recognition of assessments. However, even if other jurisdictions did not enter the agreement, there would be benefit to both the Commonwealth and ACT to align their processes and lists.

The ACT Scientific Committee (formerly the Flora and Fauna Committee) has the primary role to assess native species and ecological communities that are threatened with extinction, as well as processes that threaten the survival of native species and communities in the ACT region. The Scientific Committee will be responsible for assessment of ACT endemic species and, subject to agreements with NSW, species that are endemic to the ACT region. The Scientific Committee may also undertake assessments of species that are regionally threatened or regionally conservation dependent. Other assessments (such as species that occur across multiple jurisdictions) are primarily the responsibility of the Commonwealth, unless otherwise agreed by the jurisdictions.

The IUCN has developed the IUCN Red List Categories and Criteria (and associated guidelines). The IUCN categories and criteria for species have been developed, trialled and adjusted iteratively over 50 years. They are an easily and widely understood system for classifying species at high risk of global extinction. The general aim of the system is to provide an explicit, objective framework for the classification of the broadest range of species according to their extinction risk. The IUCN Category and Criteria are applied in the ACT through the NC Act and relevant statutory instruments.

Scrutiny of Bills Committee Principles

The following addresses the Scrutiny of Bills Committee principles.

(a) unduly trespass on personal rights and liberties;

No rights, liberties or obligations are directly impacted by the proposed changes to the legislation. There are flow on effects from the listing of threatened species and ecological communities which do require people to avoid harm to species and also includes licensing requirements. Also there are a number of offences, including under penalty of imprisonment which may engage rights. However, the Act already contains those provisions and the Amendment Bill does not alter them.

(b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

No rights, liberties or obligations are directly impacted by the proposed changes to the legislation. There are flow on effects from the listing of threatened species and ecological communities which, for example, require people to apply for licenses to undertake a range of actions about threatened species. However, the Act already contains those provisions which are well defined and the Amendment Bill does not alter them.

(c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

The clauses in this Bill do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions. The action of assessing or listing a species or ecological community does not have a personal impact. There are flow on impacts, such as for development approvals and licensing, however these are subject to review under the Nature Conservation Act 2014 or the Planning and Development Act 2007 and this Bill does not alter them.

(d) inappropriately delegate legislative powers; or

The Bill provides for transitional arrangements for this reform to ensure that there is a smooth transition from the existing arrangements for the listing of threatened species and the associated processes for developing conservation advices and action plans.

Section 423 enables the Executive to make regulations dealing with transitional matters. The section contains 2 different regulation making powers.

Section 423 (1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act's purpose.

Section 423 (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify chapter 21 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 423 (3) gives a regulation under section 423 (2) full effect according to its terms. A provision of chapter 21 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Also, any modification by regulation of chapter 21 of the Act has no ongoing effect after the expiry of that chapter.

The Bill does not otherwise delegate any legislative power to any other person or body.

(e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;

The Bill does not insufficiently subject the exercise of legislative power to parliamentary scrutiny. The clauses make changes to processes for assessment but does not change the level of parliamentary scrutiny. Decisions that were previously notifiable remain notifiable. Decisions that were subject to disallowance remain subject to disallowance.

Human rights impacts

The Amendment Bill does not limit any person's human rights. The measures included in the Bill provide processes for listing and management of threatened matters. It should be noted that flow on effects from the listing of threatened species and ecological communities do occur. This includes licensing requirements and in a number of offences, including under penalty of imprisonment which may engage human rights. However, the Act already contains those provisions and the Amendment Bill does not alter them.

The Bill engages and promotes the right to take part in public life (Human Rights Act 2004, s 17,) by increasing the ACT community's level of consultation on threatened species listings.

Costs and benefits

The amendments are not likely to impose appreciable costs on the community, or part of the community. The Amendments do not operate to the disadvantage of anyone by adversely affecting the person's rights, or imposing liabilities on the person.

The adoption of a common assessment method would ensure consistency of process and outcomes for listing assessments. It would also provide greater certainty to the community that statutory protection for threatened matters is assigned efficiently and appropriately across Australia.

A listing assessment undertaken by one jurisdiction in accordance using the common method could be adopted by any other state or territory or the Australian government, removing the need to re-assess threatened species and ecological communities in every jurisdiction. This would speed up listing processes and reduce the misalignment of listed matters that exists under the current arrangements.

A common assessment method and mutual recognition of assessments will streamline and improve efficiencies in government listing processes. Consistency across jurisdictions in the listing of threatened matters (to be considered in environmental impacts assessments) will simplify regulation on developers because only one list for the ACT will need to be consulted.

There are no significant financial implications with this measure. Costs of assessments are likely to remain the same for the ACT over the longer term. It is not expected that the numbers of species or ecological communities requiring assessment will increase significantly. Reassessments to ensure that the current status is appropriate will continue, as needed.

There are some costs to implementing the reforms to deal with legacy species and ecological communities (those species and communities that are already listed) however, transitional arrangements will minimise these costs and any residual costs will be absorbed from within existing budgets. The benefits of the reform largely relate to having consistent threat categories and assessments. This makes the application of Environmental Impact Assessment, Environmental Offsets and licensing less complex, and allows for recovery and action planning to be better aligned in the future.

Provisions in detail

Clause 1. Name of Act

This clause names the Act.

Clause 2. Commencement

This clause provides for the commencement of the Act. The Act will commence on the day after its notification day.

Clause 3. Legislation amended

This clause indicates that this Act amends the *Nature Conservation Act 2014*.

Clause 4. What is a species? New section 15 (1) (b) (ia)

This clause extends the definition of a species to a variety. A variety is a sub specific taxonomic rank applied to a plant taxon in accordance with conventions in the International Code of Botanical Nomenclature and accepted as a name by the recognised Australian Herbariums such as the Australian National Herbarium.

Clause 5. What is a native species? Section 16 (2)

This clause adds some additional definitions that are needed for any listing of Conservation Dependent. Conservation Dependent is a category currently used for marine fish species and the definitions have been included for consistency with the *Environment Protection and Biodiversity Conservation Act 1999* (Cwth) (EPBC Act).

Clause 6. Sections 63 and 64

This clause provides for the restructuring of the threatened species list into nationally threatened categories and regionally threatened categories. Nationally threatened species are those that are currently listed on the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) that occur in the ACT. The majority of the species on the current threatened species list would be placed in the nationally threatened categories of the list, subject to some level of assessment to make sure they are placed in the appropriate category.

The national categories are primarily follow the IUCN categorisation and are:

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable;
- conservation dependent.

The 'conservation dependent' category is not an IUCN category. It is however used by the Commonwealth under the EPBC Act and has been included here for consistency.

The threatened species list may also contain regional categories. These categories include:

- regionally threatened;
- regionally conservation dependent;
- provisional.

The 'regionally threatened' category is included to provide for the listing of species that are declining more rapidly in the ACT than they are nationally. This recognises that the ACT has a responsibility to reduce impacts on species to stop their decline in our region as well as nationally. This category would use IUCN categories applied at the regional scale. A small number of species currently on the NC Act list would be included under this category.

The 'regionally conservation dependent' replaces the current category of 'conservation dependent' under the NC Act. It has been renamed as 'regionally conservation dependent' to avoid confusion with the national category of conservation dependent which applies to 'fish'. This category is needed to give adequate protection to species that are reintroduced to the ACT, that are listed as extinct under the EPBC Act (as a mainland population). This reflects that some species are now extinct on the mainland but not listed as a threatened species in Tasmania where they may be relatively abundant.

'Provisional' is also a current category of the NC Act, which provides for an emergency listing of a species while assessment is being undertaken. It is intended to give adequate protection to a species that has shown a rapid decline.

Section 64 is amended to indicate the eligibility criteria for each category. Section 64A provides eligibility criteria for regional categories.

Clause 7. Threatened ecological communities list—categories New section 69 (b) (ia)

This clause adds the category of 'collapsed' to the ecological communities categories. The IUCN now uses the category of collapsed ecosystems and this category has been included for consistency. The category of collapsed ecological community is analogous to an 'extinct' species.

Clause 8. Threatened ecological communities list—eligibility for categories New section 70 (1A)

This clause provides the eligibility criteria for the new category of 'collapsed' communities.

Clause 9. Definitions—pt 4.3 Section 72A, definition of *listing advice*

The Commonwealth requires that a conservation advice be prepared for all listings at the time their Minister makes a decision about listing. Currently the ACT provisions provided for a listing advice to be prepared to inform the Ministers decision about the listing and a conservation advice to be prepared 3 months after the listing. To remove this inconsistency, the provisions at clause 30 provide for a combined listing and conservation advice. Therefore the definition at this place is redundant. This clause removes the definition of *listing advice*.

Clause 10. Section 79G

This clause removes section 79G. Section 79G is redundant because it outlined processes for consideration of a listing advice. Listing advice has been combined with a conservation advice.

Clause 11. Minister to decide whether to include item in list Section 79H

This clause updates the reference from listing advice to conservation advice

Clause 12. Section 79H (3) (b), note

This clause updates the note to cross reference to the section about conservation advice.

Clause 13. New division 4.4.1 heading

This clause adds a new heading before section 80, to provide for new definitions.

Clause 14. Definitions—pt 4.4 Section 80, new definitions

This clause adds new definitions needed to apply a common assessment method to the assessment of threatened species. The common assessment method means the methodology agreed between the Commonwealth; and the Territory; and a participating State.

Clause 15. Section 80, definition of *listing advice*

This clause removes the definition of listing advice.

Clause 16. Section 80, new definitions

This clause adds new definitions about the type of advice that the Minister can take into account when listing a species. This is needed so that the Minister can accept the listing assessment of the Commonwealth, or another jurisdiction as well as that provided by the Scientific Committee. Note, Clause 31 provides that the Minister must still consult with the Scientific Committee.

Clause 17. New division 4.4.2 heading

This clause adds a new heading before section 81, to provide for new processes about nominations.

Clause 18. Nominations—scientific committee may reject nomination New section 82 (1) (c)

This clause allows the Scientific Committee to reject a nomination if it is also being assessed by another jurisdiction. One of the aims of the reform is to reduce duplication in the assessment of species. This provision assists that aim.

Clause 19. Nominations—public consultation Section 84 (1) to (3)

Other jurisdictions, including the Commonwealth, undertake mandatory consultation on nominations. The primary aim of the consultation is to draw out additional information that is known about the species and its likely conservation status. This provision aligns the ACT process with that of other jurisdictions for species assessed at a national level. Species listed in regional categories do not require mandatory consultation. However, as species would normally be assessed at the national scale first, consultation would likely have been undertaken.

Clause 20. Nominations—scientific committee to carry out *listing assessment* Section 85 (3), note

This clause updates references to indicate that the Scientific Committee may undertake an assessment for a national category as well as a regional category of threatened species.

Clause 21. Section 86

This clause removes section 86. Section 86 is redundant because it outlined processes for preparation of a listing advice. Listing advice has been combined with a conservation advice.

Clause 22. Minister to decide whether to include, transfer or omit item Section 87 (1)

This clause updates reference to a listing advice to a conservation advice

Clause 23. Section 87 (1), new note

This clause inserts a note that the Minister may include certain nationally threatened items in a list without a nomination to reflect that other jurisdictions may have done the assessment.

Clause 24. Section 87 (2), note

This clause updates reference in a note from a listing advice to a conservation advice.

Clause 25. Minister’s decision—include item Section 88 (1), note

This clause updates a note to cross reference to the regional category of threatened species.

Clause 26. Section 88 (2) (a)

This clause updates reference to a listing advice to a conservation advice

Clause 27. Minister’s decision—transfer item Section 89 (1), note 1

This clause updates a note to cross references to the regional category of threatened species.

Clause 28. Section 89 (2) (a)

This clause updates reference to a listing advice to a conservation advice

Clause 29. Minister’s decision—omit item Section 90 (1), note

This clause updates a note to cross reference to the regional category of threatened species.

Clause 30. Section 90 (2) (a)

This clause updates the reference from listing advice to conservation advice

Clause 31. New division 4.4.3 and 4.4.4 and division 4.4.5 heading

This clause inserts new division 4.4.3 which relates to revised processes for including and transferring nationally threatened species and ecological communities to reflect that the Minister may do this based on a listing by the Commonwealth or after considering an assessment by another jurisdiction. In this case, where the Scientific Committee does not do the assessment, the Minister must still consult with the Scientific Committee and have regard to a conservation advice (section 90A).

The clause inserts new division 4.4.4 which provides that the Minister may make guidelines about information to be included in a conservation advice; and requirements for the preparation of a conservation advice (section 90B). Section 90 C provides that the Minister must ensure that there is a conservation advice for the species.

Section 90D provides that the Scientific Committee is responsible for preparing the Conservation Advice except where the Minister has adopted another conservation advice from another jurisdiction (section 90E).

The clause provides that a conservation advice may be reviewed from time to time (section 90F).

Clause 32. Final version of list and notification Section 91 (1)

This clause updates references to include the new section 90A.

Clause 33. Section 91 (2) (d)

This clause removes references to a listing advice which has been replaced by a conservation advice.

Clause 34. Section 92

This clause omits section 92 because processes for preparing conservation advices are now provided for in Division 4.4.4.

Clause 35. Section 93

This clause includes a new Division 4.4.6 about minor amendments. This is a structural change to the Act; the text of the Section 93 has not been amended.

Clause 36. Minor amendment—including similar species Section 95 (2)

This clause removes references to a listing advice which has been replaced by a conservation advice.

Clause 37. Minor amendment—omitting similar species Section 96 (2)

This clause removes references to a listing advice which has been replaced by a conservation advice.

Clause 38. Definitions—Act Section 98, definition of *relevant species*

This clause updates the definition of relevant species to include the new categories for the purpose of deciding whether an action plan is needed.

Clause 39. New section 100A

This clause provides for a Ministerial decision on whether a species needs to have an action plan prepared. Species that have occurred in the ACT in the past, but have not been seen in the recent past, or that occur infrequently are likely to be included in the national categories of the list. The list may also include species that are nationally threatened but relatively abundant in the ACT. To ensure that action plans are directed to the species most at risk in the ACT, the clause inserts new provisions to allow the Minister, based on the advice of the Scientific Committee to determine whether an action plan is needed. The Minister needs to consider whether not having a plan will increase the risk of extinction of the species.

Clause 40. Draft action plan—conservator to prepare Section 101 (2)

This clause provides that the Conservator need not prepare an action plan where the Minister has decided a plan is not needed or where the species is the subject of a native species conservation plan. Other provisions such as adopting or incorporating a plan from another jurisdiction still apply.

Clause 41. Section 101 (2) (b), note

This clause omits s92 and substitutes s90C (1) which relates to ensuring there is a conservation advice for each listed species and ecological communities.

Clause 42. Action plan—monitoring and review Section 108 (7)

This clause provides a new process that, similar to processes for making a recommendation about whether an action plan for the species is needed, that an action plan is no longer needed.

Clause 43. New section 108A

This clause provides a new process for making a decision about whether an action plan is no longer needed.

Clause 44. Draft native species conservation plan—conservator to prepare Section 117, note 2

This clause updates a note about native species conservation plans relating to conservation dependent species to recognise the new category of regionally conservation dependent and revised eligibility criteria.

Clause 45. Conservator's directions Section 331 (3) (a), note

This clause updates a reference to reflect the new processes for conservation advice at section 90C (1).

Clause 46. New chapter 21

This Clause provides for transitional arrangements for this reform to ensure that there is a smooth transition from the existing arrangements for the listing of threatened species and the associated processes for developing conservation advices and action plans.

In particular there are provisions to ensure that species in the current list remain protected (s. 421). It also provides that a conservation advice need not be prepared for species already on the list until they are transferred to a new category on the list (s 422). This will assist in a smooth transition.

Section 423 enables the Executive to make regulations dealing with transitional matters. The section contains 2 different regulation making powers.

Section 423 (1) enables the making of a regulation to deal with any transitional matter that arises as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, be strictly ancillary to the operation of the Act and not widen the Act's purpose.

Section 423 (2) enables the making of a regulation that modifies the Act. A regulation under this section may only modify chapter 21 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Section 423 (3) gives a regulation under section 423 (2) full effect according to its terms. A provision of chapter 21 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting future enactments of the Legislative Assembly. Also, any modification by regulation of chapter 21 of the Act has no ongoing effect after the expiry of that chapter.

S 424 Expiry—provides that the transitional arrangements expire 2 years after the day the Act commences.

Clause 47. Dictionary, new dot point

This clause updates a reference to the Legislation Act definition of 'state'.

Clause 48 through to Clause 55 [Dictionary]

This clause updates definitions to make them consistent with the provisions included in this Bill.

Clause 56 Further amendments, mentions of on the threatened native species list

This clause updates references to make them consistent with the provisions included in this Bill.

Schedule 1 Consequential amendments

These provisions update Schedule 4 of the *Planning and Development Act 2007* relating to Environmental Impact Assessments to update the requirements to take account of the new categories created through the restructure of the current threatened species list. It also updates the definitions used for the purpose of this Schedule.