

# Threatened Species Legislation Amendment Act 2004 No 88

[2004-88]



New South Wales

## Status Information

### Currency of version

Repealed version for 20 June 2006 to 3 December 2006 (accessed 16 August 2024 at 21:26)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Repeal**

The Act was repealed by Sch 4 to the [Statute Law \(Miscellaneous Provisions\) Act \(No 2\) 2006 No 120](#) with effect from 4.12.2006.

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Threatened Species Legislation Amendment Act 2004 No 88



New South Wales

An Act to amend the *Threatened Species Conservation Act 1995* and other threatened species legislation to make provision for critically endangered species and ecological communities and to make further provision for conservation of threatened species, threatened species recovery and threat abatement processes and integration with natural resource management and land use planning; and for other purposes.

## 1 Name of Act

This Act is the *Threatened Species Legislation Amendment Act 2004*.

## 2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 3.1 [1], [8] and [10]-[17] and 3.2 commence on the date of assent.

## 3 Amendments

The Acts and Regulation specified in the Schedules to this Act are amended as set out in those Schedules.

## Schedule 1 (Repealed)

## Schedule 2 Amendment of *Fisheries Management Act 1994 No 38*

(Section 3)

### [1] (Repealed)

### [2] Section 220B (1), definition of “threatened species”

Omit the definition. Insert instead:

***threatened species*** means a species specified in Part 1 (Endangered species) or 4 (Species presumed extinct) of Schedule 4, Part 1 (Critically endangered species) of

Schedule 4A or Part 1 (Vulnerable species) of Schedule 5.

**[3] Section 220B (1), definition of “threatened species, populations and ecological communities”**

Insert “, 4A” after “Schedules 4”.

**[4] Section 220B (1), definition of “threatened species, populations and ecological communities”**

Omit “either of those Schedules”. Insert instead “any of those Schedules”.

**[5] Section 220B (1), definition of “vulnerable species”**

Insert “Part 1 of” before “Schedule 5”.

**[6] Section 220C Lists**

Omit section 220C (5). Insert instead:

(4A) **Critically endangered species** Part 1 of Schedule 4A contains a list of critically endangered species for the purposes of this Part.

(4B) **Critically endangered ecological communities** Part 2 of Schedule 4A contains a list of critically endangered ecological communities for the purposes of this Part.

(5) **Vulnerable species** Part 1 of Schedule 5 contains a list of vulnerable species for the purposes of this Part.

(5A) **Vulnerable ecological communities** Part 2 of Schedule 5 contains a list of vulnerable ecological communities for the purposes of this Part.

**[7] Section 220D Amendment of lists**

Omit “Minister” wherever occurring in section 220D (1) and (2).

Insert instead “Fisheries Scientific Committee”.

**[8] Section 220D (1) and (2)**

Insert “4A,” after “Schedule 4,” wherever occurring.

**[9] Section 220D (3)**

Omit the subsection. Insert instead:

(3) A new species, population, ecological community or threatening process may not be listed, nor any such listing changed or omitted, unless the requirements of Subdivision 2 have been complied with.

**[10] Section 220E**

Omit the section. Insert instead:

**220E Identification of nationally threatened species and ecological communities**

- (1) A species or ecological community listed in Schedule 4, 4A or 5 that is also a listed threatened species or listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth is shown in Schedule 4, 4A or 5 to this Act marked with an asterisk to show its national status.
- (2) As soon as practicable after a species or ecological community that is or was indigenous to New South Wales becomes a listed threatened species or listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, the Fisheries Scientific Committee is to consider whether, in accordance with this Division, the species or ecological community should be listed in Schedule 4, 4A or 5 to this Act.
- (3) If a species or ecological community ceases to be a listed threatened species or a listed threatened ecological community under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth:
  - (a) Schedule 4, 4A or 5 to this Act may be amended to omit the asterisk showing its national status, and
  - (b) the Fisheries Scientific Committee is to consider, in accordance with this Division, whether the species or ecological community should be omitted from Schedule 4, 4A or 5 to this Act.

**[11] Sections 220F-220FC**

Omit section 220F. Insert instead:

**220F Eligibility for listing of species**

- (1) A species is eligible to be listed as a ***species presumed extinct*** at a particular time if, in the opinion of the Fisheries Scientific Committee, it has not been recorded in its known or expected habitat in New South Wales, despite targeted surveys, over a time frame appropriate, in the opinion of the Fisheries Scientific Committee, to its life cycle and form.
- (2) A species is eligible to be listed as a ***critically endangered species*** if, in the opinion of the Fisheries Scientific Committee, it is facing an extremely high risk

of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.

- (3) A species is eligible to be listed as an **endangered species** if, in the opinion of the Fisheries Scientific Committee:
  - (a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and
  - (b) it is not eligible to be listed as a critically endangered species.
- (4) A species is eligible to be listed as a **vulnerable species** if, in the opinion of the Fisheries Scientific Committee:
  - (a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and
  - (b) it is not eligible to be listed as an endangered or critically endangered species.

#### **220FA Listing of populations**

- (1) A population is eligible to be listed as an **endangered population** if, in the opinion of the Fisheries Scientific Committee, it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations.
- (2) A population is not eligible to be listed as an endangered population if it is a population of a species already listed in Schedule 4 or 4A.

#### **220FB Listing of ecological communities**

- (1) An ecological community is eligible to be listed as a **critically endangered ecological community** if, in the opinion of the Fisheries Scientific Committee, it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations.
- (2) An ecological community is eligible to be listed as an **endangered ecological community** if, in the opinion of the Fisheries Scientific Committee:
  - (a) it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations, and
  - (b) it is not eligible to be listed as a critically endangered ecological community.

- (3) An ecological community is eligible to be listed as a **vulnerable ecological community** if, in the opinion of the Fisheries Scientific Committee:
- (a) it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and
  - (b) it is not eligible to be listed as an endangered or critically endangered ecological community.

**220FC Threatening processes eligible for listing as key threatening processes**

- (1) A threatening process is eligible to be listed as a **key threatening process** if, in the opinion of the Fisheries Scientific Committee:
- (a) it adversely affects threatened species, populations or ecological communities, or
  - (b) it could cause species, populations or ecological communities that are not threatened to become threatened.
- (2) The regulations may prescribe criteria for the determination of matters under this section.

**220FD Regulations prescribing criteria under this Part**

A regulation that prescribes criteria for the purposes of section 220F, 220FA, 220FB or 220FC is not to be made unless the Minister certifies in writing that:

- (a) the criteria are based on scientific principles only, and
- (b) any criteria for listing under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth were given due consideration before the regulation was made.

**[12] Section 220G**

Omit the section. Insert instead:

**220G Fisheries Scientific Committee responsible for lists**

The Fisheries Scientific Committee is responsible for determining whether any species, populations, ecological communities or threatening processes should be listed in Schedule 4, 4A, 5 or 6.

**[13] Section 220H**

Omit the section. Insert instead:

## **220H Who may initiate action for listing**

- (1) The Fisheries Scientific Committee may make a determination for the purposes of this Subdivision on its own initiative.
- (2) The Fisheries Scientific Committee may also make a determination:
  - (a) following a request by the Minister or the NRC, or
  - (b) on a nomination, made in accordance with this Division, of any other person.
- (3) A proposal that involves the alteration of the listing status of a species or ecological community (by moving the description of the species or ecological community from one Schedule to another or from one Part of a Schedule to another Part of the Schedule) may be dealt with under this Subdivision as a composite proposal, whereby all aspects of the proposal are dealt with together.

### **[14] Section 220I How nominations made**

Insert “, 4A” after “Schedule 4” in section 220I (1).

### **[15], [16] (Repealed)**

### **[17] Section 220J (3) (a)**

Omit “recommend”. Insert instead “make”.

### **[18] (Repealed)**

### **[19] Section 220K Notification and consultation with respect to proposed determination of Fisheries Scientific Committee**

Omit “recommendation” wherever occurring.

Insert instead “determination”.

### **[20] Section 220K**

Insert “, 4A” after “Schedule 4”.

### **[21] Sections 220L-220MA**

Omit sections 220L and 220M. Insert instead:

## **220L Fisheries Scientific Committee’s final determination**

- (1) The Fisheries Scientific Committee must either accept or reject a proposal for the amendment of Schedule 4, 4A, 5 or 6, and must give reasons for the



determination.

- (2) The reasons for a determination are to include reference to such of the criteria prescribed by the regulations under sections 220F–220FC as may be relevant to the determination.
- (3) In a case involving a nomination, the Fisheries Scientific Committee must make a final determination within 6 months after the end of the period allowed for public comment on the proposed determination of the nomination under section 220K (as provided under section 284).
- (4) Before making a final determination the Fisheries Scientific Committee must give the Minister notice in writing of the proposed final determination. The Minister then has 2 months to decide whether to refer the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M.
- (5) The Fisheries Scientific Committee is not to proceed to make the proposed final determination unless:
  - (a) the Minister has notified the Fisheries Scientific Committee that the Minister has decided not to refer the proposed determination back to the Fisheries Scientific Committee for further consideration, or
  - (b) the Minister has not referred the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M within 2 months after the Minister was given notice of the proposed final determination, or
  - (c) if the Minister has referred the proposed final determination back to the Fisheries Scientific Committee for further consideration under section 220M within that 2 months, the Fisheries Scientific Committee has decided to proceed with the final determination following that further consideration.
- (6) The Minister may at the request of the Fisheries Scientific Committee extend and further extend the period of 6 months under subsection (3), to a maximum period of 2 years.
- (7) Failure to make a final determination within the period required by this section or to give notice to the Minister of a proposed final determination within the period required by this section does not affect the validity of the determination.

#### **220M Minister's response to proposed final determination**

- (1) Within 2 months after receiving notice from the Fisheries Scientific Committee of a proposed final determination, the Minister may:

- (a) notify the Fisheries Scientific Committee that the Minister has decided not to refer the proposed determination back to the Fisheries Scientific Committee for further consideration, or
  - (b) refer the proposed final determination back to the Fisheries Scientific Committee for further consideration.
- (2) The Minister may only refer a matter back to the Fisheries Scientific Committee for reasons of a scientific nature provided to the Fisheries Scientific Committee. In the case of a nomination, the Fisheries Scientific Committee is to notify the person who made the nomination that the matter has been referred back to the Fisheries Scientific Committee and of the Minister's reasons for doing so.
- (3) If a proposed final determination is referred back to the Fisheries Scientific Committee for further consideration:
  - (a) the Fisheries Scientific Committee may, after further considering it, decide to proceed with the final determination, to change the final determination or not to proceed with the final determination, and
  - (b) the Fisheries Scientific Committee is to make that decision within 3 months, and
  - (c) the Minister cannot refer the matter back to the Fisheries Scientific Committee again after it has made that decision.
- (4) Failure to make a decision within the period required by this section does not affect the validity of the decision.

#### **220MA Publication of final determination**

- (1) On making a final determination, the Fisheries Scientific Committee must, as soon as practicable:
  - (a) make an order under section 220D giving effect to the determination, and
  - (b) in a case involving a nomination, notify the person who made the nomination of the determination, and
  - (c) notify the Minister, the NRC and the Director-General of the determination, and
  - (d) publish notice of the determination in a newspaper circulating generally throughout the State and, if the determination is likely to affect a particular area or areas (other than the State as a whole), in a newspaper circulating generally in that area or areas, and
  - (e) publish notice of the making of the determination in the Gazette.

- (2) The notice must specify the manner in which members of the public may obtain a copy of the determination and the reasons for it.
- (3) The reasons for a final determination are to include reference to such of the criteria prescribed by the regulations under sections 220F–220FC as may be relevant to the determination.
- (4) Copies of the final determination and the reasons for it are to be made available to members of the public (free of charge) as follows:
  - (a) by publication on the internet site of the Department,
  - (b) in response to a request made by contacting an office of the Department in a manner specified in the notice of the determination,
  - (c) in response to a request made in person at an office of the Department at an address specified in the notice of the determination.
- (5) The validity of a final determination cannot be questioned in any legal proceedings except those commenced in a court by any person within 3 months of the date of publication in the Gazette of notice of the making of the final determination.

**[22] Section 220N Provisional listing**

Omit section 220N (2). Insert instead:

- (2) The Fisheries Scientific Committee may make a determination for the provisional listing of any such endangered species without complying with sections 220K, 220L (3)–(6) and 220M. The other provisions of this Subdivision apply to and in respect of any such determination.
- (2A) The Fisheries Scientific Committee must make a determination about a nomination within 6 months after it is made or, if additional information has been requested, after that information has been provided or the period specified for its provision has expired. Failure to make a determination within that period does not affect the validity of the determination.

**[23] Section 220NA**

Insert after section 220N:

**220NA Lists to be kept under review**

- (1) The Fisheries Scientific Committee must keep the lists in Schedules 4, 4A, 5 and 6 under review and must, at least every 2 years, determine whether any

changes to the lists are necessary.

- (2) The NRC or the Minister may give advice or make recommendations to the Fisheries Scientific Committee concerning priorities for the review of the lists in Schedules 4, 4A, 5 and 6 under this section, and the Fisheries Scientific Committee is to have regard to any such advice or recommendations.
- (3) The NRC or the Minister may give directions to the Fisheries Scientific Committee requiring the Fisheries Scientific Committee to undertake investigations for the purpose of identifying species, populations and communities that are potentially threatened species, populations and communities.

**[24] Part 7A, Division 3, heading**

Omit the heading. Insert instead:

Division 3 **Critical habitat of endangered species, populations and ecological communities and critically endangered species and ecological communities**

**[25] Sections 220P (1), 220T (1), 220Y (2) (a)**

Insert “or critically endangered species or ecological community” after “endangered species, population or ecological community” wherever occurring.

**[26] Section 220Q Identification of critical habitat**

Insert “and each critically endangered species and ecological community” after “ecological community” in section 220Q (1).

**[27]-[31] (Repealed)**

**[32] Section 220ZI (1) (a)**

Insert “or critically endangered” after “endangered”.

**[33]-[40] (Repealed)**

**[41] Section 221ZB Functions of Fisheries Scientific Committee**

Insert “or critically endangered” after “endangered” in section 221ZB (2) (b).

**[42], [43] (Repealed)**

**[44] Section 284 Public consultation procedure**

Omit “recommendation” from section 284 (1) (f).

Insert instead “determination”.

**[45], [46] (Repealed)**

**[47] Schedule 4A**

Insert after Schedule 4:

## **Schedule 4A Critically endangered species and ecological communities**

(Section 220C)

### **Part 1 Critically endangered species**

### **Part 2 Critically endangered ecological communities**

**[48] Schedule 5, heading**

Omit the heading and section reference. Insert instead:

## **Schedule 5 Vulnerable species and ecological communities**

(Section 220C)

### **Part 1 Vulnerable species**

**[49] Schedule 5**

Insert at the end of the Schedule:

### **Part 2 Vulnerable ecological communities**

**[50] (Repealed)**

**[51] Schedule 7**

Insert after clause 17B:

### **17C Referral of proposed final determinations to Minister**

Sections 220L and 220M, as substituted by the [Threatened Species Legislation Amendment Act 2004](#) extend to a matter pending under section 220L and not finally determined before the commencement of this clause.

### **17D Threatened Species Priorities Action Statements**

The Director-General may exercise any function of the Director-General under Division 5A of Part 7A prior to the commencement of that Division, for the purpose of facilitating the adoption of a Threatened Species Priorities Action Statement on

the commencement of that Division.

### **Schedule 3 (Repealed)**