



New South Wales

# National Parks and Wildlife Amendment Bill 2010

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.\*

### Overview of Bill

The object of this Bill is to amend the *National Parks and Wildlife Act 1974* (**the Principal Act**), the *Threatened Species Conservation Act 1995* (**the TSC Act**) and other legislation so as:

- (a) to streamline and improve the operation of Part 6 of the Principal Act relating to the protection of Aboriginal objects and Aboriginal places, and
- (b) to clarify certain provisions relating to Aboriginal lands reserved under Part 4A of the Principal Act, and
- (c) to strengthen provisions relating to stop work orders and interim protection orders, and
- (d) to enable remediation directions to be given where certain damage or harm has occurred in or as a result of the commission of offences under the Principal Act, and
- (e) to strengthen provisions relating to protected fauna directions, and
- (f) to increase the penalties for certain offences to include additional penalties per day for each day that the offence continues, and

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\* Amended in committee—see table at end of volume.

- (g) to create an offence of selling a protected native plant without a tag (where a flora plan of management requires such a tag), and
- (h) to clarify that easements, rights of way and licences may be granted through or over land reserved under the Principal Act for the purposes of enabling access to other land for occupiers as well as owners of that other land, and
- (i) to provide that easements, rights of way and licences may be granted for the erection, use or maintenance of broadcasting facilities, and
- (j) to insert new provisions (broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*) into the Principal Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence, and
- (k) to bring together certain provisions of the Principal Act relating to criminal and other proceedings into a new Part for ease of use by the reader, and
- (l) to alter the composition of the Aboriginal Cultural Heritage Advisory Committee and ensure that all appointed members of that Committee are Aboriginal persons, and
- (m) to insert new provisions (broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*) into the TSC Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence, and
- (n) to bring together certain provisions of the TSC Act relating to criminal and other proceedings into a new Part for ease of use by the reader, and
- (o) to insert provisions into the TSC Act to deal with matters relating to offences by corporations, the time within which criminal proceedings may be commenced, ancillary offences and evidentiary matters, and
- (p) to provide that land that is vested in an Aboriginal Land Council and that is reserved under Part 4A of the Principal Act is exempt from local government rates, other than water supply special rates and sewerage special rates, and
- (q) to make other miscellaneous amendments to the Principal Act, the TSC Act and other legislation.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** repeals the *National Parks and Wildlife Amendment Act 2001*.

## **Schedule 1      Amendment of National Parks and Wildlife Act 1974 No 80**

### **Amendments relating to terminology**

**Schedule 1 [1]–[7], [13] and [15]–[17]** make amendments:

- (a) to replace the outdated term “Aboriginals” with the currently used “Aboriginal persons”, and
- (b) to take account of the change in name of the Department of Environment and Conservation to the Department of Environment, Climate Change and Water, and
- (c) to amend existing, and include a number of new, definitions for the purposes of the Principal Act, including the definitions for *damage* (in relation to damaging habitat), *harm* (in relation to harming an object or place) and *pick* (in relation to picking plants).

### **Amendments relating to administrative matters**

**Schedule 1 [9]** replaces section 6 of the Principal Act to take account of structural changes to the Public Service and the National Parks and Wildlife Service in particular. **Schedule 1 [8]** makes a consequential amendment.

**Schedule 1 [10]** provides that the Director-General of the Department of Environment, Climate Change and Water (*the Director-General*) has an additional miscellaneous function of promoting opportunities for partnerships and agreements between Aboriginal people and land owners and managers in relation to places, objects and features of significance to Aboriginal people (whether on land reserved or acquired under the Principal Act or not).

**Schedule 1 [11]** omits an obsolete section of the Principal Act.

**Schedule 1 [12]** amends section 11 (5) of the Principal Act to provide that the personnel borrowed under that section may be used for the purposes of the *Marine Parks Act 1997* in addition to the purposes of the Principal Act, the *Wilderness Act 1987* and the TSC Act.

### **Amendments relating to advisory committees**

**Schedule 1 [14], [121] and [122]** amend section 24 of, and Schedule 8 to, the Principal Act to clarify that there are two types of advisory committees constituted under section 24:

- (a) a regional advisory committee constituted for each administrative region under section 24 (2), and
- (b) additional advisory committees that may be constituted by the Minister administering the Principal Act (*the Minister*) for particular purposes determined by the Minister under section 24 (3).

The amendments make it clear that Schedule 8 applies only to regional advisory committees and that the Minister may determine the constitution and procedure of an additional advisory committee constituted under section 24 (3).

### **Amendments relating to Part 4A Aboriginal lands**

Part 4A of the Principal Act deals with the lease and reservation under that Act of certain Aboriginal lands as national parks, historic sites, state conservation areas, regional parks, nature reserves, karst conservation reserves or Aboriginal areas.

Section 71AK of the Principal Act provides that a lease under Part 4A of the Principal Act may be varied only by the agreement of the parties, not inconsistent with that Act, or by an Act of Parliament. **Schedule 1 [18]** amends section 71AK to provide that such an agreement must also include the Aboriginal owner board members.

Section 71AL of the Principal Act provides that on the expiry of a lease under Part 4A of the Principal Act, the Minister holds over under the lease until such time as the lease is renewed or replaced. **Schedule 1 [19]** inserts proposed section 71AL (4) into the Principal Act to clarify, for the avoidance of doubt, that the expiry of a term of a lease under Part 4A does not affect the reservation under the Principal Act of the land that is the subject of the lease or the establishment of any board of management for the land and the appointment of any member of any such board.

**Schedule 1 [20]** amends section 71AN of the Principal Act to provide for the standard exclusion of liability for acts done in good faith by members of boards of management for Aboriginal lands leased and reserved under Part 4A of that Act and to give effect to proposed Schedule 14A to the Principal Act (see **Schedule 1 [127]** below) which contains provisions with respect to the constitution and procedure of boards of management. **Schedule 1 [21] and [23]** make consequential amendments.

**Schedule 1 [22]** substitutes section 71AO (7) of the Principal Act to provide that a board of management may delegate the exercise of its functions to other persons.

**Schedule 1 [24]** amends section 71AQ of the Principal Act in relation to the accounting and reporting requirements of boards of management.

**Schedule 1 [25]** makes an amendment to make it clear that when additional land is reserved under Division 8 of Part 4A of the Principal Act as part of an area that has already been leased under that Part, those lands may be reserved as the same category of reserved lands as the area already leased and reserved or otherwise.

**Schedule 1 [26] and [27]** make consequential amendments.

Section 72 (1F) of the Principal Act deals with plans of management for lands reserved or dedicated under Part 4A of that Act. Section 72 (1F) provides that, in the case of lands for which a plan of management was not in force when the lands were reserved or dedicated under Part 4A, a plan of management is to be prepared by the board of management for the lands within 2 years after that reservation or dedication.

**Schedule 1 [28]** amends section 72 (1F) to provide that in that case such a plan of management is to be prepared within 5 years after the reservation or dedication.

**Schedule 1 [29]** replaces section 72A (4) of the Principal Act to provide that a single plan of management may include provisions relating to any or all of the following different types of land:

- (a) land reserved under Part 4 of that Act,
- (b) land reserved under Part 4A of that Act,
- (c) land acquired or occupied or proposed to be acquired or occupied under Part 11 of that Act.

**Schedule 1 [127]** inserts proposed Schedule 14A into the Principal Act which contains provisions with respect to the constitution and procedure of boards of management.

### **Amendments relating to Aboriginal objects and Aboriginal places**

Part 6 of the Principal Act contains various provisions to protect Aboriginal objects and Aboriginal places. **Schedule 1 [30]–[36]** amend various provisions of that Part to streamline and improve the operation of the Part.

**Schedule 1 [32]** inserts a new offence provision (proposed section 86) into the Principal Act to replace the offences currently contained in sections 86 and 90 of the Principal Act.

Proposed section 86 (1) and (2) create 2 offences relating to harming Aboriginal objects—a strict liability offence in cases to criminalise harming an Aboriginal object (whether or not the person knew it was an Aboriginal object) (proposed section 86 (2)) and a knowledge offence with a higher penalty where it can be proved that the offender knew the harmed or desecrated object was an Aboriginal object (proposed section 86 (1)).

Specifically, proposed section 86 (1) makes it an offence to harm or desecrate an object that the person knows is an Aboriginal object. The offence carries a maximum penalty of 2,500 penalty units (currently \$275,000) or imprisonment for 1 year, or both, or (in circumstances of aggravation) 5,000 penalty units (currently \$550,000) or imprisonment for 2 years, or both (in the case of an individual) and 10,000 penalty units (currently \$1,100,000) (in the case of a corporation). Proposed section 86 (2) makes it an offence to harm an Aboriginal object (whether or not the person knows it is an Aboriginal object). The offence carries a maximum penalty of 500 penalty units (currently \$55,000) or (in circumstances of aggravation) 1,000 penalty units (currently \$110,000) (in the case of an individual) and 2,000 penalty units (currently \$220,000) (in the case of a corporation).

The circumstances of aggravation that will trigger the increased individual penalty are:

- (a) that the offender engaged in the act or omission that constituted the offence for financial gain, or
- (b) that the offence was the second or subsequent occasion on which the offender was convicted of an offence under the proposed section.

Proposed section 86 (3) deals with harm to Aboriginal places. Declarations of Aboriginal places are published in the Gazette (see section 84 of the Principal Act). The new provision makes it an offence to harm an Aboriginal place (whether or not the person knows it is an Aboriginal place). The offence carries a maximum penalty of 5,000 penalty units (currently \$550,000) or imprisonment for 2 years, or both (in the case of an individual) and 10,000 penalty units (currently \$1,100,000) (in the case of a corporation).

**Schedule 1 [2]** provides that *harm* in relation to an object or place is defined to include any act or omission that:

- (a) destroys, defaces or damages the object or place, or
- (b) in relation to an object—moves the object from the land on which it had been situated, or
- (c) is specified by the regulations, or
- (d) causes or permits the object or place to be harmed in a manner referred to in paragraph (a), (b) or (c),

but does not include any act or omission that:

- (e) desecrates the object or place, or
- (f) is trivial or negligible, or
- (g) is excluded from the definition by the regulations under the Principal Act.

**Schedule 1 [32]** also inserts a new provision (proposed section 87) into the Principal Act to provide for defences to the new offences. Proposed section 87 (1) provides that it is a defence to a prosecution for an offence against proposed section 86 (1), (2) or (3) if the defendant shows that:

- (a) the harm or desecration concerned was authorised by an Aboriginal heritage impact permit, and
- (b) the conditions to which that Aboriginal heritage impact permit was subject were not contravened.

Proposed section 87 (2) provides that it is a defence to a prosecution for an offence under proposed section 86 (2) if the defendant shows that the defendant exercised due diligence to determine whether the act or omission constituting the alleged offence would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed. The regulations may provide that compliance with requirements specified in the regulations, or in a code of practice adopted or prescribed by the regulations, is taken for the purposes of this subsection to constitute due diligence in determining whether the act or omission constituting the alleged offence would harm an Aboriginal object.

Other defences may also be created by regulation, but only if the Aboriginal Cultural Heritage Advisory Committee has been consulted before making such a regulation.

**Schedule 1 [32]** also inserts proposed sections 87A and 87B into the Principal Act to provide for exemptions for certain specified activities, including Aboriginal traditional cultural activities.

Section 91 of the Principal Act provides that a person who is aware of the location of an Aboriginal object that is the property of the Crown (or, not being the property of the Crown, is real property) must notify the Director-General (unless the person believes on reasonable grounds that the Director-General is already aware of the location of that Aboriginal object). Failure to so notify is an offence which currently carries a penalty of 100 penalty units (currently \$11,000), in the case of an individual, and 200 penalty units (currently \$22,000) in the case of a corporation (see section 175 of the Principal Act). **Schedule 1 [34]** inserts a maximum penalty provision into section 91 to provide that in the case of continuing offences, the offender is also liable to a further maximum penalty of:

- (a) in the case of an individual—10 penalty units for each day the offence continues, or
- (b) in the case of a corporation—20 penalty units for each day the offence continues.

**Schedule 1 [36]** inserts proposed Division 2 (being proposed sections 90–90S) into Part 6 of the Principal Act to provide for Aboriginal heritage impact permits. Aboriginal heritage impact permits are to replace permits under current section 87 and consents under current section 90. The proposed Division deals, amongst other things, with the following:

- (a) the issue of Aboriginal heritage impact permits (proposed section 90),
- (b) applications for the issue of such permits (proposed section 90A),
- (c) applications for the transfer of such permits (proposed section 90B),
- (d) the process for the grant or refusal of such applications (proposed section 90C),
- (e) variation of such permits (proposed section 90D),
- (f) restrictions on making applications to vary or transfer such permits (proposed section 90E),
- (g) requiring applicants to provide further information in connection with such applications (proposed section 90F),
- (h) suspension or revocation of such permits (proposed section 90G),
- (i) surrender of such permits (proposed section 90H),
- (j) the imposition of conditions on the suspension, revocation or surrender of such permits (proposed section 90I),
- (k) making it an offence to contravene the conditions of such permits or conditions on the suspension, revocation or surrender of such permits (proposed section 90J),
- (l) setting out the factors the Director-General must consider in making determinations regarding such permits (proposed section 90K),
- (m) appeals to the Land and Environment Court in relation to certain decisions regarding such permits (proposed section 90L),

- (n) other matters relating to the operation of such permits, the power to make regulations regarding consultation about such permits, the interaction of such permits with stop work and interim protection orders and the validity of such permits (proposed sections 90M, 90N, 90O and 90P),
- (o) matters relating to a database of information regarding Aboriginal objects and other objects, places and features of significance to Aboriginal people—the Aboriginal Heritage Information Management System (proposed section 90Q),
- (p) providing that certain Aboriginal heritage impact permits run with the land (proposed section 90R),
- (q) providing that, in certain circumstances, a subsequent permit is not required to destroy an Aboriginal object that was previously permitted to be destroyed under an earlier permit (proposed section 90S).

**Schedule 1 [30], [31], [33] and [35]** make consequential amendments.

#### **Amendments relating to stop work orders, interim protection orders and remediation directions**

Section 91AA (6) of the Principal Act provides that a person must not contravene an order under that section. Section 91G of the Principal Act provides that a person who is given notice of an interim protection order under section 91F of that Act must not contravene its terms. **Schedule 1 [38] and [39]** amend those provisions to provide that a person must not only not contravene such an order, or its terms, but must also not cause or permit another person to contravene such an order, or its terms.

**Schedule 1 [40]** inserts proposed Division 3 (being proposed sections 91J–91T) into Part 6A of the Principal Act to provide for the issue of remediation directions.

Proposed section 91K provides that the Director-General may direct a person to carry out specified remediation work in a specified manner and within a specified time, if the Director-General is satisfied that any of the following has been damaged in or as a result of the commission of an offence under the Principal Act:

- (a) any land reserved under the Principal Act or acquired under Part 11 of that Act,
- (b) any critical habitat, or habitat of threatened species, an endangered population or an endangered ecological community,
- (c) any plant or animal that is of, or is part of, a threatened species, an endangered population or an endangered ecological community.

Such a direction may be given whether or not any person has been proceeded against or convicted for the offence. The specified remediation work to be carried out by a person may include one or more of the following types of work:

- (a) work to control, abate or mitigate the damage to the land, habitat, plant or animal concerned,
- (b) work to maintain, remediate or restore the damaged land, habitat, plant or animal concerned (including replacing removed or dead plants or animals).

Proposed section 91L provides that the Director-General may direct a person to carry out specified remediation work in a specified manner and within a specified time, if the Director-General is satisfied that any Aboriginal object or any Aboriginal place has been harmed in or as a result of the commission of an offence under the Principal Act. Such a direction may be given whether or not any person has been proceeded against or convicted for the offence. The specified remediation work to be carried out by a person may include one or more of the following types of work:

- (a) work to control, abate or mitigate the harm to the Aboriginal object or Aboriginal place concerned,
- (b) work to protect, conserve, maintain, remediate or restore the harmed Aboriginal object or Aboriginal place concerned.

Other provisions of the proposed Division deal with the following:

- (a) defining certain terms for the purposes of the proposed Division (proposed section 91J),
- (b) specifying the persons to whom directions may be given (proposed section 91M),
- (c) specifying other ancillary actions that may be directed to be carried out (proposed section 91N),
- (d) providing that the Director-General may direct other persons to carry out the remediation work if the original person fails to comply with a direction (proposed section 91O),
- (e) providing that a person may enter land to carry out a direction under the proposed Division, other than any part of premises used only for residential purposes except with the consent of the occupier of the premises (proposed section 91P),
- (f) providing that it is an offence to fail to comply, without reasonable excuse, with a remediation direction (proposed section 91Q),
- (g) providing that it is an offence to wilfully delay or obstruct another person who is carrying out any action in compliance with a remediation direction or who is authorised to enter land and carry out work under the proposed Division (proposed section 91R),
- (h) providing that if a person given a remediation direction complies with the direction but was not the person who caused the damage or harm concerned, the cost of complying with the direction may be recovered as a debt in court from the person who actually caused the damage or harm concerned (proposed section 91S),
- (i) providing for appeal to the Land and Environment Court from directions of the Director-General under the proposed Division (proposed section 91T).

**Schedule 1 [37]** makes a consequential amendment.

### **Amendments relating to protection of fauna**

Section 99A of the Principal Act provides that an officer of the National Parks and Wildlife Service may give directions to persons to stop feeding protected fauna and to stop any activity that is causing, or is likely to cause, distress to protected fauna. A person who fails to comply with such a direction is guilty of an offence carrying a maximum penalty of 25 penalty units (currently \$2,750). The section also currently provides that such a direction has effect only for a period of 24 hours after the time at which it was given.

**Schedule 1 [41]** amends section 99A (3) of the Principal Act to provide that if a person continues to fail to comply with such a direction, the person is liable to an additional penalty of 2.5 penalty units (currently \$275) per day for each day the offence continues.

**Schedule 1 [42]** replaces section 99A (4) of the Principal Act to provide that such a direction has effect for such period (not exceeding 28 days) as is specified by the officer giving the direction at the time the direction is given.

**Schedule 1 [43]** inserts proposed section 99A (5A)–(5E) into the Principal Act to provide that:

- (a) a person who has been given such a direction may, within 14 days of receiving the direction, appeal to the Minister against the direction (proposed section 99A (5A)), and
- (b) after hearing an appeal, the Minister may confirm the direction, or modify or rescind the direction (proposed section 99A (5B)), and
- (c) the Minister may, by order, direct a person to stop feeding protected fauna or stop any activity that is causing, or is likely to cause, distress to protected fauna (or both) (proposed section 99A (5C)).

The proposed new provisions provide that the Minister must not give a direction under proposed section 99A (5C) unless a direction in similar terms has been given to the person under section 99A and a period of 14 days has elapsed since that direction was given and no appeal has been made against the direction or, if an appeal has been made, the direction was not substantially modified or rescinded (proposed section 99A (5D)). Such a direction given by the Minister has effect for such period (not exceeding 2 years) as is specified in the direction. The Minister may extend a direction by a further period (not exceeding 2 years) (proposed section 99A (5E)).

### **Amendments increasing penalties for certain offences to include additional penalties for continuing offences**

Sections 102, 104, 105, 105A and 107 of the Principal Act contain various offences that currently carry the general maximum penalty of 100 penalty units (currently \$11,000), in the case of an individual, and 200 penalty units (currently \$22,000) in the case of a corporation (see section 175 of the Principal Act). **Schedule 1 [45]–[49]** insert a maximum penalty provision into those sections to provide that in the case of continuing offences, the offender is also liable to a further maximum penalty of:

- (a) in the case of an individual—10 penalty units for each day the offence continues, or
- (b) in the case of a corporation—20 penalty units for each day the offence continues.

**Amendment relating to management plans for protected native plants**

Section 115A of the Principal Act deals with the preparation and adoption of flora management plans by the Director-General. **Schedule 1 [50]** inserts proposed section 115A (9) into the Principal Act to provide that if a flora plan of management adopted by the Director-General provides that no protected native plant (or part of such a plant) is to be sold unless it is tagged in accordance with the flora plan of management, a person must not sell a protected native plant (or a part of such a plant) unless it is so tagged. Contravention will be an offence that carries a maximum penalty of 100 penalty units (currently \$11,000) and an additional 10 penalty units (currently \$1,100) in respect of each whole plant that was affected by or concerned in the action that constituted the offence.

**Amendments relating to threatened species, populations and ecological communities, and their habitats, and critical habitat**

**Schedule 1 [51]** amends sections 118A (Harming or picking threatened species, endangered populations or endangered ecological communities) and 118B (Buying, selling or possessing threatened species or endangered population) of the Principal Act to make it clear that where the offences in those sections involve species presumed extinct or critically endangered species the higher of the penalties available under those sections applies.

**Schedule 1 [52]–[61]** amend sections 118C (Damage to critical habitat) and 118D (Damage to habitat of threatened species, endangered populations or endangered ecological communities) of the Principal Act:

- (a) to simplify the offences in those sections to “damage” the relevant habitat rather than “acts or omissions” that damage the relevant habitat, and
- (b) to provide that “damage” in those sections includes cause or permit damage, and
- (c) to provide that the offence in section 118D also applies to damage to critical habitat and that a person cannot be punished both under that section and under section 118C.

**Amendments relating to licensing in respect of fauna, native plants and threatened species**

**Schedule 1 [63]** inserts proposed section 123 (4)–(6) into the Principal Act to provide that the holder of a commercial fauna harvester’s licence must not, in connection with harming fauna (ie kangaroos) for the purposes of sale, use any carcass chiller unless the chiller is registered or on registered premises.

**Schedule 1 [64]** omits section 128 of the Principal Act to abolish aviary registration certificates. **Schedule 1 [44]** makes a consequential amendment.

**Schedule 1 [65]** amends section 132C (2) of the Principal Act to make it clear that a scientific licence does not, except in so far as the terms of the licence expressly provide, authorise the picking of native plants in the specified lands set out in that subsection.

Section 133 (4) of the Principal Act makes it an offence for the holder of a licence or certificate (whether issued under the Principal Act or under Part 6 of the TSC Act) to contravene or fail to comply with any condition or restriction attached to the licence or certificate under the Principal Act or Part 6 of the TSC Act. The offence currently carries a penalty of 100 penalty units (currently \$11,000), in the case of an individual, and 200 penalty units (currently \$22,000) in the case of a corporation (see section 175 of the Principal Act). **Schedule 1 [66]** inserts a maximum penalty provision into section 133 (4) to provide that in the case of continuing offences, the offender is also liable to a further maximum penalty of:

- (a) in the case of an individual—10 penalty units for each day the offence continues, or
- (b) in the case of a corporation—20 penalty units for each day the offence continues.

### **Amendments relating to finance**

**Schedule 1 [67]** makes a consequential amendment to section 138 (1) of the Principal Act to provide that certain money ordered by a court to be paid to the Director-General as costs or expenses is to be paid into the National Parks and Wildlife Fund.

**Schedule 1 [68]** omits section 138 (1B) of the Principal Act and inserts instead proposed section 138 (1A) and (1B) to make it clear that within the National Parks and Wildlife Fund there is to be a separate account for each area of lands leased under Part 4A of that Act and that, subject to other subsections of section 138, any money paid into that Fund, including rent paid by the Minister, in respect of an area of lands leased under Part 4A is to be carried into the separate account in the Fund that relates to that area.

**Schedule 1 [69]** and **[70]** omit section 140 (2) of the Principal Act and insert instead proposed section 140 (2)–(3B) and (5) to clarify the levying of community service contributions that are to be paid by the holders of leases or licences to occupy or use lands within national parks, historic sites, state conservation areas, regional parks, nature reserves or karst conservation reserves.

**Schedule 1 [71]–[74]** amend section 143 (1) of the Principal Act and insert proposed section 143 (2) and (3) to clarify the provisions relating to the charges and fees that may be made under that Act.

### **Amendments relating to leases, licences, easements etc**

**Schedule 1 [75]** amends section 153C of the Principal Act to clarify that easements, rights of way and licences may be granted through or over land reserved under that Act for the purposes of enabling access to other land for occupiers as well as owners of that other land.

Section 153D of the Principal Act currently provides that easements, rights of way and licences may be granted under that section for the erection, use or maintenance of telecommunications facilities. **Schedule 1 [76]** and **[77]** amend section 153D of the Principal Act to provide that such easements, rights of way and licences may also be granted for the erection, use or maintenance of broadcasting facilities.

### **Other miscellaneous amendments**

Section 156A of the Principal Act currently makes it an offence on or in land reserved under that Act or acquired under Part 11 of that Act to remove any water (other than for purposes authorised by or under any Act or for the purposes of personal use on the land), or damage or remove any vegetation, rock, soil, sand, stone or similar substance or damage any object or place of cultural value. **Schedule 1 [78]**, **[79]** and **[80]** amend section 156A of the Principal Act to provide that it is also an offence to cause or permit any of those things to happen.

**Schedule 1 [81]** omits section 156A (4) and (5) of the Principal Act as a consequential amendment (see **Schedule 1 [117]**).

Section 156B of the Principal Act applies certain provisions of Chapter 7 of the *Protection of the Environment Operations Act 1997* for the purposes of investigations under the Principal Act. **Schedule 1 [82]** and **[83]** amend section 156B of the Principal Act to make it clear that those applied provisions are taken to be part of the Principal Act and that a prosecution of a person for an offence against such an applied provision is to be taken as if the offence were an offence under the Principal Act.

**Schedule 1 [84]** makes a consequential amendment.

**Schedule 1 [85]** inserts proposed section 156C into the Principal Act as an exclusion of personal liability provision.

**Schedule 1 [86]** inserts proposed section 160 (9) and (10) into the Principal Act to allow penalty notices to be withdrawn. (**Schedule 1 [87]** renumbers and moves section 160 after it is amended.)

**Schedule 1 [88]** and **[89]** amend sections 160E (Notice to remove structure) and 160F (Notice prohibiting use of structure) of the Principal Act to increase the maximum penalty for failure to comply with a notice under those sections. The amendments provide that, in the case of a continuing offence, a further penalty of 2 penalty units (currently \$220) for each day the offence continues applies.

Section 164 (1) (a) of the Principal Act provides that if an authorised officer suspects that an offence against that Act or the regulations has been or is being committed and that any relevant animal, native plant, Aboriginal object or article is likely to be in or upon any premises or vehicle, the authorised officer may stop the vehicle, enter and

search any such premises or vehicle, and seize any such animal, native plant, Aboriginal object (not being real property) or article found. **Schedule 1 [90]** inserts proposed section 164 (3) into the Principal Act to provide that the authorised officer may make certain directions to that occupier of the premises or owner of the vehicle regarding the animal, native plant, Aboriginal object or article seized.

Section 167 (1) of the Principal Act provides that where any property seized under section 164 of that Act or delivered up under section 165 of that Act is fauna or is perishable, it may be disposed of, by way of sale or otherwise, by an authorised officer. **Schedule 1 [91]** inserts proposed section 167 (5) and (6) into the Principal Act to further deal with such sales or disposals of such fauna or perishable property.

**Schedule 1 [92]** and **[93]** amend section 174 of the Principal Act to provide that notices by or under that Act may be served by post both inside and outside the State and that a notice may be served by sending it by facsimile or electronic transmission (including for example the Internet) to the person in accordance with arrangements indicated by the person.

**Schedule 1 [94]–[96]** amend section 175B (Offences by corporations) of the Principal Act to make that section consistent with section 169 of the *Protection of the Environment Operations Act 1997*. The amendments remove the “no knowledge” defence in relation to corporations that contravene the Principal Act or regulations under that Act. The amendments also allow evidence of the opinion, belief or purpose (in addition to intention) of an officer, employee or agent of a corporation as evidence of that corporation’s state of mind in proceedings against the corporation for an alleged contravention of the Principal Act or regulations under that Act.

**Schedule 1 [97]** omits section 176 (1B) of the Principal Act as a consequence of the insertion of proposed section 190 by **Schedule 1 [117]** (see below). (**Schedule 1 [100]** renumbers and moves the amended provision.)

**Schedule 1 [98], [99]** and **[109]** amend sections 176 and 181 of the Principal Act to update references to certain court documents.

**Schedule 1 [101]** amends section 176A (Restraint etc of breaches of Act) of the Principal Act to provide that orders under that section may restrain breaches of the regulations under that Act as well as breaches of that Act. **Schedule 1 [102]** inserts proposed section 176A (4) into the Principal Act to provide that for the purposes of that section, the term *breach* includes a threatened or apprehended breach. (**Schedule 1 [103]** renumbers and moves section 176A after it is amended.)

**Schedule 1 [104]** inserts proposed section 176B (Ancillary offences) into the Principal Act. The new provision makes it an offence for a person to aid, abet, counsel or procure another person to commit, or to attempt to commit, or to conspire to commit, an offence under another provision of that Act or the regulations. On conviction of the offence a person is liable to the same penalty as was applicable to that other provision.

**Schedule 1 [105]** omits section 177 (Compensation) of the Principal Act as a consequential amendment (see proposed Division 3 of Part 15 in **Schedule 1 [117]** below).

**Schedule 1 [106] and [107]** amend section 179 of the Principal Act to make it clear that legal proceedings under that Act or the regulations (or the TSC Act or the regulations under that Act) may be taken in the name of the Director-General and that proceedings for offences against the Principal Act may be instituted in the Land and Environment Court in its summary jurisdiction only by the Director-General or an officer of the National Parks and Wildlife Service authorised by the Director-General for the purposes of that section. (**Schedule 1 [108]** renumbers and moves section 179 after it is amended.)

**Schedule 1 [109]–[113]** make a number of miscellaneous amendments to section 181 (Evidentiary provisions etc) of the Principal Act. (**Schedule 1 [114]** renumbers and moves section 181 after it is amended.)

**Schedule 1 [115]** replaces section 185 (4) of the Principal Act to take account of changes in water management legislation and enable leases, licences, easements or rights of way to be granted under that Act in respect of any lands within a special area (within the meaning of the *Sydney Water Catchment Management Act 1998* and the *Hunter Water Act 1991*) in accordance with a protocol agreed between the Minister and the relevant catchment management agency or in accordance with a plan of management that applies to the land concerned that deals with the granting of such leases, licences, easements or rights of way. (Currently such leases, licences, easements or rights of way may only be granted with the concurrence of the relevant catchment management agency.)

### **Amendment to insert various new miscellaneous provisions**

**Schedule 1 [116]** inserts proposed sections 188A–188G into the Principal Act.

Proposed section 188A provides for a general exemption from the offences under the Principal Act or its regulations for things done by authorised officers and officers of the National Parks and Wildlife Service in determining whether there has been compliance with or a contravention of this Act or the regulations.

Proposed section 188B provides that section 138 (Works and structures) of the *Roads Act 1993*, being a provision that makes it an offence to take certain actions in relation to public roads (eg erect a structure or carry out a work in, on or over a public road) does not apply to anything done under a provision of the Principal Act in relation to a Crown road that is, or is on, land reserved under that Act.

Proposed section 188C allows for the adjustment of boundaries of reserved or acquired lands. A boundary that adjoins a public road may be adjusted from time to time to enable the boundary to follow the formed path of the road or to provide an appropriate set back from the carriageway of the road. Such an adjustment may only take place if the Director-General certifies that the adjustment will not result in any significant reduction in the size or value of lands reserved under the Principal Act.

Proposed section 188D makes provision for the maintenance or improvement of certain access roads on National Park Estate lands and enables the Minister, in certain circumstances, to determine the width of such access roads.

Proposed section 188E makes it clear that a notice or direction given, or a condition of a licence or permit imposed, under the Principal Act or the regulations that specifies a time by which, or period within which, the notice, direction or condition must be complied with continues to have effect until the notice, direction or condition is complied with even though the time has passed or the period has expired. A notice or direction, or a condition of a licence or permit, that does not specify a time by which, or period within which, the notice, direction or condition must be complied with continues to have effect until the notice, direction or condition is complied with.

Proposed section 188F provides that the Director-General is to keep a public register containing:

- (a) details of each application for an Aboriginal heritage impact permit made to the Director-General,
- (b) details of each decision of the Director-General made in respect of any such application,
- (c) details of each Aboriginal heritage impact permit issued by the Director-General,
- (d) details of each variation of an Aboriginal heritage impact permit (including the conditions of any permit),
- (e) details of each decision to suspend, revoke or approve the surrender of any such Aboriginal heritage impact permit (including details of any conditions to which it is subject),
- (f) details of each Aboriginal place declared under section 84 of the Principal Act,
- (g) details of each remediation direction under Division 3 of Part 6A of the Principal Act given by the Director-General,
- (h) details of convictions in prosecutions under the Principal Act or the TSC Act,
- (i) the results of civil proceedings before the Land and Environment Court under the Principal Act or the TSC Act,
- (j) details of such other matters as are prescribed by the regulations (relating to matters under or relevant to the Principal Act or the TSC Act).

Proposed section 188G contains provisions relating to public access to the register under proposed section 188F.

### **Amendments relating to criminal and other proceedings and the layout of the Principal Act**

**Schedule 1 [117]** inserts proposed Part 15 into the Principal Act. The amendment inserts proposed new provisions in the Principal Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence. The proposed provisions are broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*.

More specifically:

- (a) proposed section 190 provides that proceedings for offences under the Principal Act or the regulations under that Act may be commenced within (but not later than) 2 years after the date on which the offence occurred or on which evidence of the alleged offence first came to the attention of any authorised officer (currently such proceedings may only be commenced within 2 years of the date on which the offence occurred), and
- (b) proposed section 194 sets out the matters that a court must take into consideration (so far as they are relevant) when imposing a penalty for an offence against the Principal Act or the regulations, and
- (c) proposed section 195 provides that offences under the Principal Act and the regulations may be continuing offences, and
- (d) proposed section 196 provides that in any proceedings under the Principal Act, the onus of proving that a person had a reasonable excuse or lawful excuse (as referred to in any provision of that Act or the regulations) lies with the defendant, and
- (e) proposed Division 3 of the new Part (proposed sections 198–206) deals with the orders that a court may make after finding an offence against the Principal Act or the regulations proved (such as restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders). **Schedule 1 [62]** makes a consequential amendment to omit a now redundant section.

The amendment also (along with the amendments in **Schedule 1 [87], [100], [103], [108]** and **[114]**) brings together a number of current provisions into the new Part for ease of use by the reader. Some of those provisions are placed in three new Divisions (proposed Division 1 (Proceedings for offences generally), proposed Division 2 (General provisions) and proposed Division 3 (Court orders in connection with offences)).

### **Savings and transitional amendments**

**Schedule 1 [118]** and **[120]** make savings and transitional amendments. **Schedule 1 [119]** omits clause 39 from Schedule 3 to the Principal Act. Clause 39 was a savings and transitional provision relating to the uncommenced provisions of the *National Parks and Wildlife Amendment Act 2001* which are to be repealed by proposed section 3 of this proposed Act and therefore are never to commence.

## **Amendments relating to the Aboriginal Cultural Heritage Advisory Committee**

**Schedule 1 [123]** amends clause 1 (Composition) of Schedule 9 (The Aboriginal Cultural Heritage Advisory Committee) to the Principal Act. The amendment alters the composition of that Committee and provides that:

- (a) the Committee is to consist of:
  - (i) 13 members appointed by the Minister in accordance with that clause, and
  - (ii) an ex-officio member, being the Director-General (or his or her delegate), and
- (b) the ex-officio member is a non-voting member of the Committee, and
- (c) those appointed members of the Committee are to consist of:
  - (i) one member nominated by the New South Wales Aboriginal Land Council, and
  - (ii) one member nominated by the Heritage Council of New South Wales, and
  - (iii) one member nominated by the NTSCORP Limited (ACN 098 971 209), and
  - (iv) 10 other members appointed from the following:
    - (A) nominees of Aboriginal elders groups,
    - (B) registered native title claimants,
    - (C) Aboriginal owners listed on the register under the *Aboriginal Land Rights Act 1983*.

**Schedule 1 [124]** and **[125]** amend clause 1 (4) of Schedule 9 to the Principal Act to provide that the Minister is to ensure that as far as is reasonably practicable, there is gender balance in the membership of the Aboriginal Cultural Heritage Advisory Committee and that all the appointed members of the Committee are Aboriginal persons.

**Schedule 1 [126]** makes a consequential amendment.

## **Schedule 2      Amendment of Threatened Species Conservation Act 1995 No 101**

### **General amendments**

**Schedule 2 [1], [5]** and **[7]** update references to the Director-General and the Department of Environment, Climate Change and Water.

**Schedule 2 [2]** amends section 95 of the TSC Act to provide that where a certificate has been issued by the Director-General to the effect that the Director-General has determined that an action proposed is not likely to significantly affect threatened species, populations or ecological communities, or their habitats and a licence under

that Act is not required, that certificate may be issued unconditionally or subject to conditions. It is noted that section 133 (4) of the Principal Act makes it an offence for the holder of such a certificate to contravene or fail to comply with any condition or restriction attached to the certificate.

**Schedule 2 [3]** inserts proposed section 114 (6) into the TSC Act to provide that it is an offence to contravene a stop work order made under Division 1 of Part 7 of that Act. The offence carries the same maximum penalty as the corresponding offence under the Principal Act carries, being, in the case of a corporation, 10,000 penalty units (currently \$1,100,000) and, in the case of a continuing offence, a further penalty of 1,000 penalty units (currently \$110,000) for each day the offence continues, or in the case of an individual, 1,000 penalty units (currently \$110,000) and, in the case of a continuing offence, a further penalty of 100 penalty units (currently \$11,000) for each day the offence continues.

**Schedule 2 [4]** updates a reference to the Department of Planning.

**Schedule 2 [6]** amends section 127F (5) of the TSC Act to make it clear that the Minister must not enter into a biobanking agreement for Crown lands that are dedicated for a public purpose under the *Crown Lands Act 1989*, except with the consent of the Minister administering that Act.

**Schedule 2 [8]** inserts proposed section 135A into the TSC Act to protect members of the Scientific Committee and persons acting under the direction of the Scientific Committee from liability for any matter or thing done or omitted to be done in good faith for the purpose of exercising functions under that Act.

**Schedule 2 [9]** updates a reference to the Department of Industry and Investment.

**Schedule 2 [11]** amends section 147 (Restraint of breaches of Act) of the TSC Act to provide that orders under that section may restrain breaches of the regulations under that Act as well as breaches of that Act. **Schedule 2 [12]** inserts proposed section 147 (4) into the TSC Act to provide that for the purposes of that section, the term *breach* includes a threatened or apprehended breach. (**Schedule 2 [13]** renumbers and moves section 147 after it is amended.)

**Schedule 2 [14]** amends section 150 (2) of the TSC Act to increase the maximum penalty that may be prescribed for an offence created by regulation from 50 penalty units (currently \$5,500) to 200 penalty units (currently \$22,000).

### **Amendments relating to criminal and other proceedings and TSC Act structure**

**Schedule 2 [10]** inserts proposed Part 9B into the TSC Act. The amendment inserts proposed new provisions (proposed Division 3 of the Part) into that Act relating to orders that courts may make after finding an offence against that Act or the regulations under that Act proved (such as restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders). The proposed provisions are broadly consistent with provisions in Part 8.3 of Chapter 8 of the *Protection of the Environment Operations Act 1997*.

The amendment also (along with the amendments in **Schedule 2 [13]** and **[15]**) brings together a number of current provisions into the new Part for ease of use by the reader. Some of those provisions are placed in three new Divisions (proposed Division 1 (Proceedings for offences generally), proposed Division 2 (Restraining orders) and proposed Division 3 (Court orders in connection with offences)).

### **Amendment to insert various new miscellaneous provisions**

**Schedule 2 [16]** inserts proposed sections 152–154B into the TSC Act.

The proposed sections deal with matters relating to offences by corporations, the time within which criminal proceedings may be commenced, ancillary offences and evidentiary matters.

### **Savings and transitional amendment**

**Schedule 2 [17]** makes a savings and transitional amendment. It will enable regulations of a savings and transitional nature consequent on the enactment of this proposed Act to be made.

## **Schedule 3 Amendment of other Acts**

**Schedule 3.1** amends section 25 of the *Dividing Fences Act 1991* to provide that that Act does not operate to impose any liability, or to confer any rights, with respect to dividing fences on an Aboriginal Land Council with respect to land reserved under Part 4A of the Principal Act.

**Schedule 3.2 [1]–[5]** make consequential amendments to sections 75U and 91 of the *Environmental Planning and Assessment Act 1979*.

**Schedule 3.2 [6]** updates a reference to an obsolete term.

**Schedule 3.3** updates a reference to an obsolete term in the *Forestry and National Park Estate Act 1998*.

**Schedule 3.4** makes a consequential amendment to the *Land and Environment Court Act 1979*.

**Schedule 3.5 [1]** and **[2]** make consequential amendments to Schedules 1 and 4 to the *Licensing and Registration (Uniform Procedures) Act 2002*.

**Schedule 3.6** amends section 556 of the *Local Government Act 1993* to provide that land that is vested in an Aboriginal Land Council and that is reserved under Part 4A of the Principal Act is exempt from all rates, other than water supply special rates and sewerage special rates.

**Schedule 3.7** updates a reference to an obsolete term in the *Lord Howe Island Act 1953*.

**Schedule 3.8 [1]–[4]** make amendments to section 11 of the *National Park Estate (Reservations) Act 2002* relating to adjustments to descriptions of land transferred to national park estate by that Act. **Schedule 3.8 [5]** inserts a provision to validate certain actions that would have been validly done had those amendments been in force.

**Schedule 3.9 [1]** amends section 10 of the *National Park Estate (Reservations) Act 2005* (Adjustment of description of land transferred to national park estate) to clarify the operation of that section. **Schedule 3.9 [2]** inserts a provision to validate certain actions that would have been validly done had the amendment in **Schedule 3.9 [1]** been in force.

**Schedule 3.10 [1]–[4]** make amendments to section 10 of the *National Park Estate (Southern Region Reservations) Act 2000* relating to adjustments to descriptions of land transferred to national park estate by that Act. **Schedule 3.10 [5]** inserts a provision to validate certain actions that would have been validly done had those amendments been in force. **Schedule 3.10 [6]** makes an amendment to clause 8 of Schedule 7 to the *National Park Estate (Southern Region Reservations) Act 2000* to make it clear that clause 8 (3) (relating to discharging certain access road land from all trusts, obligations, estates, interests, rights of way or other easements etc) does not apply to land excluded from the operation of that Schedule.

**Schedule 3.10 [7]** inserts clause 8 (11)–(16) into Schedule 7 to the *National Park Estate (Southern Region Reservations) Act 2000* to provide that certain specified rights of way granted under the *Forestry Act 1916* are taken to have continued in force as if they were granted under the Principal Act.

**Schedule 3.11** amends section 104A of the *Native Title (New South Wales) Act 1994* to provide that a notice under proposed section 188C of the Principal Act (see **Schedule 1 [116]** above) that adjusts the boundary of land reserved under that Act, or acquired under Part 11 of that Act, that adjoins a public road does not operate to extinguish any native title rights and interests existing in relation to land or waters immediately before the notice.

**Schedule 3.12** updates a reference to an obsolete term in the *Plantations and Reafforestation Act 1999*.

**Schedule 3.13** replaces section 4 of the *State Records Act 1998* to update references to an obsolete term.

**Schedule 3.14 [1]–[3]** make amendments to the *Wilderness Act 1987* to update references to the Director of National Parks and Wildlife to the Director-General of the Department of Environment, Climate Change and Water.