

## **Division 2—Actions in area offshore from a State or the Northern Territory**

### **157 Actions treated as though they were in a State or the Northern Territory**

- (1) A provision of this Chapter that is expressed to apply in relation to actions taken or to be taken in a State also applies in the same way to actions taken or to be taken on, under or over the seabed vested in the State by section 4 of the *Coastal Waters (State Title) Act 1980*.
- (2) So far as a provision of this Chapter that is expressed to apply in relation to actions taken or to be taken in a self-governing Territory relates to the Northern Territory, the provision also applies in the same way to actions taken or to be taken on, under or over the seabed vested in the Northern Territory by section 4 of the *Coastal Waters (Northern Territory Title) Act 1980*.

## **Division 3—Exemptions**

### **158 Exemptions from Part 3 and this Chapter**

- (1) A person proposing to take a controlled action, or the designated proponent of an action, may apply in writing to the Minister for an exemption from a specified provision of Part 3 or of this Chapter.
- (2) The Minister must decide within 20 business days of receiving the application whether or not to grant the exemption.
- (3) The Minister may, by written notice, exempt a specified person from the application of a specified provision of Part 3 or of this Chapter in relation to a specified action.
- (4) The Minister may do so only if he or she is satisfied that it is in the national interest that the provision not apply in relation to the person or the action.
- (5) In determining the national interest, the Minister may consider Australia's defence or security or a national emergency. This does not limit the matters the Minister may consider.
- (6) A provision specified in the notice does not apply in relation to the specified person or action on or after the day specified in the notice. The Minister must not specify a day earlier than the day the notice is made.
- (7) Within 10 business days after making the notice, the Minister must:
  - (a) publish a copy of the notice and his or her reasons for granting the exemption in accordance with the regulations; and
  - (b) give a copy of the notice to the person specified in the notice.

**Division 3A—Approval process decisions not affected by  
listing events that happen after section 75  
decision made**

**158A Approval process decisions not affected by listing events that  
happen after section 75 decision made**

(1) In this section:

***approval process decision*** means any of the following decisions:

- (a) a decision under section 75 whether an action is a controlled action;
- (b) a decision under section 75 whether a provision of Part 3 is a controlling provision for an action;
- (c) a decision under section 78 in relation to a decision referred to in paragraph (a) or (b) of this definition;
- (d) a decision under section 87 on the approach for the assessment of the impacts of an action;
- (e) a decision under section 133 whether to approve an action;
- (f) a decision under section 134 to attach conditions to an approval of an action;
- (g) a decision under section 143 to revoke, vary or add to conditions attached to an approval of an action;
- (h) any other decision made under a provision of this Chapter that is specified in the regulations.

***listing event*** means any of the following events:

- (a) a property becoming a declared World Heritage property;
- (b) a change in the world heritage values of a declared World Heritage property;
- (c) a place becoming a National Heritage place;
- (d) a change in the National Heritage values included in the National Heritage List for a National Heritage place;
- (e) a place becoming a Commonwealth Heritage place;

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- (f) a change in the Commonwealth Heritage values included in the Commonwealth Heritage List for a Commonwealth Heritage place;
  - (g) a wetland becoming a declared Ramsar wetland;
  - (h) a change in the boundaries of any of the following:
    - (i) a World Heritage property;
    - (ii) a National Heritage place;
    - (iii) a Commonwealth Heritage place;
    - (iv) a declared Ramsar wetland;
    - (v) the Great Barrier Reef Marine Park;
  - (i) a species becoming a listed threatened species;
  - (j) an ecological community becoming a listed threatened ecological community;
  - (k) a listed threatened species or a listed threatened ecological community becoming listed in another category representing a higher degree of endangerment;
  - (l) a species becoming a listed migratory species;
  - (m) any other event of a kind specified in the regulations.
- (2) This section applies if:
- (a) the Minister has, before or after the commencement of this section, decided under section 75 (the **primary decision**) whether an action (the **relevant action**) is a controlled action (whether the decision is that the action is a controlled action, or that the action is not a controlled action); and
  - (b) at a time that is after the commencement of this section and after the primary decision was made, a listing event occurs.
- (3) The validity of the primary decision, or any other approval process decision made in relation to the relevant action before the listing event occurred, is not affected by the listing event, nor can it be revoked, varied, suspended, challenged, reviewed, set aside or called in question because of, or for reasons relating to, the listing event.
- (4) After the listing event occurs, the listing event is to be disregarded:
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- (a) in making any further approval process decision in relation to the relevant action; and
  - (b) in doing anything under this Chapter, in relation to the relevant action, because of the making of an approval process decision in relation to the relevant action (whether that approval process decision is or was made before or after the listing event occurred).
- (5) This section has effect despite any other provision of this Act and despite any other law.

## **Division 4—Application of Chapter to actions that are not controlled actions**

### **Subdivision A—Minister’s advice on authorising actions**

#### **159 Simplified outline of this Subdivision**

The following is a simplified outline of this Subdivision:

A Commonwealth agency or employee must consider advice from the Minister before authorising one of the following actions with a significant impact on the environment:

- (a) providing foreign aid;
- (b) managing aircraft operations in airspace;
- (c) adopting or implementing a major development plan for an airport;
- (d) an action prescribed by the regulations.

The agency or employee must inform the Minister of the proposal to authorise the action.

The environmental impacts of the action must be assessed in accordance with a declaration made by the Minister accrediting a Commonwealth assessment process, or by one of the following methods chosen by the Minister:

- (a) a specially accredited process;
- (aa) an assessment on referral information under Division 3A;
- (b) an assessment on preliminary documentation under Division 4 of Part 8;

- (c) a public environment report under Division 5 of Part 8;
- (d) an environmental impact statement under Division 6 of Part 8;
- (e) an inquiry under Division 7 of Part 8.

The Minister must give the agency or employee advice on protecting the environment from the action, within 30 days of receiving the report of the assessment.

## **160 Requirement to take account of Minister's advice**

### *Requirement*

- (1) Before a Commonwealth agency or employee of the Commonwealth gives an authorisation (however described) of an action described in subsection (2), the agency or employee must obtain and consider advice from the Minister in accordance with this Subdivision.

Note: The giving of an authorisation for an action may be constituted by the renewal of an authorisation of the action or the variation of an authorisation for a different action.

### *Minister may decide advice is not required*

- (1A) Subsection (1) does not apply in relation to an authorisation of an action if:
- (a) the agency or employee has referred a proposal to give the authorisation to the Minister under subsection 161(1); and
  - (b) the Minister has decided under subsection 161A(1) that this Subdivision does not apply in relation to the referral or the action.

### *Relevant actions*

- (2) Subsection (1) applies in relation to:

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- (a) the entry by the Commonwealth, under Australia's foreign aid program, into a contract, agreement or arrangement for the implementation of a project that has, will have or is likely to have a significant impact on the environment anywhere in the world; and
  - (b) the adoption or implementation of a plan for aviation airspace management involving aircraft operations that have, will have or are likely to have a significant impact on the environment; and
  - (c) the adoption or implementation of a major development plan (as defined in the *Airports Act 1996*); and
  - (d) any other action prescribed by the regulations for the purposes of this paragraph.
- (2A) Regulations may prescribe an action for the purposes of paragraph (2)(d):
- (a) partly by reference to the action's having, or being likely to have, a significant impact on the environment; or
  - (b) partly by reference to a specified person believing that the action has, will have or is likely to have a significant impact on the environment; or
  - (c) wholly or partly by reference to legislation under which the authorisation of the action is to be granted.

This does not limit the ways in which regulations may prescribe an action.

*This section does not apply to actions like those already assessed*

- (3) Subsection (1) does not apply in relation to a particular authorisation (the **later authorisation**) if the agency or employee has complied with, or is complying with, this Subdivision in relation to another authorisation or proposed authorisation and is satisfied of one or both of the matters in subsection (4).

*Which actions are like actions?*

- (4) For the purposes of subsection (3), the agency or employee must be satisfied that:



- (a) the Minister's advice relating to the other authorisation deals or will deal with all the impacts that the action to which the later authorisation relates has, will have or is likely to have on the environment; or
- (b) the impacts that the action to which the later authorisation relates has, will have or is likely to have on the environment:
  - (i) are an extension of the corresponding impacts of the action to which the other authorisation relates; and
  - (ii) are not significantly different in nature from those corresponding impacts; and
  - (iii) do not significantly add to those corresponding impacts.

*State law excluded in relation to aviation*

- (5) A law of a State or Territory does not apply in relation to the assessment of the certain or likely environmental impacts of an action described in paragraph (2)(b) if subsection (1) applies in relation to authorisation of the action, or would apply apart from subsection (3).

## **161 Seeking the Minister's advice**

*Requirement for referral*

- (1) If a Commonwealth agency or employee of the Commonwealth proposing to give an authorisation (however described) of an action thinks the agency or employee is required by section 160 (disregarding subsection 160(1A)) to obtain and consider the Minister's advice before giving the authorisation, the agency or employee must:
  - (a) refer the proposal to the Minister; and
  - (b) nominate a person to act as designated proponent of the action.

*Minister may request referral*

- (2) The Minister may request a Commonwealth agency or employee of the Commonwealth to:

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- (a) refer to the Minister a proposal to give an authorisation (however described) of an action; and
- (b) nominate a person to act as designated proponent of the action;

if the Minister thinks the agency or employee is required by section 160 (disregarding subsection 160(1A)) to obtain and consider the Minister's advice before giving the authorisation.

*Complying with Minister's request*

- (3) The Commonwealth agency or employee must comply with the Minister's request.

*Content of referral*

- (4) A referral must include the information prescribed by the regulations.

**161A Minister may decide that advice is not required**

- (1) If:
  - (a) the Minister receives a referral under subsection 161(1) of a proposal by a Commonwealth agency or employee of the Commonwealth to give an authorisation of an action; and
  - (b) the Minister is satisfied, on the basis of the information in the referral, that the action does not have, will not have or is not likely to have a significant impact on the environment;the Minister may decide, in writing, that this Subdivision does not apply in relation to the referral or the action.
- (2) If the Minister decides that this Subdivision does not apply in relation to the referral or the action, this Act (other than Divisions 2 and 3 of Part 7) applies as if the Minister had decided under Division 2 of Part 7 that the action is not a controlled action.
- (3) If the Minister decides that this Subdivision does not apply in relation to the referral or the action, the Minister must:

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- (a) give written notice of the decision to the agency or employee who referred the proposal to give an authorisation of the action; and
- (b) publish notice of the decision in accordance with the regulations.

**161B Certain provisions of other Acts not to apply if Minister decides that advice is not required**

- (1) This section applies in relation to a provision of another Act that is expressed to apply if:
  - (a) the advice of the Minister is sought under this Subdivision in relation to a proposal to give an authorisation (however described) of an action; or
  - (b) a proposal to give an authorisation (however described) of an action is referred to the Minister under this Subdivision.
- (2) The provision does not apply in relation to an action if:
  - (a) a proposal to give an authorisation (however described) of the action has been referred to the Minister under section 161; and
  - (b) the Minister has decided under section 161A that this Subdivision does not apply in relation to the referral or the action.

Note: See, for example, subsections 94(6A) and 95(3A) of the *Airports Act 1996* and subsections 16(5) and 29(5) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

**162 Assessment of the action**

Part 8 (except sections 82, 83 and 84) and the other provisions of this Act (so far as they relate to that Part) apply in relation to the action proposed to be authorised as if:

- (a) the referral of the proposal to give the authorisation were a referral of a proposal to take the action; and

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- (b) the Minister had decided under Division 2 of Part 7 that the action was a controlled action when the proposal to give the authorisation was referred to the Minister; and
- (c) the person nominated to act as the designated proponent had been designated as the proponent of the action by the Minister under section 75; and
- (d) a reference in Part 8 or those provisions to the relevant impacts of the action were a reference to the impact that the action has, will have or is likely to have on the environment; and
- (e) a reference in Part 8 or those provisions to making an informed decision on approving under Part 9 (for the purposes of each controlling provision) the taking of the action were a reference to giving informed advice about the proposal to give an authorisation of the action.

### 163 Providing advice

- (1) The Minister must give advice on the following matters to the Commonwealth agency or employee of the Commonwealth who referred the proposal to give an authorisation of the action:
  - (a) whether the agency or employee should give the authorisation;
  - (b) what conditions (if any) should be attached to the authorisation (if possible) to protect the environment;
  - (c) any other matter relating to protection of the environment from the action.
- (2) The Minister must give the advice within 30 business days of receiving:
  - (a) a report mentioned in subsection 84(3) relating to the action; or
  - (aa) a finalised recommendation report under Division 3A of Part 8 (as applied by section 162) relating to the action; or
  - (ab) the documents given to the Minister under subsection 95B(1) (as applied by section 162), or the statement given to the

- Minister under subsection 95B(3) (as applied by section 162), as the case requires, relating to the action; or
- (ac) a finalised public environment report under Division 5 of Part 8 (as applied by section 162) relating to the action; or
  - (ad) a finalised environmental impact statement under Division 6 of Part 8 (as applied by section 162) relating to the action; or
  - (b) a report of an inquiry under Division 7 of Part 8 (as applied by section 162) relating to the action.

#### **164 Reporting on response to advice**

As soon as practicable after considering the Minister's advice, the Commonwealth agency or employee of the Commonwealth must give the Minister a report stating:

- (a) what action has been taken in relation to the Minister's advice; and
- (b) if the agency or employee did not give effect to some or all of the Minister's advice—why the agency or employee did not do so.

#### **Subdivision C—Assessment under agreement with State or Territory**

##### **166 This Subdivision applies if Ministers agree it should**

- (1) This Subdivision applies if the Minister and a Minister of a State or self-governing Territory agree that it should apply in relation to an action that:
  - (a) is to be taken in the State or Territory by a constitutional corporation; or
  - (b) if the agreement is with a Minister of a Territory—is to be taken in the Territory; or
  - (c) is to be taken in the State or Territory by a person for the purposes of trade or commerce:
    - (i) between Australia and another country; or
    - (ii) between 2 States; or

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- (iii) between a State and a Territory; or
    - (iv) between 2 Territories; or
  - (d) is to be taken in the State or Territory and is an action whose assessment under this Subdivision is an appropriate means of giving effect to Australia's obligations under an agreement with one or more other countries.
- (2) This section applies to the adoption or implementation of a policy, plan or program in the same way as it applies to any other action.
- (3) Despite subsection (1), this Subdivision does not apply in relation to an action to be taken in 2 or more States or self-governing Territories unless there is an agreement between the Minister and a Minister of each of those States and Territories that this Subdivision should apply in relation to the action.

**167 Making an agreement**

*Power to make agreement*

- (1) The Minister may make a written agreement with a Minister of a State or self-governing Territory to apply this Subdivision in relation to an action to be taken in the State or Territory.

*Prerequisites for making agreement*

- (2) The Minister may agree only if he or she is satisfied that the action is not a controlled action.

*Minister must not make an agreement that gives preference*

- (3) The Minister must not enter into an agreement that has the effect of giving preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State, in relation to the taking of the action:
- (a) by a constitutional corporation; or
  - (b) by a person for the purposes of trade or commerce between Australia and another country or between 2 States.

## 168 Content of an agreement

### *Generally*

- (1) An agreement to apply this Subdivision in relation to an action must:
  - (a) specify that one of the following is to apply in relation to the action:
    - (i) Division 3A of Part 8;
    - (ii) Division 4 of Part 8;
    - (iii) Division 5 of Part 8;
    - (iv) Division 6 of Part 8;
    - (v) Division 7 of Part 8;
    - (vi) Subdivision A of Division 1 of Part 10; and
  - (b) if it specifies that Division 3A, 4, 5 or 6 of Part 8 is to apply in relation to the action—specify the person who is taken to be the designated proponent of the action for the purposes of that Division.

### *Agreement applying Division 5 of Part 8*

- (3) An agreement that specifies that Division 5 of Part 8 (about public environment reports) is to apply in relation to an action may deal with how the Minister will exercise his or her power:
  - (a) under section 97 to prepare tailored guidelines for the preparation of a draft report; or
  - (b) under section 98 to approve publication of a draft report or specify a period for comment.

### *Agreement applying Division 6 of Part 8*

- (4) An agreement that specifies that Division 6 of Part 8 (about environmental impact statements) is to apply in relation to an action may deal with how the Minister will exercise his or her power:
  - (a) under section 102 to prepare tailored guidelines for the preparation of a draft statement; or

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- (b) under section 103 to approve publication of a draft statement or specify a period for comment.

*Agreement applying Division 7 of Part 8*

- (5) An agreement that specifies that Division 7 of Part 8 (about inquiries) is to apply in relation to an action may deal with how the Minister will exercise his or her power under section 107:
  - (a) to appoint one or more persons as commissioners, and to appoint a person to preside; or
  - (b) to specify the matters relating to the action that are to be the subject of the inquiry and report; or
  - (c) to specify the time within which the commission must report to the Minister; or
  - (d) to specify the manner in which the commission is to carry out the inquiry.

*Agreement applying Part 10*

- (6) An agreement that specifies that Subdivision A of Division 1 of Part 10 is to apply may:
  - (a) be in the same document as an agreement mentioned in that Subdivision; or
  - (b) specify the manner in which an agreement the Minister makes under that Subdivision is to provide for matters that that Subdivision requires that agreement to provide for.

**169 Application of a Division of Part 8**

*Provisions that apply*

- (1) If the agreement states that a particular Division of Part 8 is to apply in relation to the assessment of an action, the following provisions of this Act (the ***applied provisions***) apply in relation to the action as set out in subsection (2):
  - (a) that Division;
  - (b) the other provisions of this Act (except Part 9), so far as they relate to that Division.



*Modification of applied provisions*

- (2) The applied provisions apply in relation to the action as if:
- (a) the Minister had decided under Division 2 of Part 7 that the action was a controlled action; and
  - (b) the Minister had decided that the relevant impacts of the action must be assessed under the Division specified in the agreement applying the Division; and
  - (c) the person specified in the agreement as the person who is taken to be the designated proponent of the action for the purposes of that Division had been designated as the proponent of the action by the Minister under section 75; and
  - (d) a reference in the applied provisions to the relevant impacts of the action were a reference to the impact that the action has, will have or is likely to have on the environment; and
  - (e) a reference in the applied provisions to making an informed decision on approving under Part 9 (for the purposes of each controlling provision) the taking of the action were a reference to making an informed report and recommendations relating to the action.

*Modification of Division 4 of Part 8*

- (3) Also, if the agreement states that Division 4 of Part 8 is to apply in relation to the action, that Division applies in relation to the action as if paragraphs 95(2)(a) and (b) and 95A(3)(a), (b) and (c) merely referred to specified information relating to the action.

*Minister must give copy of report to State or Territory Minister*

- (4) The Minister must give a copy of the report he or she receives from the Secretary or commission of inquiry under the applied provisions in relation to the action to each Minister of a State or Territory who is party to the agreement.

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**170 Application of Subdivision A of Division 1 of Part 10**

If an agreement to apply this Subdivision states that Subdivision A of Division 1 of Part 10 is to apply:

- (a) that Subdivision applies as if:
  - (i) the reference in subsection 146(1) to relevant impacts of actions were a reference to the impacts the actions have, will have or are likely to have on the environment; and
  - (ii) paragraph 146(2)(f) were omitted; and
- (b) the Minister must give a copy of the report provided to the Minister under the agreement made under section 146, and of any recommendations made by the Minister under the agreement, to each Minister of a State or Territory who is party to the agreement to apply this Subdivision.

## **Division 5—Publication of information relating to assessments**

### **170A Publication of information relating to assessments**

The Secretary must publish on the internet every week notice of the following:

- (a) the publication in the immediately preceding week by the Minister under section 45 of a notice of the Minister's intention to develop a draft bilateral agreement;
- (b) each referral (if any) of an action received by the Minister under Division 1 of Part 7 in the immediately preceding week;
- (c) each decision (if any) in the immediately preceding week under Division 2 of Part 7 that an action is a controlled action;
- (d) each decision (if any) in the immediately preceding week under Division 3 of Part 8 about which approach is to be used for assessment of the relevant impacts of an action;
- (da) each draft recommendation report and invitation (if any) published in the immediately preceding week under Division 3A of Part 8 (about assessment on referral information);
- (e) the information and invitations (if any) published in the immediately preceding week under Division 4 of Part 8 (about assessment on preliminary documentation);
- (f) each set of guidelines (if any) prepared in the immediately preceding week by the Minister under Division 5 or 6 of Part 8 for a report or statement;
- (g) each public invitation (if any) issued in the immediately preceding week by the Minister to comment on a draft of guidelines under Division 5 or 6 of Part 8 for a report or statement;

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- (h) each draft or finalised report or statement published in the immediately preceding week under Division 5 or 6 of Part 8 by a designated proponent;
- (i) each finalised recommendation report given to the Minister under Division 3A of Part 8 in the immediately preceding week;
- (ia) each recommendation report given to the Minister in the immediately preceding week under section 95C, 100 or 105;
- (j) any other matter prescribed by the regulations.

### **170B Information critical to protecting matters of national environmental significance not to be disclosed**

- (1) The Minister may, by notice in writing to a person, direct the person not to disclose specified information when publishing a document or material as required or permitted by a specified provision of this Chapter, if the Minister considers that the information is critical to the protection of a matter protected by a provision of Division 1 of Part 3 (about matters of national environmental significance).
- (2) A provision of this Chapter that is specified in a direction under subsection (1) has effect as if it did not require or permit the publication of the information specified in the direction.
- (3) A person who is given a direction under subsection (1) must not contravene the direction.

Civil penalty: 100 penalty units.

### **170BA Designated proponent may request Minister to permit commercial-in-confidence information not to be disclosed**

- (1) This section applies in relation to the assessment documentation that must be published by the designated proponent of an action to which Division 4, 5 or 6 of Part 8 applies.
- (2) The designated proponent may request the Minister, in writing, to permit the designated proponent not to publish so much of the

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assessment documentation relating to the action as the designated proponent considers is commercial-in-confidence.

- (3) A request under subsection (2) must include the information prescribed by the regulations.
- (4) If the Minister is satisfied that a part of the assessment documentation relating to the action is commercial-in-confidence, the Minister may, by written notice to the designated proponent, permit the designated proponent not to publish that part of the assessment documentation.
- (5) The Minister must not be satisfied that a part of the assessment documentation relating to the action is commercial-in-confidence unless a person demonstrates to the Minister that:
  - (a) release of the information in that part would cause competitive detriment to the person; and
  - (b) the information in that part is not in the public domain; and
  - (c) the information in that part is not required to be disclosed under another law of the Commonwealth, a State or a Territory; and
  - (d) the information in that part is not readily discoverable.
- (6) If the Minister permits the designated proponent not to publish a part of the assessment documentation that the Minister considers is commercial-in-confidence, the provision of Division 4, 5 or 6 of Part 8 that requires the designated proponent to publish the assessment documentation has effect as if it did not require the publication of that part of the assessment documentation.
- (7) In this section:

***assessment documentation***, in relation to an action to which Division 4, 5 or 6 of Part 8 applies, means:

- (a) if Division 4 of Part 8 (assessment on preliminary documentation) applies to the action:
  - (i) the information referred to in paragraphs 95(2)(a) and (b) or 95A(3)(a), (b) and (c), as the case requires; and

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- (ii) the document prepared under paragraph 95B(1)(a) or the information referred to in subsection 95B(4), as the case requires; or
- (b) if Division 5 of Part 8 (public environment reports) applies to the action:
  - (i) the draft public environment report relating to the action given to the Minister under paragraph 98(1)(ab); and
  - (ii) the finalised public environment report relating to the action given to the Minister under section 99; or
- (c) if Division 6 of Part 8 (environmental impact statements) applies to the action:
  - (i) the draft environmental impact statement relating to the action given to the Minister under paragraph 103(1)(ab); and
  - (ii) the finalised environmental impact statement relating to the action given to the Minister under section 104.

## **Division 6—Withdrawal of referrals**

### **170C Withdrawal of referral of proposal to take an action**

- (1) Subject to subsection (2), a person who:
  - (a) has referred a proposal to take an action to the Minister under section 68; or
  - (b) is named as the person proposing to take an action in a proposal that is referred to the Minister under section 69 or 71;may withdraw the referral, by written notice to the Minister.
- (2) The referral cannot be withdrawn after the Minister has decided, under Part 9, whether or not to approve the taking of the action.
- (3) If the Minister receives a notice withdrawing the referral, the Minister must publish notice of the withdrawal of the referral in accordance with the regulations.
- (4) If the referral is withdrawn, the provisions of this Chapter that would, apart from this subsection, have applied to the action cease to apply to the action.

## **Division 7—Miscellaneous**

### **170CA Fees**

- (1) The Minister may, in writing, determine the amounts of fees that may be charged if the approach for assessing the relevant impacts of an action that the Minister has decided is a controlled action is:
  - (a) assessment by inquiry under Division 7 of Part 8; or
  - (b) assessment by strategic assessment under Division 1 of Part 10.
- (2) Before making a determination, the Minister must consult:
  - (a) the person proposing to take the action; or
  - (b) if the person proposing to take the action is not the designated proponent—the designated proponent; or
  - (c) if the approach is assessment by strategic assessment—the person responsible for the adoption or implementation of the relevant policy, plan or program;about the amounts of fees to be charged.
- (3) The Minister may, in the determination made under subsection (1), determine the way in which a fee is to be worked out.
- (4) A determination made under subsection (1) is not a legislative instrument.



## **Chapter 5—Conservation of biodiversity and heritage**

### **Part 11A—Interpretation**

#### **170D References to business days are references to Canberra business days**

A reference in this Chapter to a business day is a reference to a day that is a business day in Canberra.

## Part 12—Identifying and monitoring biodiversity and making bioregional plans

### Division 1—Identifying and monitoring biodiversity

#### 171 Identifying and monitoring biodiversity

- (1) The Minister may, on behalf of the Commonwealth, co-operate with, and give financial or other assistance to, any person for the purpose of identifying and monitoring components of biodiversity.
- (2) Without limiting subsection (1), the co-operation and assistance may include co-operation and assistance in relation to all or any of the following:
  - (a) identifying and monitoring components of biodiversity that are important for its conservation and ecologically sustainable use;
  - (b) identifying components of biodiversity that are inadequately understood;
  - (c) collecting and analysing information about the conservation status of components of biodiversity;
  - (d) collecting and analysing information about processes or activities that are likely to have a significant impact on the conservation and ecologically sustainable use of biodiversity;
  - (e) assessing strategies and techniques for the conservation and ecologically sustainable use of biodiversity;
  - (f) systematically determining biodiversity conservation needs and priorities.
- (3) In this Act:

***components of biodiversity*** includes species, habitats, ecological communities, genes, ecosystems and ecological processes.
- (4) For the purposes of this section, the components of biological diversity that are important for its conservation and ecologically

sustainable use are to be identified having regard to the matters set out in Annex I to the Biodiversity Convention.

- (5) The giving of assistance may be made subject to such conditions as the Minister thinks fit.

### **172 Inventories of listed threatened species etc. on Commonwealth land**

- (1) The Minister may prepare an inventory covering an area of Commonwealth land that identifies, and states the abundance of, the listed threatened species, listed threatened ecological communities, listed migratory species and listed marine species on the area of land if:
- (a) the Minister is satisfied that the area of land is of importance for the conservation of biodiversity; and
  - (b) the area of land is not covered by a plan that:
    - (i) has an object (whether express or implied) of either protecting the environment or promoting the conservation of biodiversity; and
    - (ii) is in force under a law of the Commonwealth.
- (2) A Commonwealth agency must provide all reasonable assistance in connection with the preparation of an inventory if:
- (a) the inventory is to cover an area of Commonwealth land; and
  - (b) the agency has an interest in the area of land.
- (3) For the purposes of paragraph (2)(b), a Commonwealth agency has an interest in an area of Commonwealth land if the agency:
- (a) has a legal or equitable interest in the area; or
  - (b) occupies the area; or
  - (c) has administrative responsibilities relating to the area or to actions taken in the area.

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**173 Surveys of cetaceans, listed threatened species etc. in Commonwealth marine areas**

- (1) The Minister may prepare a survey covering a Commonwealth marine area that identifies, and states the extent of the range of, cetaceans, listed threatened species, listed threatened ecological communities, listed migratory species and listed marine species in the area if:
  - (a) the Minister is satisfied that the area is of importance for the conservation of biodiversity; and
  - (b) the area is not covered by a plan that:
    - (i) has an object (whether express or implied) of either protecting the environment or promoting the conservation of biodiversity; and
    - (ii) is in force under a law of the Commonwealth.
- (2) A Commonwealth agency must provide all reasonable assistance in connection with the preparation of a survey if:
  - (a) the survey is to cover a Commonwealth marine area; and
  - (b) the agency has an interest in the area.
- (3) For the purposes of paragraph (2)(b), a Commonwealth agency has an interest in a Commonwealth marine area if the agency:
  - (a) has a legal or equitable interest in the area; or
  - (b) occupies the area; or
  - (c) has administrative responsibilities relating to the area or to actions taken in the area.

**174 Inventories and surveys to be updated**

The Minister must take reasonable steps to ensure that the inventories and surveys prepared under this Division are maintained in an up-to-date form.

## **Division 2—Bioregional plans**

### **176 Bioregional plans**

- (1) The Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan in accordance with the regulations.
- (2) The Minister may, on behalf of the Commonwealth, co-operate with a State or a self-governing Territory, an agency of a State or of a self-governing Territory, or any other person in the preparation of a bioregional plan for a bioregion that is not wholly within a Commonwealth area.
- (3) The co-operation may include giving financial or other assistance.
- (4) A bioregional plan may include provisions about all or any of the following:
  - (a) the components of biodiversity, their distribution and conservation status;
  - (b) important economic and social values;
  - (ba) heritage values of places;
  - (c) objectives relating to biodiversity and other values;
  - (d) priorities, strategies and actions to achieve the objectives;
  - (e) mechanisms for community involvement in implementing the plan;
  - (f) measures for monitoring and reviewing the plan.
- (4A) A bioregional plan prepared under subsection (1) or (2) is not a legislative instrument.
- (5) Subject to this Act, the Minister must have regard to a bioregional plan in making any decision under this Act to which the plan is relevant.

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**177 Obligations under this Act unaffected by lack of bioregional plans**

Obligations imposed by this Act are not affected, in their application in relation to Commonwealth areas, by a lack of bioregional plans for those areas.

## **Part 13—Species and communities**

### **Division 1—Listed threatened species and ecological communities**

#### **Subdivision A—Listing**

#### **178 Listing of threatened species**

- (1) The Minister must, by legislative instrument, establish a list of threatened species divided into the following categories:
  - (a) extinct;
  - (b) extinct in the wild;
  - (c) critically endangered;
  - (d) endangered;
  - (e) vulnerable;
  - (f) conservation dependent.
- (2) The list, as first established, must contain only the species contained in Schedule 1 to the *Endangered Species Protection Act 1992*, as in force immediately before the commencement of this Act.
- (3) The Minister must include:
  - (a) in the extinct category of the list, as first established, only the species mentioned in subsection (2) that were listed as presumed extinct; and
  - (b) in the endangered category of the list, as first established, only the native species mentioned in subsection (2) that were listed as endangered; and
  - (c) in the vulnerable category of the list, as first established, only the species mentioned in subsection (2) that were listed as vulnerable.

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- (4) If the Minister is satisfied that a species included in the list, as first established, in:
- (a) the extinct category; or
  - (b) the endangered category; or
  - (c) the vulnerable category;
- is not eligible to be included in that or any other category, or is eligible to be, or under subsection 186(3), (4) or (5) can be, included in another category, the Minister must, within 6 months after the commencement of this Act, amend the list accordingly in accordance with this Subdivision.

**179 Categories of threatened species**

- (1) A native species is eligible to be included in the *extinct* category at a particular time if, at that time, there is no reasonable doubt that the last member of the species has died.
- (2) A native species is eligible to be included in the *extinct in the wild* category at a particular time if, at that time:
- (a) it is known only to survive in cultivation, in captivity or as a naturalised population well outside its past range; or
  - (b) it has not been recorded in its known and/or expected habitat, at appropriate seasons, anywhere in its past range, despite exhaustive surveys over a time frame appropriate to its life cycle and form.
- (3) A native species is eligible to be included in the *critically endangered* category at a particular time if, at that time, it is facing an extremely high risk of extinction in the wild in the immediate future, as determined in accordance with the prescribed criteria.
- (4) A native species is eligible to be included in the *endangered* category at a particular time if, at that time:
- (a) it is not critically endangered; and
  - (b) it is facing a very high risk of extinction in the wild in the near future, as determined in accordance with the prescribed criteria.



- (5) A native species is eligible to be included in the **vulnerable** category at a particular time if, at that time:
- (a) it is not critically endangered or endangered; and
  - (b) it is facing a high risk of extinction in the wild in the medium-term future, as determined in accordance with the prescribed criteria.
- (6) A native species is eligible to be included in the **conservation dependent** category at a particular time if, at that time:
- (a) the species is the focus of a specific conservation program the cessation of which would result in the species becoming vulnerable, endangered or critically endangered; or
  - (b) the following subparagraphs are satisfied:
    - (i) the species is a species of fish;
    - (ii) the species is the focus of a plan of management that provides for management actions necessary to stop the decline of, and support the recovery of, the species so that its chances of long term survival in nature are maximised;
    - (iii) the plan of management is in force under a law of the Commonwealth or of a State or Territory;
    - (iv) cessation of the plan of management would adversely affect the conservation status of the species.
- (7) In subsection (6):
- fish** includes all species of bony fish, sharks, rays, crustaceans, molluscs and other marine organisms, but does not include marine mammals or marine reptiles.

## 180 Native species of marine fish

- (1) A native species of marine fish is eligible to be included in a category mentioned in a paragraph of subsection 178(1) at a particular time if, at that time, the species meets the prescribed criteria for that category.

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- (2) A subsection of section 179 referring to a category (the *relevant category*) does not apply to a native species of marine fish if regulations are in force for the purposes of subsection (1) of this section prescribing criteria for the relevant category.

**181 Listing of threatened ecological communities**

- (1) The Minister must, by legislative instrument, establish a list of threatened ecological communities divided into the following categories:
- (a) critically endangered;
  - (b) endangered;
  - (c) vulnerable.
- (2) Subject to subsection (3), the Minister must not include an ecological community in a particular category of the list, as first established, unless satisfied that the ecological community is eligible to be included in that category when the list is first published.
- (3) The list, as first established, must contain only the ecological communities listed in Schedule 2 to the *Endangered Species Protection Act 1992* immediately before the commencement of this Act, and they must be listed in the endangered category.
- (4) If the Minister is satisfied that an ecological community included in the endangered category of the list, as first established under subsection (3), is not eligible to be included in that or any other category, or is eligible to be included in another category, the Minister must, within 6 months after the commencement of this Act, amend the list accordingly in accordance with this Subdivision.
- (5) To avoid doubt, the instrument first establishing the list under subsection (1) is not taken to have been a legislative instrument.

Note: When the list was first established, it was required to be established by instrument published in the Gazette.

## **182 Critically endangered, endangered and vulnerable communities**

- (1) An ecological community is eligible to be included in the ***critically endangered*** category at a particular time if, at that time, it is facing an extremely high risk of extinction in the wild in the immediate future, as determined in accordance with the prescribed criteria.
- (2) An ecological community is eligible to be included in the ***endangered*** category at a particular time if, at that time:
  - (a) it is not critically endangered; and
  - (b) it is facing a very high risk of extinction in the wild in the near future, as determined in accordance with the prescribed criteria.
- (3) An ecological community is eligible to be included in the ***vulnerable*** category at a particular time if, at that time:
  - (a) it is not critically endangered nor endangered; and
  - (b) it is facing a high risk of extinction in the wild in the medium-term future, as determined in accordance with the prescribed criteria.

## **183 Listing of key threatening processes**

- (1) The Minister must, by legislative instrument, establish a list of threatening processes that are key threatening processes.
- (2) The list, as first established, must contain only the key threatening processes contained in Schedule 3 to the *Endangered Species Protection Act 1992*, as in force immediately before the commencement of this Act.

## **184 Minister may amend lists**

Subject to this Subdivision, the Minister may, by legislative instrument, amend a list referred to in section 178, 181 or 183 by:

- (a) including items in the list in accordance with Subdivision AA; or

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- (aa) including items in the list in accordance with subsection 186(3), (4) or (5); or
- (b) deleting items from the list; or
- (c) in the case of the list referred to in section 178 or 181—transferring items from one category in the list to another category in the list in accordance with Subdivision AA; or
- (d) correcting an inaccuracy or updating the name of a listed threatened species or listed threatened ecological community.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the instrument. See regulations made for the purposes of paragraph 54(2)(b) of that Act.

**186 Amending list of threatened native species**

*Including native species in a category*

- (1) Subject to subsections (3), (4) and (5), the Minister must not include (whether as a result of a transfer or otherwise) a native species in a particular category unless satisfied that the native species is eligible to be included in that category.
- (2) In deciding whether to include a native species in a particular category (whether as a result of a transfer or otherwise), the only matters the Minister may consider are matters relating to:
  - (a) whether the native species is eligible to be included in that category; or
  - (b) the effect that including the native species in that category could have on the survival of the native species.

*Deleting native species from a category*

- (2A) The Minister must not delete (whether as a result of a transfer or otherwise) a native species from a particular category unless satisfied that:
  - (a) the native species is no longer eligible to be included in that category; or

- (b) the inclusion of the native species in that category is not contributing, or will not contribute, to the survival of the native species.
- (2B) In deciding whether to delete a native species from a particular category (whether as a result of a transfer or otherwise), the only matters the Minister may consider are matters relating to:
- (a) whether the native species is eligible to be included in that category; or
  - (b) the effect that the inclusion of the native species in that category is having, or could have, on the survival of the native species.

*Including similar species to an eligible species*

- (3) The Minister may include a native species in the critically endangered category if satisfied that:
- (a) it so closely resembles in appearance, at any stage of its biological development, a species that is eligible to be included in that category (see subsection 179(3)) that it is difficult to differentiate between the 2 species; and
  - (b) this difficulty poses an additional threat to the last-mentioned species; and
  - (c) it would substantially promote the objects of this Act if the first-mentioned species were regarded as critically endangered.
- (4) The Minister may include a native species in the endangered category if satisfied that:
- (a) it so closely resembles in appearance, at any stage of its biological development, a species that is eligible to be included in that category (see subsection 179(4)) that it is difficult to differentiate between the 2 species; and
  - (b) this difficulty poses an additional threat to the last-mentioned species; and
  - (c) it would substantially promote the objects of this Act if the first-mentioned species were regarded as endangered.

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- (5) The Minister may include a native species in the vulnerable category if satisfied that:
- (a) it so closely resembles in appearance, at any stage of its biological development, a species that is eligible to be included in that category (see subsection 179(5)) that it is difficult to differentiate between the 2 species; and
  - (b) this difficulty poses an additional threat to the last-mentioned species; and
  - (c) it would substantially promote the objects of this Act if the first-mentioned species were regarded as vulnerable.

**187 Amending list of ecological communities**

*Including ecological communities in a category*

- (1) The Minister must not include (whether as a result of a transfer or otherwise) an ecological community in a particular category unless satisfied that the ecological community is eligible to be included in that category.
- (2) In deciding whether to include an ecological community in a particular category (whether as a result of a transfer or otherwise), the only matters the Minister may consider are matters relating to:
- (a) whether the ecological community is eligible to be included in that category; or
  - (b) the effect that including the ecological community in that category could have on the survival of the ecological community.

*Deleting ecological communities from a category*

- (3) The Minister must not delete (whether as a result of a transfer or otherwise) an ecological community from a particular category unless satisfied that:
- (a) the ecological community is no longer eligible to be included in that category; or

- (b) the inclusion of the ecological community in that category is not contributing, or will not contribute, to the survival of the ecological community.
- (4) In deciding whether to delete an ecological community from a particular category (whether as a result of a transfer or otherwise), the only matters the Minister may consider are matters relating to:
  - (a) whether the ecological community is eligible to be included in that category; or
  - (b) the effect that the inclusion of the ecological community in that category is having, or could have, on the survival of the ecological community.

### **188 Amending list of key threatening processes**

- (1) The Minister must not add a threatening process to the list unless satisfied that it is eligible to be treated as a key threatening process.
- (2) The Minister must not delete a threatening process from the list unless satisfied that it is no longer eligible to be treated as a key threatening process.
- (3) A process is a ***threatening process*** if it threatens, or may threaten, the survival, abundance or evolutionary development of a native species or ecological community.
- (4) A threatening process is eligible to be treated as a key threatening process if:
  - (a) it could cause a native species or an ecological community to become eligible for listing in any category, other than conservation dependent; or
  - (b) it could cause a listed threatened species or a listed threatened ecological community to become eligible to be listed in another category representing a higher degree of endangerment; or
  - (c) it adversely affects 2 or more listed threatened species (other than conservation dependent species) or 2 or more listed threatened ecological communities.

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**189 Minister must consider advice from Scientific Committee**

- (1) In deciding whether to make an amendment covered by paragraph 184(1)(aa), (b) or (d), the Minister must, in accordance with the regulations (if any), obtain and consider advice from the Scientific Committee on the proposed amendment.
- (1A) Subsection (1) has effect subject to section 192.
- (1B) If advice from the Scientific Committee for the purposes of subsection (1) is to the effect that a particular native species, or a particular ecological community, is eligible to be included in the relevant list in a particular category, the advice must also contain:
  - (a) a statement that sets out:
    - (i) the grounds on which the species or community is eligible to be included in the category; and
    - (ii) the main factors that are the cause of it being so eligible; and
  - (b) either:
    - (i) information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community; or
    - (ii) a statement to the effect that there is nothing that could appropriately be done to stop the decline of, or support the recovery of, the species or community; and
  - (c) a recommendation on the question whether there should be a recovery plan for the species or community.
- (2) In preparing advice under subsection (1), the Scientific Committee may obtain advice from a person with expertise relevant to the subject matter of the proposed amendment.
- (3) In preparing advice for a proposed amendment to delete an item:
  - (a) included in a category of a list referred to in section 178 or 181; and
  - (b) that had not been included in that category in accordance with subsection 186(3), (4) or (5);



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the only matters the Scientific Committee may consider are matters relating to:

- (c) the survival of the native species or ecological community concerned; or
- (d) the effect that the inclusion in the list of the native species or ecological community concerned is having, or could have, on the survival of that native species or ecological community.

(3A) In preparing advice for a proposed amendment to:

- (a) include a native species in a category of the list referred to in section 178 in accordance with subsection 186(3), (4) or (5) because of the species' resemblance to another species; or
- (b) delete a native species from a category of the list referred to in section 178 that had been included in that category in accordance with subsection 186(3), (4) or (5) because of the species' resemblance to another species;

the only matters the Scientific Committee may consider are matters relating to:

- (c) the survival of either species; or
- (d) the effect that the inclusion in the list of the first-mentioned species is having, or could have, on the survival of either species.

**189A Certain information may be kept confidential**

- (1) This section applies if the Minister considers that the survival of a native species or ecological community could be threatened by the disclosure of some or all of the following information, or by the presence or actions of persons if some or all of the following information were disclosed publicly:
  - (a) the precise location of the species in the wild, or of the community;
  - (b) any other information about the species or community.
- (2) It is sufficient compliance with this Act if only a general description of the location of the species or community is included

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in an instrument or other document created for the purposes of this Act.

**189B Disclosure of Scientific Committee's assessments and advice**

- (1) A member of the Scientific Committee has a duty not to disclose the following to a person other than the Minister, an employee in the Department whose duties relate to the Committee or another member of the Committee:
  - (a) an assessment under section 194N in relation to whether an item is eligible for inclusion (whether as a result of a transfer or otherwise) in a list referred to in section 178, 181 or 183, any information relating to the assessment or any information about the nomination (if any) that led to the making of the assessment;
  - (b) advice under section 189 concerning an amendment covered by subsection 189(1) or any information relating to the advice.
- (2) However:
  - (a) the duty not to disclose a thing described in paragraph (1)(a) in relation to an item does not exist after:
    - (i) registration under Division 3 of Part 4 of the *Legislative Instruments Act 2003* of an instrument made under section 189 in relation to the item; or
    - (ii) the Minister decides under paragraph 194Q(1)(b) not to include the item in a list referred to in section 178, 181 or 183; and
  - (b) the duty not to disclose a thing described in paragraph (1)(b) in relation to an amendment does not exist after:
    - (i) registration under Division 3 of Part 4 of the *Legislative Instruments Act 2003* of an instrument made under section 189 relating to the amendment; or
    - (ii) the Minister decides under this Subdivision not to remove the item from a list referred to in section 178, 181 or 183.

- (3) Subsection (1) does not apply to a disclosure of particular information if:
- (a) the Chair of the Scientific Committee requests the Minister to give permission to disclose that information to a particular person (or persons within a particular group of persons); and
  - (b) the Minister gives that permission; and
  - (c) the disclosure is made to that person (or a person within that group).
- (4) After a member of the Scientific Committee has ceased under subsection (2) to have a duty not to disclose:
- (a) an assessment under section 194N in relation to whether an item is eligible for inclusion (whether as a result of a transfer or otherwise) in a list referred to in section 178, 181 or 183; or
  - (b) advice under section 189 concerning an amendment covered by subsection 189(1);
- the member must give a copy of the assessment or advice to anyone who asks for it.
- (5) If:
- (a) a member of the Scientific Committee proposes to give a person under subsection (4):
    - (i) a copy of an assessment relating to an item concerning a native species or ecological community; or
    - (ii) a copy of advice relating to an amendment concerning a native species or ecological community; and
  - (b) the member is aware that, under section 189A, it would be sufficient compliance with this Act if the copy included only a general location of the species or community;
- the member must take reasonable steps to ensure that the copy given to the person does not include a more detailed description than is necessary for sufficient compliance with this Act under that section.

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**190 Scientific Committee may provide advice about species or communities becoming threatened**

- (1) If the Scientific Committee is of the opinion that a native species or ecological community is not eligible to be included in any category of the list mentioned in section 178 or 181, the Committee may give advice to the Minister concerning any action that is necessary to prevent the species or community becoming threatened.
- (2) The Minister is to have regard to any advice given under subsection (1) in performing any function, or exercising any power, under this Act relevant to the species or community.

**192 Rediscovery of threatened species that were extinct**

- (1) If the Minister is satisfied that a native species that is listed in the extinct category has been definitely located in nature since it was last listed as extinct, the Minister may, under section 184, transfer the species from the extinct category to another category without considering advice from the Scientific Committee.
- (2) Subsection (1) does not prevent the Minister from making such an amendment after having considered advice from the Scientific Committee.

**193 Species posing a serious threat to human health**

- (1) If the Minister is satisfied that a native species poses a serious threat to human health, the Minister may, by legislative instrument, determine that the species is not appropriate for inclusion in any of the categories of the list referred to in section 178.
- (2) While the determination is in force, the species is not to be added to that list.
- (4) The Minister must cause a notice summarising the information contained in an instrument to be published in accordance with the regulations (if any).

## **194 Lists must be publicly available**

The Minister must ensure that:

- (a) up-to-date copies of the lists referred to in sections 178, 181 and 183 are available for free to the public on request; and
- (b) up-to-date copies of the lists are available on the internet.

Note: The copies of the lists made publicly available may not contain certain information kept confidential under section 189A.

## **Subdivision AA—The nomination and listing process**

### **194A Simplified outline**

The following is a simplified outline of this Subdivision:

This Subdivision sets out the usual process for including an item in a list referred to in section 178, 181 or 183, or transferring an item from one category in one of those lists to another category in the list.

The usual process involves an annual cycle that revolves around 12-month periods known as assessment periods. The Minister determines the start of the first assessment period (see section 194C).

The usual process involves the following steps for each assessment period for a list:

- (a) the Minister may determine conservation themes (this step is optional) (see section 194D);
- (b) the Minister invites people to nominate items for inclusion in the list referred to in section 178, 181 or 183, and gives the nominations to the Scientific Committee (see sections 194E and 194F);
- (c) the Scientific Committee prepares, and gives to the Minister, a list of items (which will mostly be

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	items that have been nominated) that it thinks should be assessed (see sections 194G to 194J);
(d)	the Minister finalises the list of items that are to be assessed (see sections 194K and 194L);
(e)	the Scientific Committee invites people to make comments about the item in the finalised list (see section 194M);
(f)	the Scientific Committee assesses the item in the finalised list, and gives the assessments to the Minister (see sections 194N and 194P);
(g)	the Minister decides whether an item that has been assessed should be included in the list referred to in section 178, 181 or 183 (see section 194Q).
The steps mentioned in paragraphs (a) to (d) will generally be completed before the start of the assessment period.	

**194B Definitions**

(1) In this Subdivision:

***assessment period*** has the meaning given by subsection 194C(1).

***eligible for assessment consideration***, in relation to an assessment period, has the meaning given by subsection 194G(3).

***finalised priority assessment list*** for an assessment period has the meaning given by subsection 194K(4).

***includes*** has a meaning affected by subsection (2).

***proposed priority assessment list*** for an assessment period has the meaning given by subsection 194G(1).

***Subdivision A List*** means a list referred to in section 178, 181 or 183.

- (2) A reference in this Subdivision to including an item in a list referred to in section 178 or 181 includes a reference to transferring the item from one category in the list to another category in the list.

**194C Meaning of *assessment period***

- (1) For the purposes of this Subdivision, each of the following is an ***assessment period*** for a Subdivision A List:
- (a) the period of 12 months starting on the day determined in writing by the Minister for the purposes of this paragraph in relation to the Subdivision A List;
  - (b) each period of 12 months starting on an anniversary of the day so determined.
- (2) The Minister must make a determination under paragraph (1)(a) within 3 months after the commencement of this section. The day so determined must not be more than 12 months after that commencement.
- (3) A determination under paragraph (1)(a) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the determination. See regulations made for the purposes of paragraph 54(2)(b) of that Act.

**194D Minister may determine conservation themes for an *assessment period***

- (1) Before the Minister invites nominations for an assessment period for a Subdivision A List under section 194E, the Minister may determine one or more conservation themes that the Minister considers should be given priority in relation to the assessment period for the Subdivision A List.
- (2) Without limiting subsection (1), the Minister may determine as a conservation theme that priority should be given to the conservation of:

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- (a) particular groups of species; or
  - (b) particular species; or
  - (c) particular regions of Australia.
- (3) The Minister may request advice from the Scientific Committee for the purpose of making a determination under subsection (1), and may have regard to any advice the Committee provides in response to the request.
- (4) A determination under subsection (1) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

**194E Minister to invite nominations for each assessment period**

- (1) Before the start of each assessment period for a Subdivision A List, the Minister must publish a notice inviting people to nominate items for inclusion in the Subdivision A List.

Note: Nominations can be for the transfer of an item already on a list covered by section 178 or 181 from one category in the list to another category in the list (see subsection 194B(2)).

- (2) A notice under subsection (1):
  - (a) must be published in accordance with the regulations referred to in paragraph (3)(a); and
  - (b) must invite people to nominate, to the Minister, items for inclusion in the Subdivision A List; and
  - (c) must identify the assessment period to which the notice relates; and
  - (d) must specify a date (the *cut-off date*) by which nominations must be received, which must be at least 40 business days after the notice has been published as required by paragraph (a); and
  - (e) must specify, or refer to, the information requirements, and the manner and form requirements, that, under regulations referred to in paragraphs (3)(b) and (c), apply to making nominations; and
  - (f) may also include:



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- (i) information related to any conservation themes that the Minister has determined under section 194D should be given priority in relation to the assessment period for the Subdivision A List; and
  - (ii) any other information that the Minister considers appropriate.
- (3) The regulations must provide for the following:
  - (a) how a notice under subsection (1) is to be published;
  - (b) the manner and form for making nominations;
  - (c) what information is to be included in a nomination.

**194F Minister to give nominations to Scientific Committee**

*Nominations in relation to first assessment period*

- (1) Within 30 business days after the cut-off date specified in the notice under subsection 194E(1) for the first assessment period, the Minister must give the Scientific Committee the nominations that the Minister:
  - (a) had received before the end of that cut-off date; and
  - (b) had not already forwarded to the Scientific Committee, under section 191 (as in force before the commencement of this section), to assess; and
  - (c) had not already rejected under section 191 (as in force before the commencement of this section); and
  - (d) does not reject under subsection (3).

*Nominations in relation to later assessment periods*

- (2) Within 30 business days after the cut-off date (the **current cut-off date**) specified in the notice under subsection 194E(1) for an assessment period (other than the first) for a Subdivision A List, the Minister must give the Scientific Committee the nominations that were received by the Minister in the period:
  - (a) starting immediately after the end of the cut-off date specified in the notice under subsection 194E(1) for the

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immediately preceding assessment period for the  
Subdivision A List; and

- (b) ending at the end of the current cut-off date for the  
Subdivision A List;

other than any such nominations that the Minister has rejected  
under subsection (3).

*Minister may reject nominations*

- (3) The Minister may, in writing, reject a nomination if the Minister  
considers that:
- (a) the nomination is vexatious, frivolous or not made in good  
faith; or
  - (b) the Minister considers that regulations referred to in  
paragraph 194E(3)(b) or (c) have not been complied with in  
relation to the nomination.
- (4) If a nomination is rejected under paragraph (3)(b), the Minister  
must, if practicable, notify the person who made the nomination of  
the rejection of the nomination and the reason for the rejection.

*Definition*

- (5) In this section:

***nomination*** means a nomination of an item for inclusion in a  
Subdivision A List.

**194G Scientific Committee to prepare proposed priority assessment  
list**

- (1) Within 40 business days after the Scientific Committee receives  
the nominations as required by subsection 194F(1) in relation to an  
assessment period for a Subdivision A List, the Committee must  
prepare and give to the Minister a list (the ***proposed priority  
assessment list***) for the assessment period for the Subdivision A  
List.

- (2) The proposed priority assessment list for the Subdivision A List is to consist of such of the items that are eligible for assessment consideration in relation to the assessment period for the Subdivision A List as the Scientific Committee considers it appropriate to include in the proposed priority assessment list, having regard to:
- (a) any conservation themes determined by the Minister under section 194D in relation to the assessment period for the Subdivision A List; and
  - (b) the Committee's own views about what should be given priority in relation to the assessment period for the Subdivision A List; and
  - (c) the Committee's capacity to make assessments under this Division while still performing its other functions; and
  - (d) any other matters that the Committee considers appropriate.
- (3) An item is **eligible for assessment consideration** in relation to the assessment period for a Subdivision A List if:
- (a) the item has been nominated by a nomination referred to in subsection (1); or
  - (b) the Committee itself wishes to nominate the item for inclusion in the Subdivision A List; or
  - (c) the item was eligible for assessment consideration, otherwise than because of this paragraph, in relation to the immediately preceding assessment period (if any) for the Subdivision A List but was not included in the finalised priority assessment list for that assessment period for the Subdivision A List.
- (4) Without limiting the generality of the Scientific Committee's discretion under subsection (2), the Committee does not have to include in the proposed priority assessment list an item that has been nominated if the Committee considers that:
- (a) if the item is not on the Subdivision A List concerned—it is unlikely that the item is eligible to be included in the Subdivision A List; or
  - (b) if the nomination is for the transfer of the item to another category in the Subdivision A List concerned—it is unlikely

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that the item is eligible to be included in that other category of the Subdivision A List.

- (5) For the purposes of subsection (4), the Committee is not required to have regard to any information beyond the information that was included in the nomination.
- (6) The proposed priority assessment list is not a legislative instrument.

**194H Matters to be included in proposed priority assessment list**

- (1) The proposed priority assessment list for an assessment period for a Subdivision A List is to include, for each item in the proposed priority assessment list:
  - (a) a description of the item; and
  - (b) an assessment completion time; and
  - (c) any other information required by the regulations.
- (2) The assessment completion time for an item must be either:
  - (a) a time that is at or before the end of the assessment period for the proposed priority assessment list; or
  - (b) if the Scientific Committee considers it likely that making an assessment in relation to the item will take a period that is longer than 12 months—the end of that longer period (calculated from the start of the assessment period for the proposed priority assessment list).

**194J Statement to be given to Minister with proposed priority assessment list**

- (1) When the Scientific Committee gives the Minister the proposed priority assessment list for an assessment period for a Subdivision A List, the Committee must also give the Minister a statement setting out such information as the Committee considers appropriate relating to:

- (a) for each item that is included in the proposed priority assessment list—why the Committee included the item in the list; and
  - (b) for each item that is not included in the proposed priority assessment list but that was eligible for assessment consideration because of paragraph 194G(3)(a) or (c)—why the Committee did not include the item in the proposed priority assessment list.
- (2) The statement must also identify, as items nominated by the Scientific Committee, any items that are included in the proposed priority assessment list because the Committee itself wishes to nominate them (see paragraph 194G(3)(b)).

#### **194K The finalised priority assessment list**

- (1) Within 20 business days after the Minister, under section 194G, receives the proposed priority assessment list for an assessment period for a Subdivision A List, the Minister may, in writing, make changes to the proposed priority assessment list as mentioned in subsection (2).
- (2) The changes the Minister may make are as follows:
  - (a) including an item in the proposed priority assessment list (and also including the matters referred to in subsection 194H(1));
  - (b) omitting an item from the proposed priority assessment list (and also omitting the matters referred to in subsection 194H(1));
  - (c) changing the assessment completion time for an item in the proposed priority assessment list;
  - (d) any other changes of a kind permitted by the regulations.
- (3) In exercising the power to make changes, the Minister may have regard to any matters that the Minister considers appropriate.
- (4) At the end of the period of 20 business days referred to in subsection (1), the proposed priority assessment list, as changed (if

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at all) by the Minister, becomes the ***finalised priority assessment list*** for the assessment period for the Subdivision A List.

- (5) The Minister must notify the Scientific Committee of all changes that the Minister makes to the proposed priority assessment list.
- (6) The finalised priority assessment list is not a legislative instrument.

**194L Publication of finalised priority assessment list**

- (1) The Scientific Committee must publish the finalised priority assessment list for an assessment period for a Subdivision A List on the internet.
- (2) The Scientific Committee must also publish the finalised priority assessment list in accordance with any requirements of the regulations.

**194M Scientific Committee to invite comments on items in finalised priority assessment list**

- (1) In relation to each item included in the finalised priority assessment list for an assessment period for a Subdivision A List, the Scientific Committee must publish a notice inviting people to make comments on the item.
- (2) The Scientific Committee may, under subsection (1), publish a single notice relating to all of the items on the finalised priority assessment list, or may publish a number of separate notices, each of which relates to one or more of the items.
- (3) A notice under subsection (1), in relation to an item or items:
  - (a) must be published in accordance with the regulations referred to in paragraph (4)(a); and
  - (b) must identify the item or items to which the notice relates; and
  - (c) if the Subdivision A List is the list referred to in section 178 or 181—must identify the category of the Subdivision A List in which the item or items are proposed to be included; and

- (d) must invite people to make comments, to the Scientific Committee, setting out:
    - (i) if the Subdivision A List is the list referred to in section 178 or 181—views about whether the item or items are eligible for inclusion in that category of the Subdivision A List; and
    - (ii) if the Subdivision A List is the list referred to in section 183—views whether the item or items are eligible for inclusion in the Subdivision A List; and
    - (iii) reasons supporting those views; and
  - (e) must specify the date (the *cut-off date*) by which comments must be received, which must be at least 30 business days after the notice has been published as required by paragraph (a); and
  - (f) must specify, or refer to, the manner and form requirements that, under regulations referred to in paragraph (4)(b), apply to making comments; and
  - (g) may also invite people to comment on other matters that the Scientific Committee considers appropriate; and
  - (h) may also include any other information that the Scientific Committee considers appropriate.
- (4) The regulations must provide for the following:
- (a) how a notice under subsection (1) is to be published;
  - (b) the manner and form for making comments.

**194N Scientific Committee to assess items on finalised priority assessment list and give assessments to Minister**

- (1) In relation to each item included in the finalised priority assessment list for an assessment period for a Subdivision A List, the Scientific Committee must (by the time required by section 194P):
- (a) make a written assessment of:
    - (i) whether the item is eligible for inclusion in the Subdivision A List; and

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- (ii) if the Subdivision A List is the list referred to in section 178 or 181—the category of that List in which the item is eligible to be included; and
- (b) give to the Minister:
  - (i) the written assessment (or a copy of it); and
  - (ii) a copy of the comments referred to in paragraphs (2)(a) and (b) (whether or not they have all been taken into account under subsection (2)).
- (2) In making an assessment in relation to an item, the Scientific Committee, subject to subsections (3) and (4):
  - (a) must take into account the comments the Committee receives in response to the notice under subsection 194M(1) in relation to the item; and
  - (b) may seek, and have regard to, information or advice from any source.
- (3) The Scientific Committee is not required to take a comment referred to in paragraph (2)(a) into account if:
  - (a) the Committee does not receive the comment until after the cut-off date specified in the notice under subsection 194M(1) in relation to the item; or
  - (b) the Committee considers that regulations referred to in paragraph 194M(4)(b) have not been complied with in relation to the comment.
- (4) In making an assessment, the only matters the Scientific Committee may consider are matters relating to:
  - (a) whether the item is eligible for inclusion in the Subdivision A List; or
  - (b) the effect that including the item in that List could have on the survival of the native species or ecological community concerned.

**194P Time by which assessments to be provided to Minister**

- (1) Subsection 194N(1) must be complied with, in relation to an item included in the finalised priority assessment list for an assessment



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period for a Subdivision A List, by the assessment completion time specified in the finalised priority assessment list for the item, or by that time as extended under this section.

- (2) The Scientific Committee may request the Minister to extend the assessment completion time (or that time as previously extended) if the Committee considers that it needs more time to make the assessment.
- (3) The Minister may, in response to a request under subsection (2), extend the assessment completion time (or that time as previously extended) by such period (if any) as the Minister considers appropriate. However, the total length of all extensions of the assessment completion time must not be more than 5 years.
- (4) An extension under subsection (3) must be made in writing.
- (5) If the Minister grants an extension under this section, the Minister must publish particulars of the extension in a way that the Minister considers appropriate.

**194Q Decision about inclusion of an item in the Subdivision A List**

*Minister to decide whether or not to include item*

- (1) After receiving from the Scientific Committee an assessment under section 194N of an item, the Minister must:
  - (a) include the item in the Subdivision A List concerned; or
  - (b) in writing, decide not to include the item in the Subdivision A List concerned.

Note 1: Under this subsection the Minister can transfer an item already on a Subdivision A List to a different category in the List (see subsection 194B(1)).

Note 2: Sections 186, 187 and 188 contain rules about including items in a Subdivision A List.

- (2) If, under subsection (1), the Minister transfers an item to a category of the Subdivision A List, the Minister must at the same time

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delete the item from the category in which it was included before the transfer.

- (3) Subject to subsection (4), the Minister must comply with subsection (1) within 90 business days after the day on which the Minister receives the assessment.
- (4) The Minister may, in writing, extend or further extend the period for complying with subsection (1).
- (5) Particulars of an extension or further extension under subsection (4) must be published on the internet and in any other way required by regulations.
- (6) For the purpose of deciding what action to take under subsection (1) in relation to the item:
  - (a) the Minister must have regard to:
    - (i) the Scientific Committee's assessment of the item; and
    - (ii) the comments (if any), a copy of which were given to the Minister under subsection 194N(1) with the assessment; and
  - (b) the Minister may seek, and have regard to, information or advice from any source.

*Additional requirements if Minister decides to include item*

- (7) If the Minister includes the item in the Subdivision A List, he or she must, within a reasonable time:
  - (a) if the item was nominated by a person in response to a notice under subsection 194E(1)—advise the person that the item has been included in the Subdivision A List; and
  - (b) publish a copy of the instrument referred to in paragraph (1)(a) on the internet; and
  - (c) publish a copy or summary of that instrument in accordance with any other requirements specified in the regulations.

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*Additional requirements if Minister decides not to include item*

- (8) If the Minister decides not to include the item in the Subdivision A List, the Minister must, within 10 business days after making the decision:
- (a) publish the decision on the internet; and
  - (b) if the item was nominated by a person in response to a notice under subsection 194E(1)—advise the person of the decision, and of the reasons for the decision.

**194R Scientific Committee may obtain advice**

In performing its functions under this Subdivision, the Scientific Committee may obtain advice from a person with expertise relevant to the inclusion of an item in a Subdivision A List.

**194S Co-ordination with Australian Heritage Council—Committee undertaking assessment**

- (1) This section applies if:
- (a) the Scientific Committee undertakes an assessment under this Subdivision; and
  - (b) before giving the assessment to the Minister, the Committee becomes aware that:
    - (i) the Australian Heritage Council is undertaking, or has undertaken, an assessment of a place under Subdivision BA or BB of Division 1A of Part 15 or under Subdivision BA or BB of Division 3A of Part 15; and
    - (ii) there is a matter that is relevant to both the assessment referred to in paragraph (a) and the assessment referred to in subparagraph (i).
- (2) A member of the Scientific Committee may discuss the matter with a member of the Australian Heritage Council.

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- (3) Before the Scientific Committee gives an assessment to the Minister under this Subdivision, the Committee must comply with subsection (4) or (6).
- (4) If the Australian Heritage Council has not yet given the Minister an assessment that deals with that matter, the Scientific Committee must:
  - (a) give the Council a copy of the assessment that the Committee proposes to give to the Minister; and
  - (b) invite the Council to give the Committee its comments in relation to that matter; and
  - (c) take into account, in finalising the assessment that the Committee gives the Minister, any comments that the Council makes in relation to that matter in response to that invitation within 14 days, or such longer period as is specified in the invitation, after being given the invitation.
- (5) If the Scientific Committee gives the Australian Heritage Council a copy of a proposed assessment under paragraph (4)(a), the Committee must also give the Council a copy of the assessment that the Committee gives the Minister.
- (6) If:
  - (a) the Australian Heritage Council has already given the Minister an assessment that deals with that matter; and
  - (b) the Scientific Committee has been given a copy of that assessment;the Committee must take that assessment into account in finalising the assessment that the Committee gives the Minister.
- (7) If, under section 324JR, 324JS, 341JQ or 341JR, the Australian Heritage Council gives the Scientific Committee a proposed assessment, or an assessment, that deals with a particular matter because the Committee is undertaking an assessment that deals with that matter, a member of the Committee may discuss that matter with a member of the Council.
- (8) Subsection (2), paragraph (4)(a) and subsections (5) and (7) have effect despite section 189B.

**194T Co-ordination with Australian Heritage Council—Committee given assessment to Minister**

- (1) This section applies if:
  - (a) the Scientific Committee has given to the Minister an assessment under this Subdivision; and
  - (b) the Committee is or becomes aware that:
    - (i) the Australian Heritage Council is undertaking an assessment of a place under Subdivision BA or BB of Division 1A of Part 15 or under Subdivision BA or BB of Division 3A of Part 15; and
    - (ii) there is a matter that is relevant to both the assessment referred to in paragraph (a) and the assessment referred to in subparagraph (i).
- (2) The Scientific Committee must, within 7 days after giving the assessment to the Minister, or becoming aware, as referred to in paragraph (1)(b):
  - (a) ensure the Australian Heritage Council is aware of the existence of the paragraph (1)(a) assessment dealing with the matter; and
  - (b) give the Council a copy of the assessment.
- (3) A member of the Scientific Committee may discuss the matter with a member of the Australian Heritage Council.
- (4) Subsections (2) and (3) have effect despite section 189B.

**Subdivision B—Permit system**

**195 Subdivision does not apply to cetaceans**

This Subdivision does not apply to a member of a listed threatened species that is a cetacean.

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**196 Killing or injuring member of listed threatened species or community**

- (1) A person commits an offence if:
- (a) the person takes an action; and
  - (b) the action results in the death or injury of a member of a species or a member of an ecological community; and
  - (c) the member is a member of a listed threatened species (except a conservation dependent species) or of a listed threatened ecological community; and
  - (d) the member is in or on a Commonwealth area.

Penalty:

- (a) in the case of an aggravated offence—imprisonment for 2 years or 3,000 penalty units, or both;
- (b) in any other case—imprisonment for 2 years or 1,000 penalty units, or both.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(c) and (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**196A Strict liability for killing or injuring member of listed threatened species or community**

- (1) A person commits an offence if:
- (a) the person takes an action; and
  - (b) the action results in the death or injury of a member of a native species or a member of an ecological community; and
  - (c) the member is a member of a listed threatened species (except a conservation dependent species) or of a listed threatened ecological community; and
  - (d) the member is in or on a Commonwealth area.

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Penalty:

- (a) in the case of an aggravated offence—1,500 penalty units;
- (b) in any other case—500 penalty units.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(a), (b), (c) and (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**196B Taking etc. member of listed threatened species or community**

- (1) A person commits an offence if:

- (a) the person takes, trades, keeps or moves a member of a species or a member of an ecological community; and
- (b) the member is a member of a listed threatened species (except a conservation dependent species) or a listed threatened ecological community; and
- (c) the member is in or on a Commonwealth area.

Penalty:

- (a) in the case of an aggravated offence—imprisonment for 2 years or 3,000 penalty units, or both;
- (b) in any other case—imprisonment for 2 years or 1,000 penalty units, or both.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(b) and (c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

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**196C Strict liability for taking etc. member of listed threatened species or community**

- (1) A person commits an offence if:
- (a) the person takes, trades, keeps or moves a member of a native species or a member of an ecological community; and
  - (b) the member is a member of a listed threatened species (except a conservation dependent species) or a listed threatened ecological community; and
  - (c) the member is in or on a Commonwealth area.

Penalty:

- (a) in the case of an aggravated offence—1,500 penalty units;
- (b) in any other case—500 penalty units.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(a), (b) and (c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**196D Trading etc. member of listed threatened species or community taken in Commonwealth area**

- (1) A person commits an offence if:
- (a) the person trades, keeps or moves a member of a species or a member of an ecological community; and
  - (b) the member is a member of a listed threatened species (except a conservation dependent species) or a listed threatened ecological community; and
  - (c) the member has been taken in or on a Commonwealth area.

Penalty:

- (a) in the case of an aggravated offence—imprisonment for 2 years or 3,000 penalty units, or both;



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- (b) in any other case—imprisonment for 2 years or 1,000 penalty units, or both.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(b) and (c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**196E Strict liability for trading etc. member of listed threatened species or community taken in Commonwealth area**

- (1) A person commits an offence if:
- (a) the person trades, keeps or moves a member of a native species or a member of an ecological community; and
  - (b) the member is a member of a listed threatened species (except a conservation dependent species) or a listed threatened ecological community; and
  - (c) the member has been taken in or on a Commonwealth area.

Penalty:

- (a) in the case of an aggravated offence—1,500 penalty units;
- (b) in any other case—500 penalty units.

Note 1: For the extra element of an aggravated offence, see section 196F.

Note 2: This section does not apply in the circumstances described in section 197. A defendant bears an evidential burden in relation to those circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) Strict liability applies to paragraphs (1)(a), (b) and (c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

**196F Aggravated offence—member of listed threatened species that is a dugong or turtle**

- (1) For the purposes of this Subdivision, an offence against section 196, 196A, 196B, 196C, 196D or 196E (the *underlying*