

# APPENDIX 3

## Environmental Planning and Assessment Act 1979 (NSW) – Part 5

### Part 5 – Environmental assessment

#### Division 1 – Preliminary

##### 110 Definitions

(1) In this Part: "**activity**" means:

- (a) the use of land, and
- (b) the subdivision of land, and
- (c) the erection of a building, and
- (d) the carrying out of a work, and
- (e) the demolition of a building or work, and
- (f) any other act, matter or thing referred to in section 26 that is prescribed by the regulations for the purposes of this definition,

but does not include:

- (g) any act, matter or thing for which development consent under Part 4 is required or has been obtained, or
- (h) any act matter or thing that is prohibited under an environmental planning instrument, or
- (i) exempt development, or
- (j) development carried out in compliance with an order under Division 2A of Part 6, or
- (k) any development of a class or description that is prescribed by the regulations for the purposes of this definition.

"**approval**" includes:

- (a) a consent, licence or permission or any form of authorisation, and
- (b) a provision of financial accommodation by a determining authority to another person, not being a provision of such financial accommodation, or financial accommodation of such class or description, as may be prescribed for the purposes of this definition by a determining authority so prescribed.

"**determining authority**" means a Minister or public authority and, in relation to any activity, means the Minister or public authority by or on whose behalf the activity is or is to be carried out or any Minister or public authority whose approval is required in order to enable the activity to be carried out. "**nominated determining authority**", in relation to an activity, means the determining authority nominated by the Minister in accordance with section 110A in relation to the activity. "**proponent**", in relation to

an activity, means the person proposing to carry out the activity, and includes any person taken to be the proponent of the activity by virtue of section 110B.

(2) The Minister is not a determining authority in relation to an activity for the purposes of this Part merely because the Minister's approval is required under Part 3A.

#### **110A Nomination of nominated determining authority**

(1) Where the approval of more than one determining authority is required in relation to an activity or an activity of a specified class or description (either in respect of the carrying out of the activity or the granting of an approval in respect of the activity), the Minister may, by order published in the Gazette and in a newspaper circulating throughout the State, nominate a determining authority to be the nominated determining authority in relation to the activity or an activity of that class or description for the purposes of this Part.

(2) Where, under subsection (1), the Minister has nominated a determining authority to be the nominated determining authority in relation to an activity or an activity of a specified class or description, any other determining authority which would otherwise be required to comply with the provisions of this Part in relation to the activity or an activity of that class or description is not required:

(a) to comply with section 112 (2) or (3), or

(b) to comply with section 113,

in relation to the activity or any activity which comes within that class or description but shall, in all other respects, comply with the relevant provisions of this Part.

(3) A determining authority (other than the nominated determining authority) is required to forward to the nominated determining authority a copy of any submissions made to it under section 113 (2) and to provide other information to the nominated determining authority, as required by the regulations, to enable the nominated determining authority to co-ordinate the preparation and furnishing of reports in relation to the activity or activity of the specified class or description.

#### **110B Determining authorities taken to be proponents of activities**

(1) A proponent of an activity for the purposes of this Part is taken to include the following:

(a) the Forestry Commission in respect of forestry activities authorised by that Commission on land under the management of that Commission,

(b) any determining authority which the Minister certifies in writing to be the proponent of a particular activity specified in the certificate or which the regulations declare to be the proponent of activities of the kind specified in the regulations.

(2) In any such case, a reference in this Part to a determining authority carrying out an activity includes a reference to the Forestry Commission or such a determining authority granting an approval in relation to the activity.

#### **110C Determining authorities to have regard to register of critical habitat**

Each determining authority must, for the purpose of exercising functions under this Part, have regard to the register of critical habitat kept by the Director-General of National Parks and Wildlife under the *Threatened Species Conservation Act 1995*.

### **110D Transitional--amendment of list of vulnerable species**

(1) For the purposes of Divisions 2 and 3 of this Part, an amendment to the list of vulnerable species does not apply in respect of an activity if:

(a) an environmental impact statement was obtained in relation to that activity in accordance with this Part before the amendment was made, and

(b) notice of the environmental impact statement has been given as provided for by section 113 (1).

(2) Subsection (1) ceases to apply in respect of an activity if the activity has not commenced to be carried out, or an approval in relation to the activity has not been granted, by a determining authority at the end of the period of 12 months after the date the notice of the environmental impact statement was given under section 113 (1).

(3), (4) (Repealed)

(5) In this section: "**list of vulnerable species**" means Part 1 of Schedule 2 to the *Threatened Species Conservation Act 1995* or, subject to section 5C, Schedule 5 to the *Fisheries Management Act 1994*.

### **110E Exemptions for certain activities**

Sections 111 and 112 do not apply to or in respect of the following (despite the terms of those sections):

(a) a modification of an activity, whose environmental impact has already been considered, that will reduce its overall environmental impact,

(b) a routine activity (such as the maintenance of infrastructure) that the Minister determines has a low environmental impact and that is carried out in accordance with a code approved by the Minister,

(c) an activity (or part of an activity) that has been approved, or is to be carried out, by another determining authority after environmental assessment in accordance with this Part.

## **Division 2 – Duty of determining authorities to consider environmental impact of activities**

### **111 Duty to consider environmental impact**

(1) For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its consideration of an activity shall, notwithstanding any other provisions of this Act or the provisions of any other Act or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.

(2) Without limiting subsection (1), a determining authority shall consider the effect of an activity on:

(a) any conservation agreement entered into under the *National Parks and Wildlife Act 1974* and applying to the whole or part of the land to which the

activity relates, and

(b) any plan of management adopted under that Act for the conservation area to which the agreement relates, and

(c) any joint management agreement entered into under the *Threatened Species Conservation Act 1995*, and

(d) any biobanking agreement entered into under Part 7A of the *Threatened Species Conservation Act 1995* that applies to the whole or part of the land to which the activity relates.

(3) Without limiting subsection (1), a determining authority shall consider the effect of an activity on any wilderness area (within the meaning of the *Wilderness Act 1987*) in the locality in which the activity is intended to be carried on.

(4) Without limiting subsection (1), a determining authority must consider the effect of an activity on:

(a) critical habitat, and

(b) in the case of threatened species, populations and ecological communities, and their habitats, whether there is likely to be a significant effect on those species, populations or ecological communities, or those habitats, and

(c) any other protected fauna or protected native plants within the meaning of the *National Parks and Wildlife Act 1974*.

If a biobanking statement has been issued in respect of a development under Part 7A of the *Threatened Species Conservation Act 1995*, the determining authority is not required to consider the impact of the activity on biodiversity values.

## **111A (Repealed)**

### **Division 3 – Activities for which EIS required**

#### **112 Decision of determining authority in relation to certain activities**

(1) A determining authority shall not carry out an activity, or grant an approval in relation to an activity, being an activity that is a prescribed activity, an activity of a prescribed kind or an activity that is likely to significantly affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, unless:

(a) the determining authority has obtained or been furnished with and has examined and considered an environmental impact statement in respect of the activity:

(i) prepared in the prescribed form and manner by or on behalf of the proponent, and

(ii) except where the proponent is the determining authority, submitted to the determining authority in the prescribed manner,

(b) notice referred to in section 113 (1) has been duly given by the determining authority (or, where a nominated determining authority has been nominated in relation to the activity, by the nominated determining authority), the period specified in the notice has expired and the determining authority has examined and considered any representations made to it or any other determining

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authority in accordance with section 113 (2),

(c) the determining authority has complied with section 113 (3),

(c1) (Repealed)

(d) where it receives notice from the Director-General that the Minister has requested that a review be held by the Planning Assessment Commission with respect to the activity, the review has been held and the determining authority has considered the findings and recommendations of the Planning Assessment Commission and any advice given to it by the Minister in accordance with section 114, and

(e) where it receives notice from the Director-General that the Director-General has decided that an examination be undertaken in accordance with section 113 (5), that examination has been carried out and the determining authority has considered the report furnished to it in accordance with that subsection.

(1A) A determining authority shall not grant an approval in relation to an activity referred to in subsection (1) that is to be carried out in respect of land that is, or is part of, a wilderness area (within the meaning of the *Wilderness Act 1987*) unless any consent to the activity required under that Act has been obtained.

(1B) Without limiting subsection (1), a determining authority must not carry out an activity, or grant an approval in relation to an activity, being an activity that is in respect of land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats, unless a species impact statement, or an environmental impact statement that includes a species impact statement, has been prepared (in each case) in accordance with Division 2 of Part 6 of the *Threatened Species Conservation Act 1995*.

(1C) An environmental impact statement is not required (despite subsection (1) (a)) in respect of an activity that:

(a) is on land that is, or is part of, critical habitat, or is likely to significantly affect threatened species, populations or ecological communities, or their habitats, and

(b) is not likely to significantly affect the environment except as described in paragraph (a),

if the determining authority has obtained or been furnished with a species impact statement in respect of the activity, prepared in accordance with Division 2 of Part 6 of the *Threatened Species Conservation Act 1995*. However, the provisions of this Part relating to environmental impact statements (other than subsection (1) (a) (i)) apply to the species impact statement as if references to an environmental impact statement included a reference to the species impact statement. If a biobanking statement has been issued in respect of the activity under Part 7A of the *Threatened Species Conservation Act 1995*, the activity is taken not to significantly affect threatened species, populations or ecological communities, or their habitats.

(1D) (Repealed)

(2) The determining authority or nominated determining authority, as the case requires, shall, as soon as practicable after an environmental impact statement is obtained by or furnished to it, as referred to in subsection (1), but before giving notice

under section 113 (1), furnish to the Director-General a copy of the statement.

(3) A determining authority or nominated determining authority, as the case requires, shall furnish such number of additional copies of an environmental impact statement to the Director-General as the Director-General may request.

(4) Before carrying out an activity referred to in subsection (1) or in determining whether to grant an approval in relation to such an activity, a determining authority which is satisfied that the activity will detrimentally affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats:

(a) may, except where it is the proponent of the activity:

(i) impose such conditions or require such modifications as will in its opinion eliminate or reduce the detrimental effect of the activity on the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, or

(ii) disapprove of the activity, or

(b) may, where it is the proponent of the activity:

(i) modify the proposed activity so as to eliminate or reduce the detrimental effect of the activity on the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, or

(ii) refrain from undertaking the activity.

(5) Where a determining authority, not being the proponent of an activity, imposes conditions as referred to in subsection (4) (a) (i) or disapproves of an activity as referred to in subsection (4) (a) (ii), the determining authority shall, by notice in writing to the proponent, indicate the reasons for the imposition of the conditions or for disapproving of the activity.

(6) The provisions of subsection (4) have effect notwithstanding any other provisions of this Act (other than Part 3A) or the provisions of any other Act or of any instrument made under this or any other Act.

(6A) (Repealed)

(7) Where a nominated determining authority has been nominated in relation to an activity, no other determining authority which may grant an approval in relation to the activity shall be concerned to inquire whether or not the nominated determining authority has complied with this section or section 113.

### **112A Determining authorities to have regard to recovery plans and threat abatement plans**

A determining authority, in considering a species impact statement, must have regard to the terms of any recovery plan or threat abatement plan relating to the land referred to in the species impact statement for the purposes of assessing any effect on a threatened species, population or ecological community, or its habitat.

### **112B Consultation with Minister for the Environment if Minister is determining authority**

(1) A Minister who is a determining authority must not carry out, or grant an approval to carry out, an activity in respect of land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats, unless that Minister has consulted with the Minister administering the *Threatened Species Conservation Act 1995*.

(2) In so consulting, the Minister administering the *Threatened Species Conservation Act 1995* must provide the Minister who is the determining authority with any recommendations made by the Director-General of National Parks and Wildlife concerning the determination of the activity. If that Minister does not accept any one or more of the recommendations, that Minister must include the recommendations not accepted and the Minister's reasons for not accepting them in the determination.

### **112C Concurrence of or consultation with Director-General of National Parks and Wildlife if Minister is not determining authority**

(1) A determining authority (not being a Minister) must not carry out, or grant an approval to carry out, an activity:

(a) that is to be carried out in respect of land that is, or is part of, critical habitat, or

(b) that is likely to significantly affect a threatened species, population or ecological community or its habitat,

without the concurrence of the Director-General of National Parks and Wildlife.

(2) Despite subsection (1), if the Minister administering the *Threatened Species Conservation Act 1995* considers that it is appropriate, that Minister may elect to act in the place of the Director-General of National Parks and Wildlife for the purpose of that subsection. However, if the Minister so elects, the Minister must:

(a) consult the Director-General of National Parks and Wildlife and seek that Director-General's recommendations in respect of the proposed activity, and

(b) if the Minister does not accept any one or more of those recommendations-specify, in the determination as to the grant or refusal to grant concurrence under this section, the recommendations that were not accepted and the Minister's reasons for not accepting them.

(3) Section 79B (8), (9) and (11) and the prescribed provisions of the regulations apply (with such modifications as may be necessary) to and in respect of the granting of concurrence under this section in the same way as they apply to and in respect of the granting of concurrence required by an environmental planning instrument.

(4) The Director-General of National Parks and Wildlife or, in a case where the Minister administering the *Threatened Species Conservation Act 1995* has elected to act in the place of the Director-General, the Minister may, on the request of a determining authority that proposes to carry out or grant an approval to carry out an activity referred to in subsection (1), modify a concurrence granted under this section by:

(a) revoking or varying a condition of the concurrence, or

(b) imposing an additional condition on the concurrence.

### **112D Matters to be considered by Director-General of National Parks and Wildlife as concurrence authority**

(1) In deciding whether or not concurrence should be granted under section 112C, the Director-General of National Parks and Wildlife (or the Minister administering the *Threatened Species Conservation Act 1995*, if that Minister acts under that section) must take the following matters into consideration:

- (a) any species impact statement prepared in relation to the activity,
- (b) any assessment report prepared by or on behalf of the proponent,
- (c) any representations made under section 113 concerning the species impact statement,
- (d) any relevant recovery plan or threat abatement plan,
- (e) whether the activity is likely to reduce the long-term viability of the species, population or ecological community in the region,
- (f) whether the activity is likely to accelerate the extinction of the species, population or ecological community or place it at risk of extinction,
- (g) the principles of ecologically sustainable development,
- (h) the likely social and economic consequences of granting or of not granting concurrence.

(2) Before the Director-General of National Parks and Wildlife or the Minister administering the *Threatened Species Conservation Act 1995* decides to modify a concurrence in respect of an activity under section 112C he or she must:

- (a) give notice of the proposed decision to any person who made representations under section 113 concerning the species impact statement in respect of the activity, and
- (b) provide the person with an opportunity to make submissions with respect to the proposed decision within a period specified in the notice (being a period of not less than 28 days after the date of the notice), and
- (c) have regard to any submissions made to him or her in accordance with the notice within the period so specified.

**112E Matters to be considered by Minister or Director-General of National Parks and Wildlife when consulted**

The Minister administering the *Threatened Species Conservation Act 1995* (for the purposes of consultation under section 112B) or the Director-General of National Parks and Wildlife (for the purposes of consultation under section 112C) (or the Minister administering the *Threatened Species Conservation Act 1995*, if that Minister acts under that section) must take the following matters into consideration:

- (a) any species impact statement prepared in relation to the activity,
- (b) any assessment report prepared by or on behalf of the proponent,
- (c) any representations made under section 113 concerning the species impact statement,
- (d) whether the activity is likely to reduce the long-term viability of the species in the region,



- (e) whether the activity is likely to place the species at risk of becoming endangered as described in section 10 of the *Threatened Species Conservation Act 1995*,
- (f) the principles of ecologically sustainable development,
- (g) the likely social and economic consequences if the activity is not carried out.

### **113 Publicity and examination of environmental impact statements**

(1) A determining authority shall give notice in the prescribed form and manner that a copy of an environmental impact statement prepared by or submitted to it, as referred to in section 112 (1), may be inspected at:

- (a) the office of the determining authority and the Department at any time during ordinary office hours, and
- (b) such other premises operated or controlled by them respectively and at such times as may be prescribed,

within such period, being not less than 30 days after the day on which the notice is given, as may be specified in the notice.

(2) Any person may, during the period specified in the notice, inspect the environmental impact statement (except any part thereof the publication of which would, in the opinion of the determining authority, be contrary to the public interest by reason of its confidential nature or for any other reason) and may within that period make submissions in writing to the determining authority with respect to the activity to which the environmental impact statement relates.

(3) A determining authority shall, as soon as practicable and not less than 21 days before carrying out an activity or granting an approval in relation to an activity, being an activity referred to in section 112 (1), furnish to the Director-General a copy of any submissions made to it under subsection (2) with respect to the activity.

(3A) The determining authority must, at that time, also forward copies of those submissions to the Environment Protection Authority if the activity is a scheduled activity under the *Protection of the Environment Operations Act 1997*.

(4) A proponent not entitled to copyright in an environmental impact statement referred to in section 112 (1) shall be deemed to have indemnified all persons using the environmental impact statement for the purposes of this Part against any claim or action in respect of a breach of copyright in the statement.

(5) Except where the Minister has requested that a review be held by the Planning Assessment Commission, the Director-General may examine or cause to be examined in the Department an environmental impact statement furnished in accordance with section 112 (2) and any submissions made with respect to the activity to which the statement relates under subsection (2) and shall forward, as soon as practicable to the relevant determining authority, a report containing the findings of that examination together with any recommendations arising therefrom.

(6) After the report referred to in subsection (5) has been forwarded to the determining authority, the Director-General shall make public that report.

(7) Any public authority or body to which an appeal may be made by or under any Act in relation to the activity the subject of an examination carried out under subsection (5) shall, in deciding the appeal, consider and take into account the report forwarded to the determining authority under that subsection.

(8) In this section, "**environmental impact statement**" includes a fauna impact statement and a species impact statement.

#### **114 Consideration of findings and recommendations of Planning Assessment Commission**

Where the Minister has requested that a review be held by the Planning Assessment Commission, with respect to any activity referred to in section 112 (1):

(a) the Minister shall consider the findings and recommendations of the Planning Assessment Commission and forward to the relevant determining authority (whether or not that determining authority is the nominated determining authority) a copy of the findings and recommendations and may give advice to the authority as to whether, in the Minister's opinion:

(i) there are no environmental grounds which would preclude the carrying out of the activity to which the findings and recommendations relate in accordance with the proponent's proposal,

(ii) there are no environmental grounds which would preclude the carrying out of the activity subject to its being modified in the manner specified in the advice,

(iii) there are no environmental grounds which would preclude the carrying out of the activity subject to the observance of conditions specified in the advice, or

(iv) there are environmental grounds which would preclude the carrying out of the activity, and

(b) any public authority or body to which an appeal may be made by or under any Act in relation to the activity shall, in deciding the appeal, consider and take into account the findings and recommendations of the Planning Assessment Commission and any such advice given by the Minister.

#### **115 Regulations**

The regulations may make provision for or with respect to:

(a) the factors to be taken into account when consideration is being given to the likely impact of an activity on the environment,

(b) the preparation, contents, form and submission of environmental impact statements,

(c) the making of environmental impact statements available for public comment, or

(d) the methods of examination of environmental impact statements and submissions made with respect to activities to which any such statements relate.