

Drafting Instructions

NOVEMBER 2006

A New

*Biodiversity
Conservation Act*

for Western Australia



A New *Biodiversity Conservation Act* for Western Australia

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Preamble

The Act will include the following preamble:

“This preamble sets out the considerations taken into account by the Parliament in enacting the law that follows.

This Act is intended to contribute to the implementation of the Convention on Biological Diversity and the National Strategy for the Conservation of Australia’s Biological Diversity.

Biodiversity is not something that can be understood or managed in the context of species within jurisdictions or genomes within zoos.

The objectives of biodiversity conservation must be to maintain indigenous plant, animal and fungi populations in viable habitats within landscapes or seascapes and to prevent the breakdown of the ecological relationships between them. Our entire civilisation is ultimately based on being able to achieve these objectives.

Ecosystems contribute to the life of the planet in many ways. Plant species populations assembled into ecosystems extract carbon-dioxide from the atmosphere and produce the oxygen we breathe. They also purify our water, control water tables, stabilise soils, extract excess nutrients and provide habitats for pollinators, seed dispersers and the predators and parasites that control pests and maintain ecosystem stability.

Biodiversity has provided all of our plant and animal foods and many of our medicines. The maintenance of biodiversity will be crucial to the development of new foods, drugs and materials in a rapidly changing environment. The study of animals enables us to understand our own origins, our biology, ecology and behaviour.

There are numerous threats to biodiversity. Humankind has already engineered a period of extinctions rivaling some of the great catastrophes in the fossil record. The threats to Western Australia’s terrestrial ecosystems include direct habitat loss from vegetation clearing, changed fire regimes, plant diseases such as jarrah dieback, salinity, introduced weeds, introduced animals, predators, trampling and overgrazing of rangelands, pollution, waste disposal and climate change. In the marine environment over-fishing, by-catch and ecological changes from fishing threaten marine biodiversity. Biodiversity which is dependent upon inland aquatic resources are threatened by activities such as dewatering, draining, damming, and water extraction.

The southwest Australia terrestrial ecological region is recognized as one of the planet’s major areas of biodiversity based on its natural richness in endemic plant and



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amphibian species and the significant threats to its ecosystems. It is one of only five Mediterranean systems to be listed as globally significant. In the marine context, more marine biodiversity has been documented for Western Australia's North West Shelf than in any other region in the world, and collectively the marine waters off Western Australia are of global biodiversity significance.

Merely focusing on the recovery of species and communities, rather than maintaining viable populations and ensuring the health of ecosystems, will ultimately result in the State's conservation resources being overwhelmed by an increasing number of biodiversity entities which are under threat.

The Parliament therefore enacts as follows:



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Part 1 – Preliminary

Short title: An Act to provide for the conservation, protection and restoration of Western Australia's indigenous biodiversity, including by provision for its identification, conservation, protection, restoration and management, and the ecologically sustainable use of native species.

Commencement information: Act to commence upon proclamation.

Definitions of particular importance include:

adaptive environmental management means that the impacts of all taking, use and management of biodiversity are monitored, and that the information obtained from the monitoring, and any other relevant information, are used to inform subsequent decisions about taking, use and management of that biodiversity

biodiversity or biological diversity means the variety of living native organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part, and includes:

- diversity within native species, that is the variation in genetic composition within each species,
- diversity of native species, that is the range and variation of species, and the differences between them;
- diversity of communities of native species, that is the variation of combinations of species that occur together, and the changes in species composition from one community to another; and
- diversity of ecosystems, that is the range and variation of ecosystems, the variation in species and communities within each ecosystem and the variety of processes that support these species and communities.

biodiversity components includes genes, species, populations, habitats, communities, ecosystems and ecological processes

ecologically sustainable use means use of biodiversity components of biodiversity in a way and at a rate that does not cause a population in a bioregion to become an unviable population, and in a way which is within the capacity of the populations, communities and ecosystems to sustain natural processes while maintaining the life-support systems of nature and ensuring that the benefit of the use to the present generation does not diminish the potential to meet the needs and aspirations of future generations



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ecosystem means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit

habitat means the place or type of site where a native species, population or community naturally occurs, occurred or which may become suitable for occurrence in the future, and which is characterized by biophysical features

native species means any individual organism or part of an individual organism (whether dead or alive) of an animal or plant or fungi biological entity known to exist in Western Australia or neighbouring State before 1750. (Note: the regulations can provide that a particular native species is not to be included in the definition (eg noxious weeds), and also that other organisms are included (eg stromatolites))

population means an aggregation of individuals of a biological entity identifiable as distinct through possessing shared characteristics that are associated with a common gene pool, and may include subspecies

precautionary principle means that where there are threats of serious or irreversible harm, lack of full scientific certainty should not be used as a reason to postpone measure to prevent degradation. Careful evaluation should be undertaken to avoid or serious and irreversible damage to the environment and an assessment of the risk-weighted consequences of various options. In applying this principle, the following steps must be followed:

- the onus is on any proponent to show that development does not pose any likelihood of serious or irreversible harm to the environment;
- if the proponent cannot demonstrate there is no likelihood of such harm, the onus is on the proponent to show that the harm can be managed; and
- if the proponent cannot demonstrate that the harm will be managed, the development shall not proceed.

take means to conduct any activity in the State that may directly or indirectly cause or contribute to a population becoming an unviable population, and includes to alter the habitat of or the resources on which that species or population may rely for survival

unviable population means a population which cannot respond to, and recover from, a disturbance or range of disturbances

use means to take possession or control of or to disturb any native species, or to attempt to do so, and includes to kill, injure, disturb or remove from its habitat

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The Act will include provision for the regulations to provide that a particular native species is not to be included in the definition (eg noxious weeds), and also that other organisms are included (eg stromatolites).

Object of this Bill is to conserve, protect and restore the diversity of Western Australia's indigenous biodiversity, having regard to the following principles and matters:

- The need to focus on conservation, protection and restoration of biodiversity at a bioregional level
- The need to conserve, protect and restore viable populations of species, habitats of species, and the ecosystems in and across which they occur
- Precautionary principle
- Adaptive environmental management
- Establishment and management of comprehensive, adequate and representative reserves for terrestrial, inland aquatic and marine areas
- The Convention on Biological Diversity and the National Strategy for the Conservation of Australia's Biological Diversity
- The need to establish and maintain a comprehensive, up-to-date, public, "smart" database of biodiversity within the State
- Recognition of Indigenous knowledge of and interests in biodiversity
- Ecological sustainable use of biodiversity
- Community engagement

This Act binds the Crown.

Where this Act is inconsistent with a provision contained in another written law, the provision of this Act shall prevail.

Part 2 – Administration

Biodiversity Conservation Commission established

A Biodiversity Conservation Commission is to be established, and the Conservation Commission and Marine Parks and Reserves Authority will be abolished.

Functions of Biodiversity Conservation Commission

The functions of Biodiversity Conservation Commission will be:

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- (i) to hold vesting orders for lands and waters that are reserved for biodiversity conservation, protection and restoration and/or ecologically sustainable use of the natural resources (other than pastoral lands), to own/lease land that has been acquired in fee simple or as leasehold for biodiversity conservation, and to be responsible for the care, control and management of such land;
- (ii) provide recommendations to the Minister about lands and waters to be reserved (or taken out of reserve) for biodiversity conservation, protection and restoration;
- (iii) to approve management plans for reserved lands and waters, and to audit and report on the implementation of these management plans;
- (iv) to prepare and review the State Biodiversity Strategy on a 5-yearly basis;
- (v) to prepare and review regional biodiversity plans on a 5-yearly basis, and to audit the compliance with and implementation of each of these plans, including whether agencies have complied with their obligation not to make a decision or issue an authorisation which will result in the taking of native species otherwise than in accordance with a bioregional plan;
- (vi) to assess plans for the issue of ecological sustainable use permits proposed to be issued by other agencies, including for native species, tourism, timber production, beekeeping, fishing, pastoralism, and approve the plans if they ensure the proposed use will be ecologically sustainable and consistent with the relevant regional biodiversity plan;
- (vii) to advise the Minister on all matters pertaining to the conservation, protection and restoration of biodiversity throughout the State;
- (viii) to develop policy on matters related to biodiversity conservation, protection and restoration and to take measures to implement these policies;
- (ix) to prepare and publish strategic and policy documents and guidelines;
- (x) to enter into agreements for the conservation, protection and restoration of biodiversity, to ensure the provision of any incentives identified in those agreements, and to audit and report on outcomes resulting from those agreements;
- (xi) to prepare a 5 yearly State of Biodiversity report to the Parliament, and to identify investment needs and opportunities;
- (xii) to seek Government for resources to implement this Act;

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- (xiii) receive reports from the Trustee of any biodiversity trusts established by this Act;
- (xiv) to support/encourage/carry out research, investigation and monitoring of biodiversity,
- (xv) to facilitate the involvement of members of the public and corporations and Indigenous people in biodiversity conservation, protection and restoration; and
- (xvi) to promote public awareness of and interest in biodiversity.

The Biodiversity Conservation Commission will have all the powers necessary to undertake its functions, including a specific power to direct the Director General of the Department of Environment and Conservation to carry out works, assist and support the Biodiversity Conservation Commission as necessary and convenient for the exercise of the Biodiversity Conservation Commission's functions and powers.

Membership of Biodiversity Conservation Commission

The Biodiversity Conservation Commission shall have a membership of a Chairperson and 8 other members, all of whom shall be chosen on the basis of their knowledge of and experience in:

- (i) the conservation, protection and restoration of biodiversity;
- (ii) management of biodiversity;
- (iii) population dynamics;
- (iv) terrestrial, inland aquatic or marine biodiversity;
- (v) environmental education;
- (vi) Indigenous cultural or heritage matters;
- (vii) ecologically sustainable use of native species,

or have some other function or vocational interest relevant to the functions of the Biodiversity Conservation Commission.

The Biodiversity Conservation Commission will be appointed by the Minister. Appointments will be for 5 years, but only 5 positions should be appointed during any 2 year cycle. (Some inaugural Biodiversity Conservation Commission members will therefore need to be appointed for an initial 7 year term).

There will be an option for appointment of a Deputy Chairperson.

The Biodiversity Conservation Commission shall have explicit powers to establish committees, sub-committees, advisory committees, and be able to co-opt people for specific tasks.

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Functions of the Director General of Department of Environment and Conservation

The Director General of the Department of Environment and Conservation will have the following functions:

- (i) to carry out works for, assist and support the Biodiversity Conservation Commission as directed by the Commission;
- (ii) to carry out management of lands and waters under the control of the Biodiversity Conservation Commission, in accordance with all relevant plans, policies and strategies;
- (iii) to implement regional biodiversity plans, in accordance with all relevant plans, policies and strategies, where appropriate in collaboration with local communities and organizations;
- (iv) to prepare, for the approval of the Biodiversity Conservation Commission, plans under which it can issue ecologically sustainable use permits;
- (v) to issue ecologically sustainable use permits for biodiversity, ensuring that such permits are in accordance with the regional biodiversity plan approved by the Biodiversity Conservation Commission;
- (vi) to ensure that records of the impacts of ecologically sustainable use permits it issues are provided to the Biodiversity Conservation Commission;
- (vii) subject to the direction of the Biodiversity Conservation Commission, to receive, manage and be responsible for general funds for biodiversity conservation, protection and restoration, and to ensure that these funds are used to maximum effect for biodiversity conservation, protection and conservation;
- (viii) to develop and maintain a comprehensive, up-to-date and public database of the biodiversity information and values of the State, and to maintain accurate and reliable records of management decisions and actions (including decisions to do nothing) related to the reserved lands and biodiversity values on other lands and waters;
- (ix) to undertake the survey, research and monitoring, and management of biodiversity-related data and information including development of decision-support tools, to ensure that plans, policies and strategies, and implementation is informed by the best available knowledge; and
- (x) to work with the community to ensure that the knowledge and understanding of the State's biodiversity is communicated effectively, and to support community engagement in biodiversity conservation throughout the State.

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Powers of the Minister

The Minister appoints the Biodiversity Conservation Commission.

The Biodiversity Conservation Commission must furnish to the Minister all minutes of meetings and any other records of deliberations as requested by the Minister.

The Minister may give directions to the Biodiversity Conservation Commission, but any directions so given must be in writing and must be tabled in Parliament within 14 days.

The Minister may reserve any land/water for biodiversity conservation, protection and restoration purpose.

The Minister may direct an agency to comply with a regional biodiversity plan.

Part 3 - Biodiversity Database

The Department of Environment and Conservation will be required to maintain an up-to-date, comprehensive database of species, populations, communities, habitats and ecosystems across the State, their status and trends in status, and information on biological and ecological characteristics (ie. distribution and abundance, representation in protected areas, threats). This database shall be publicly accessible.

The Department shall maintain a record of management decisions and actions taken for the purposes of fulfilling the objects of this Act (to include decisions to do nothing).

This Part will provide for development of decision-support tools to aid decision-makers and managers of biodiversity, based on the data that are available – the notion is that this is not just a “dumb” database but a set of information or knowledge products designed specifically to answer questions about the conservation of biodiversity, that are underpinned by sound data.

The Biodiversity Conservation Commission may, on behalf of the State, co-operate with, and give financial or other assistance to, any person for the purpose of surveying, identifying and monitoring components of biodiversity, and for studies relating to their conservation and management.

Any person or government agency who prepares or obtains any data or information about biodiversity for the purpose of complying with this Act shall be required to provide that information to the Department in a prescribed form as soon as reasonably practical. The

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Department shall include the information on its database (unless it is shown to be commercially confidential and that its inclusion would diminish the commercial value of the information). There shall not be any payment for the provision of information, and it may be used for any purpose under the Act.

Part 4 – Bioregional planning for biodiversity conservation

This Part provides for the development of a set of nested, strategic planning documents aimed at ensuring biodiversity conservation, protection and restoration. At the highest level is the overarching State Biodiversity Conservation Strategy. There will then be regional biodiversity plans for each bioregion of the State. Any taking or use of native species within a bioregion must be in accordance with the relevant regional biodiversity plan, the plans must be followed by decision-makers at all levels of government in the State, and the plans will guide the expenditure of funds by the Department.

Biodiversity Conservation Strategy

The Biodiversity Conservation Commission will develop (with the assistance of the Department) and approve the State Biodiversity Conservation Strategy as a strategic plan that sets out priorities for biodiversity conservation, protection and restoration actions throughout the State.

In making the Strategy, the Biodiversity Conservation Commission will undertake community engagement consistent with *Working Together. Involving Community and Stakeholders in Decision-Making* guidelines (Department of the Premier and Cabinet 2006).

The State Biodiversity Conservation Strategy will identify overall needs and priorities for biodiversity conservation, protection and restoration in the State. It will be implemented primarily as a policy document and as a guide for investment in biodiversity conservation. It will recognize and involve actions by government, community and industry. It will aim to ensure that the Department, all government agencies, and all other people are proactive for conservation rather than being reactive, attempting to mitigate threats before they become serious and potentially threatening process.

The strategy will be reviewed every five years, based on new information and the principles of adaptive environmental management.

The Strategy will incorporate a range of meaningful performance indicators that will allow the Biodiversity Conservation Commission and the community to evaluate progress in implementation, and the effectiveness of the planned actions in conserving the biodiversity

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of the State. The information will also form the basis of the Biodiversity Conservation Commission's 5 yearly State of Biodiversity reports to Parliament.

Regional Biodiversity Plans

The Biodiversity Conservation Commission will, with the support of the Department, develop plans for biodiversity conservation for each bioregion (and sub-region) across both the terrestrial and marine environments of the State. The planning process will initially be based around the bioregions set out in the Interim Bio-Regionalisation for Australia (IBRA) for the terrestrial environment and Interim Marine Conservation Regionalisation for Australia (IMCRA) for the marine environment, but the bioregions may be refined over time. The over-riding goal for each regional biodiversity plan shall be to ensure that viable populations of all native species and associated habitats, ecosystems and natural processes in that region are conserved, protected and restored. They will also identify threatening processes. Key elements of regional biodiversity plans will be:

- objectives and targets for each native species, population, community, habitat and ecosystem;
- identification of specific species, populations, communities, habitats, ecosystems or other biodiversity values or land/water parcels which need specific consideration or management priority;
- recovery plans for biodiversity components which need specific consideration or management priority;
- identification of, and measures to address, threatening processes which are a management priority;
- timelines for action;
- adaptive environmental management;
- conditions subject to which developments can proceed;
- conditions to be incorporated into all planning by any statutory or government agency, including statutory corporations in the region;
- take into account all relevant information on the Biodiversity Database; and
- monitoring and evaluation, and reporting procedures and protocols.

In preparing the plans, the Biodiversity Conservation Commission and Department will need to undertake community engagement consistent with *Working Together. Involving Community and Stakeholders in Decision-Making* guidelines (Department of the Premier and Cabinet 2006).



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Implementation of Regional Biodiversity Plans

Once a regional biodiversity plan is finalised by the Biodiversity Conservation Commission, all planning and development decisions in that bioregion must be in accordance with the bioregional plan. This means:

- all planning by any statutory authority or government agency, including statutory corporations, must be in accordance with the regional biodiversity plan. This includes (without limitation) local government schemes, town planning schemes, inland aquatic water resource planning, fishing management planning, and any plans for the future use and development of land, water or biodiversity;
- all decisions which could result in the “taking” of native species must be in accordance with the regional biodiversity plan. This includes (without limitation) all mining and petroleum tenements, clearing permits, environmental protection licences/works approvals, decisions under Part IV of the Environmental Protection Act, subdivisions, local government development approvals, water extraction, heritage approvals, contaminated sites notices, management plans for reserved lands, pastoral leases, soil and land conservation notices;
- If there is no requirement for an action which would result in the “taking” of a native species to be approved within two years of Act coming into force (eg grazing, burning, some water extraction), then the “taking” must be approved by the Biodiversity Conservation Commission. Appropriate exemptions and delegations would ensure no statutory authority/agency duplication or overlap;
- Native species can only be directly “used” (eg fishing, forestry) in accordance with an ecologically sustainable use permit or plan. No permits which authorise the use of native species can be issued under any legislation unless the use is ecologically sustainable and is in accordance with the regional biodiversity plan. Alternatively, the use may be approved by the Biodiversity Conservation Commission under an ecologically sustainable use plan prepared for that native species/resource by the authorising agency. The Biodiversity Conservation Commission cannot approve the ecologically sustainable use plan unless it is in accordance with relevant regional biodiversity plan). No new classes of permits will be created under the Act unless there is a regulatory gap.

It will be an offence to “take” or “use” native species without some form of authorisation.

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Conditions of all authorisations will require the holder to fully disclose the impact of their activities on biodiversity, and to provide the information to the Department for inclusion in the Biodiversity Database.

Regional biodiversity plans will be prepared for 5 years. The content of the plans, and the boundaries of the bioregions, may be amended during the currency of the plan by the Minister if there is some impact of biodiversity which was not identified or addressed in the plan, or if new information or issues have arisen. The principles of adaptive management will be used to inform any amendments, and results of any monitoring and evaluation, including that resulting from adaptive environmental management, will be used to inform any amendments.

The Biodiversity Conservation Commission shall audit the implementation of the regional biodiversity plans, including the contributions made by agencies other than the Department, and the community. It will audit whether approvals which authorize “taking” have been issued in accordance with the regional biodiversity plan, and whether “use” permits have been issued for ecologically sustainable uses or otherwise than in accordance with relevant bioregional plans. The Biodiversity Conservation Commission shall record instances of non-compliance with the bioregional plans in its Annual Report, and can report non-compliance to the Minister at any time. The Minister may then direct the agency to comply.

For the initial stages of the operation of this Act, the following documents will make up the regional biodiversity plan for bioregions:

- *Biodiversity Audit of Western Australia*;
- All current listings of rare and protected species and threatened ecological communities;
- All relevant EPA and Department policies and guidelines.

Part 5 – Conservation reserves

This Part lists conservation reserves (including marine areas) types/classes and their purposes, vesting arrangements, management principles for each class, development and implementation of management plans and arrangements for leases (interests).

This Part replaces the provisions in the *Conservation and Land Management Act 1984*, redefines the management objectives (here referred to as principles) and adds substantially to the range of protected area types/classes dealt with. The provisions for creating new marine

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protected areas are revised completely to remove requirements for Ministerial concurrence multiple times during the process.

Reservation and vesting process

All existing lands and waters reserved under the *Conservation and Land Management Act 1984* would be reserved under the Biodiversity Conservation Act. The Biodiversity Conservation Commission would be able to recommend that the Minister reserve new area of land or waters. The Minister would have the power to reserve new areas of land or water by a notice in the government gazette. The Minister would also be able to increase the protection of an area by a notice in the gazette.

All reserve land would be vested in the Biodiversity Conservation Commission, who would be responsible for the care, control and management of the land.

Land or waters, once reserved, could only have its reservation status revoked or reduced by an Act of Parliament. The protections in the *Land Administration Act* for relevant reserves would remain.

State Forests and Timber Reserves will be included here, and would be vested in the Biodiversity Conservation Commission.

New reserve classes would be able to be created for wilderness areas, World Heritage areas, Ramsar wetlands, National Heritage places, Biosphere reserves and for the conservation, protection and restoration of biodiversity which is dependent on inland aquatic water resources.

In making reserves, consideration shall be given to the natural values, natural processes and natural dispersal of biodiversity in the bioregion. All reserve classes will apply to all terrestrial, marine and inland water aquatic areas.

Management of reserves

The Biodiversity Conservation Commission (with the support of the Department) would prepare a management plan for each reserve, taking into account the State Biodiversity Conservation Strategy, and in accordance with the regional biodiversity plan (but noting that stronger measures for biodiversity conservation, protection and conservation can be incorporated into reserve management plans). Management plans would include timelines. Public consultation would be required as part of preparing plans consistent with *Working Together. Involving Community and Stakeholders in Decision-Making* guidelines (Department of the Premier and Cabinet 2006).

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The Department of Environment and Conservation would carry out actual management of the reserved lands, and regularly report to the Biodiversity Conservation Commission on the management outcomes.

The principle of adaptive environmental management would be paramount in management planning and implementation.

Management principles

The principles by which particular classes of protected areas will be managed will be amended substantially to place greater emphasis on ensuring their management for the priority purposes of biodiversity conservation purposes, protection and restoration, rather than on multiple (sometimes conflicting) uses.

A *wilderness area* is to be managed to ensure that the area:

- (a) is substantially unmodified by modern technological society;
- (b) is sufficiently large and remote to make the long term protection of its biodiversity and natural systems practical;
- (c) is a place where ecological processes remain essentially intact; and
- (d) where opportunities exist for solitude, inspiration and self-reliant recreation.

A *nature reserve* (including marine nature reserve) is to be managed to—

- (a) protect the area's scientific values and, in particular—
 - (i) to ensure that the processes of nature continue unaffected in the area; and
 - (ii) to protect and/or restore the area's biological diversity to the greatest possible extent;
- (b) allow controlled scientific study and monitoring of the area's natural resources

A *national park* (including marine park) is to be managed to—

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- (a) protect the area's scientific values and, in particular—
 - (i) to ensure that the processes of nature continue unaffected in the area; and
 - (ii) to protect and/or restore the area's biological diversity to the greatest possible extent;
- (b) allow controlled scientific study and monitoring of the area's natural resources;
- (c) present the area's cultural and natural resources and their values; and
- (d) ensure that the only use of the area is nature-based and ecologically sustainable.

A *conservation park* (including marine management area) is to be managed to--

- (a) conserve and present the area's cultural and natural resources and their values; and
- (b) provide for the permanent conservation of the area's biodiversity and natural condition to the greatest possible extent; and
- (c) ensure that any commercial use of the area's natural resources, including fishing and grazing, is ecologically sustainable.

A *World Heritage management area* is to be managed to--

- (a) meet international obligations in relation to the area; and
- (b) protect the area's internationally outstanding cultural and natural resources and its biological diversity; and
- (c) transmit the area's world heritage values to future generations

A *an agreement area* (Ramsar wetland, National Heritage place, Biosphere Reserve) is to be managed to--

- (a) maintain the area's importance to the conservation of nature that is the subject of significant international/national concern; and

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(b) conserve the area's biodiversity as far as practicable.

An *inland aquatic water reserve* is to be managed to:

- (a) ensure no degradation or extraction of water resource;
- (b) conserve, protect and restore the biodiversity components which are dependent upon the water resource.

Audits of management

The Biodiversity Conservation Commission will undertake regular audits of management of the reserved lands and waters, and compliance with management principles, plans and policies, objectives and targets. The Biodiversity Conservation Commission would report on the result to the Minister, and the Minister will have the power to direct the Department to comply in instances of non compliance.

Regulation of ecologically sustainable use and taking of biodiversity in certain classes of reserve

No permits for ecologically sustainable use will be able to be issued in wilderness areas, nature reserves, national parks, or specified areas of conservation parks.

No agency will be able to approve the taking of native species within wilderness areas, nature reserves, national parks, or agreement areas such as World Heritage areas and Ramsar wetlands. Exploration for resources will also be prohibited in these areas.

Part 6 – Indigenous Reserves

This part establishes mechanisms whereby any existing or proposed conservation reserve which is the subject of a successful Native Title claim can then be leased back to the Crown as a protected area of the same or equivalent status. It provides for support for the management of those areas for the conservation of their biodiversity values. It also allows for the Biodiversity Conservation Commission to enter into negotiations with Aboriginal communities and corporations, including the Aboriginal Lands Trust, to support management for biodiversity conservation on areas under their management.

Registered groups under the *Native Title Act 1993* (Cth) will be eligible to apply to have areas of the conservation estate within their claim area made available for claim under an arrangement where the land is subsequently leased back to the Biodiversity Conservation

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Commission for biodiversity conservation purposes, and arrangements are made to support the management of the area by the members of the registered group.

Aboriginal communities can apply to the Biodiversity Conservation Commission to have land for which they are responsible in some way classified as an Indigenous Protected Area, and when agreement is reached on objectives and management, a Biodiversity Conservation Agreement can be entered into.

Part 7 – Conservation Agreements and Incentives

This Part provides the legal basis for writing of covenants and other forms of agreements, including contracts, with memorials on title where appropriate, that may be linked to the range of incentive provisions to encourage biodiversity conservation on private (freehold) land and leasehold land (pastoral leases). The provisions should extend to land held by local governments, Crown land vested or held, and also to the very extensive land holdings of the Aboriginal Lands Trust and land owned by Aboriginal corporations.

The Agreements will be executed on behalf of the Crown by the Biodiversity Conservation Commission. The fundamental component of each Agreement is a legally binding contract between the owner or occupier (to cover leasehold land) and the Biodiversity Conservation Commission which will result in some biodiversity conservation benefit to the State, and may require financial or technical assistance to be provided by the Department. While such an agreement might be registered on the title, it does not automatically transfer to successive holders of the title. In order to allow for this option, there must be a provision for covenants that meet the requirements of due notice, that allow for these covenants to be positive in nature, and where the requirement for adjacency is removed. Covenants and contracts shall be enforceable.

There will be a specific provision to facilitate transfer of covenants under any other legislation, such as the existing *National Trust of Australia (WA) Act* and *Transfer of Land Act* “covenants” into this Act, as the former Act is to be repealed, and the so-called covenants under the *Transfer of Land Act* are not legally enforceable.

Biodiversity Conservation Agreements will provide a contractual mechanism under which public funds might be provided to private owners and occupiers etc to encourage and permit them to undertake biodiversity conservation activities. Incentives to be provided should include technical advice and assistance, materials such as seedlings and fencing materials, and a range of financial incentives. These financial incentives might include direct grants e.g. through a biodiversity tendering process, revaluation of property (automatic on

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recording a covenant), remission of all or part of State Government rates and taxes, and all or part of local government rates and taxes.

Part 8 – Ecologically Sustainable Use of Biodiversity

This part would allow for the issuing of ecologically sustainable use permits to take native species for scientific, educational or commercial purposes provided that the taking was ecologically sustainable and is in accordance with a regional biodiversity plan.

Ecologically sustainable use plans

Any agency who proposed to issue a permit which would allow a person to use native species (eg fishing, forestry) would be able to submit an ecologically sustainable use plan to the Biodiversity Conservation Commission. The Biodiversity Conservation Commission would then assess the plan to determine whether it would result in ecologically sustainable use of biodiversity (including assessment of whether the use would result in the taking of other species, such a fishing by-catch), and whether it was in accordance with the regional biodiversity plan for the area. If it meets these criteria, the Commission will approve the plan and the agency may then issue the permits.

As part of approving an ecologically sustainable use plan, the Biodiversity Conservation Commission could require the agency to prepare a biodiversity management plan for the individual species to be exploited, or otherwise of special interest e.g. crocodiles, or for resources that are exploited more generally, such as forests.

If it was not practical for the permitting agency to submit a plan, it could alternatively issue the permit as long as it was approved by the Biodiversity Conservation Commission as being for an ecologically sustainable use and in accordance with the regional biodiversity plan.

Ecologically sustainable use permits under the Act

The provisions permit the Department to issue permits authorising the ecologically sustainable use of flora and fauna eg harvesting of wild flora, bee keeping in national parks, conservation parks, State Forests and Timber Reserves, nature reserves, the issue of kangaroo damage licenses and tags, removal of sandalwood from Crown land and pastoral leases, and native forest logging (and all other activities which the Department currently issues “use” permits for).

The Act will also include a requirement that a person must apply to the Biodiversity Conservation Commission for an ecologically sustainable use permit if the use of the native

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species they are proposing is not able to be authorized by another permit or under an approved plan. The Biodiversity Conservation Commission will not be able to issue the

permit otherwise than in accordance with the relevant regional biodiversity plan, and unless it will result in ecologically sustainable use.

It will be an offence to “use” native species without some form of ecologically sustainable use permit.

Conditions of all ecologically sustainable use permits will require the holder to fully disclose the impact of their activities on biodiversity, and to provide the information to the Department for inclusion in the Biodiversity Database.

Nature based tourism

This part would also require that nature-based tourism activities within any part of reserved land or waters must only result in ecologically sustainable use of resources, and be in accordance with the relevant regional biodiversity plan.

Monitoring and assessment

Part of the conditions of any plans approved by the Biodiversity Conservation Commission would be that the permits required monitoring and reporting of biodiversity impacts. All information would be given to the Biodiversity Conservation Commission and where appropriate used as part of the Biodiversity Database.

Part 9 – Property Rights in Biological Resources

This part retains the notion that all native species (other than flora on private land) are the property of the Crown.

This part also provides for the protection and valuing of Indigenous rights in, and knowledge of, the biodiversity of the State, including in the management for conservation of biodiversity.

Licences can be issued for bioprospecting/ biodiscovery, and any commercialization of the intellectual property discovered through this bioprospecting/ biodiscovery.

This part includes provisions for issuing of licences and payment of licence fees and royalties. Scientific study of the biodiversity of the State would be encouraged, but subject

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to requirements that ensure that any knowledge gained is acknowledged and available to the State unless stated otherwise in licence conditions.

There is a requirement for accurate and reliable reporting on licenses to ensure accountability, and to ensure that this process contributes to improvements in knowledge of the biodiversity of the State.

Part 10 – Threatening Processes

Threatening processes must be identified in regional biodiversity plans, and may be general or specific to a particular region. This Part allows for additional action to be taken to address threatening processes, including environmental weeds, introduced grazers and predators. It permits the Biodiversity Conservation Commission to recommend, and the Minister to gazette, threatening processes which are likely to significantly impact the viability of a population of a native species, and permits the Biodiversity Conservation Commission and the Department to take action on the land (at the owners expense) to mitigate the threatening process.

Part 11 – Biodiversity Conservation Trust

This Part creates a Trust (replacing the Nature Conservation Trust established under Part IXA of the *Conservation and Land Management Act 1986*) and establishes a Trust similar on approach to the Victorian Trust for Nature (*Victorian Conservation Trust Act 1972*). The key feature of the Victorian Trust is that it has a wide range of tax advantages recognized under the Australian tax system, that make gifts of land attractive for owners, for example.

The Biodiversity Conservation Trust will have a body corporate and a board, separate from the Biodiversity Conservation Commission but reporting to the Commission. There will be a Trust Fund.

Part 12 – Enforcement

This part creates the usual range of investigation and enforcement powers for Biodiversity Conservation Officers (to be accredited by the Director General of the Department, and who may be officers of the Department but may also be cross-vested officers of other

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agencies), and establishes procedures for enforcement action to be taken. Penalties will be consistent with those proposed under the *Environmental Protection Act 1986*.

Biodiversity Conservation Officers will need to be provided with investigation and enforcement powers to deal with the situation where a person is taking or using native species without the appropriate permit/approval, and the agency who is primarily responsible for enforcement has failed to take any action.

The investigation and enforcement powers will include power to stop, search, question, enter, monitor, audit, acquire documents, issue stop orders, remediation orders, and apply for injunctions for what is likely to be an unlawful action.

Third parties will be able to commence prosecutions and apply for an injunction to prevent what is likely to be unlawful action. Standing will be attributed to any person in a similar way as under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

Directors and managers should be responsible for the actions of their corporations, and vice versa, unless they can show they exercised due diligence.

Where the penalty under an approval for a breach of a condition related to the regional biodiversity plan is less than the similar provisions in this Act, the penalty in this Act applies.

There will be provision for civil penalties, strict liability offences, and offences relating to negligent actions, and reckless or intentional actions. Offences include:

- actions by any person on reserve lands otherwise than in accordance with a management plan
- taking native species without approval
- using native species without a permit
- breach of a biodiversity condition of an approval or permit
- failures to provide information to the biodiversity database

The usual Criminal Code defences will apply.

The Court shall have a full range of orders to make in the event of a conviction, including restoration and rehabilitation orders and publication orders.

There will be a provision for Biodiversity Conservation Orders to be used in the event that actions (including authorised actions) are leading to the demise of particular biodiversity values identified as management priority under a bioregional plan. Orders will be subject to objection, open to review by the State Administrative Tribunal. There will be penalties for non-compliance with an Order.

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Part 13 – Acquisition of Land

Land can be acquired if it supports biodiversity that is identified for priority management in a regional biodiversity plan. It can be acquired compulsorily if the biodiversity values are threatened, or if the owner of the land applies to have it acquired as if compulsorily. Compulsory acquisition will be done on just terms.

Part 14 – Bilateral Agreements

This Part makes provision for Bilateral Agreements between State and Commonwealth re management of World Heritage Properties, Ramsar wetlands, Biosphere Reserves, National Heritage places.

Part 15 – Review of decisions

Review of all decisions which will result in approval to take a native species, and all ecologically sustainable use permits, will be available to the State Administrative Tribunal.

Any person with standing will be able to bring review proceedings, including those with conservation interests as set out under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

The decision will stand while the review decision is being considered. However, interim injunctions will be able to be granted if there is a risk that there will be a risk of material environmental harm.

Part 16 – Transitional Arrangements

Where there is an existing activity, the biodiversity ‘taking’ or ‘use’ of which was specifically approved when the Act comes into force, and no further approval was necessary for the action to result in the taking of biodiversity, it can continue, but cannot be expanded or enlarged without approval.

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Where there is an activity which will result in take or use of native species and it would have required permission under the CALM Act or Wildlife Conservation Act but now no longer does, it needs permission from the Biodiversity Conservation Commission.

Where the instrument authorizing the issue of an approval which will result in the taking of a native species, or issuance of a ecologically sustainable use permit does not have the power to impose all the conditions required under the bioregional plan, the instrument is taken to provide those powers (eg protection of native species, bonds, rehabilitation, monitoring, reporting, auditing etc).

Part 17 – Consequential matters

This Act will result in repeal of the *Conservation and Land Management Act 1984* (and associated regulations), so need to ensure that all provisions (other than those which are replaced here) are moved to this Act.

Repeal of the *Wildlife Conservation Act 1950*.

Provision for regulations in respect of all matters necessary or incidental to Act, plus provisions for specific regulations.

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Introduction

The Conservation Council of Western Australia, the Australian Conservation Foundation, The Wilderness Society and the Environmental Defender's Office of WA (Inc) have developed drafting instructions for a Biodiversity Conservation Bill in response to the urgent need for significant reform to the existing biodiversity protection laws in WA.

Primary objective of the Bill:

To conserve, protect and restore the indigenous biodiversity of Western Australia.

Essential elements of the Bill:

Must be based upon ecologically sound principles.

Need to conserve, protect and restore viable populations of all species in bioregions, not making lists of threatened species for the State as a whole. Use proactive planning mechanisms capable of managing cumulative impacts and incorporating adaptive environmental management, not make reactive decisions to individual ad hoc applications.

Must result in efficient, certain and streamlined legislative processes.

Use existing approval mechanisms and do not require additional approvals unless necessary. Ensure there is no duplication of planning or decision-making processes. Ensure there are no regulatory gaps, particularly in the aquatic/marine/terrestrial interface, and between off-reserve and on-reserve measures. Ensure biodiversity planning provides certainty for all stakeholders.

Must result in efficient governance and administration.

Ensure there is no opportunity for counter-productive "turf war" between agencies, and that responsibilities and hierarchies are clearly understood. Ensure whole of government approach to, understanding of and responsibility for biodiversity outcomes.

Must provide for community engagement.

Provide for all stakeholders to have opportunities to engage in biodiversity planning, implementation and monitoring.

Key mechanisms of the Bill:

Biodiversity Conservation Commission:

Establishment of an expert Biodiversity Conservation Commission.



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Biodiversity Strategy and Reports:

Provision for development, implementation and audit of a WA Biodiversity Strategy, and State of Biodiversity reports.

Regional Biodiversity Plans:

Provision for development, implementation and audit of regional biodiversity plans for all specific bioregions in WA, with aim of conserving, protecting and restoring viable populations of native species and associated habitats, ecosystems and natural processes in each bioregion.

Streamlined approvals:

Requirement that all planning by, decisions of and authorisations granted by government which will result in direct “use” or indirect “taking” of native species be in accordance with the relevant regional biodiversity plan and ecologically sustainable use principles. There is emphasis on reducing regulatory approvals and streamlining processes, and no new approvals are required unless there is a regulatory gap.

Integration of off-reserve and on-reserve protection:

Integration of the terrestrial, inland aquatic and marine conservation reservation system into one Act, and implement reforms for reservation and management process (particularly for marine reserves).

Biodiversity database:

Development and maintenance of a comprehensive, up to date, public, “smart” database of biodiversity in the State.

Monitoring and adaptive environmental management:

Requirements for continuous monitoring, reporting and audit of biodiversity and biodiversity impacts, and for adaptive management.

Governance and administrative arrangements under the Bill:

Biodiversity Conservation Commission responsibilities

- develop and review State Biodiversity Strategy, prepare State of Biodiversity report, develop biodiversity policy.
- develop and review regional biodiversity plans.
- be vested with reserves (and other conservation areas), recommend new reserves, approve management plans for reserves.
- assess and approve proposed ecologically sustainable use plans prepared by other agencies (eg DoF) against relevant regional biodiversity plans.



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- issue approvals to “take” or “use” native species in accordance with regional biodiversity plans ONLY if there is no other statutory approval available.
- audit other agencies’ compliance with Act (eg DEC, local government, WAPC, DoIR, DoF, FPC).
- report on biodiversity outcomes and advise Minister on biodiversity issues.
- prepare applications for funds from Government for biodiversity.
- support/encourage research, investigation and monitoring of biodiversity, and biodiversity conservation on private lands.

The Biodiversity Conservation Commission will be subject to direction from the Minister.

Department of Environment and Conservation responsibilities

- manage reserves (and other conservation areas) in accordance with approved management plans and regional biodiversity plans.
- implement State Biodiversity Strategy and regional biodiversity plans.
- issue ecologically sustainable use permits for use of relevant biodiversity.
- enforcement activities.
- research and monitoring.
- maintain comprehensive, up to date, “smart” public biodiversity database.
- follow directions of, carry out works for and provide support and assistance to the Biodiversity Conservation Commission.
- receive and be responsible for general funds for biodiversity.

The Department will be subject to direction from Biodiversity Conservation Commission.

Other agencies’ responsibilities

Agencies which issue approvals which will result in incidental “take” of native species (eg mining, subdivision) must issue approvals in accordance with relevant regional biodiversity plans. They will be provided with support from the Biodiversity Conservation Commission and the Department of Environment and Conservation, and (where necessary) be provided with additional condition setting and enforcement powers under the Act.

Agencies which issue permits to “use” native species (eg forestry, fishing) will only be able to issue permits in accordance with an ecologically sustainable use plan approved by the Biodiversity Conservation Commission, or in accordance with the principles of ecologically sustainable use and relevant regional biodiversity plan.

Cross vesting enforcement powers and appropriate cross statutory delegations and exemptions will ensure there is no duplication of agency responsibility, while still ensuring no regulatory gaps.

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Concept Map:

