

This note is about the procedures being followed in the ACT for protection of threatened species. The *Nature Conservation Act 1980* ('the Act') provides for such procedures.

Broadly, the Act provides two main avenues for achieving protection of particular threatened species. First, pursuant to s.33, certain species might have 'special protection status', which is mainly relevant to offences and penalties. A species may be declared for that purpose by the conservator if he/she believes on reasonable grounds that the species is 'threatened with extinction', or if protection of a migratory species is called for by Commonwealth legislation or arrangements. In addition, a species has that status if the Minister makes a declaration, pursuant to s.38, that the species is 'endangered'.

Secondly, the s.38 procedure might lead to preparation of an 'action plan' for a species declared to be 'endangered' or 'vulnerable'. For present purposes, the condition for declaration of a species is that the Flora and Fauna Committee ('the Committee') must have reasonable grounds, having regard to the criteria specified under s.35, to believe that a species is 'vulnerable' or 'endangered' (s.38).

The Act seems to have been drafted to cause difficulty for the Committee. The definitions of 'vulnerable' and 'endangered' are fixed by the Act. Section 35 requires the Committee to specify 'criteria' for *assessing whether it should recommend the making of a declaration*. In doing so, the Committee is to

- have regard only to factors relevant to—
    - (a) the conservation of a species or ecological community; or
    - (b) the ecological significance of a threatening process;
- in relation to the Territory and the surrounding region.

By contrast, s.38 (1) says –

*Where, having regard to the criteria specified under section 35, the committee has reasonable grounds to believe that a species is vulnerable or endangered, the committee shall advise the Minister of that opinion and recommend to the Minister that the species be declared to be vulnerable or endangered, as the case may be [emphasis added].*

The difference in language is a probable source of confusion. Section 35 suggests that the Committee might determine, or have reasonable grounds to believe, that a species is vulnerable or endangered, but then recommend making of a declaration only if, applying the criteria, this would advance the conservation of the species within the Territory and the surrounding region.

If that is the intended meaning, s.38 would be clearer if it said: 'where *[using the definitions in the Act]* the Committee has reasonable grounds to believe that a species is vulnerable or endangered, and assesses in accordance with the criteria that it should recommend making of a declaration, it shall ...'.

On that basis the criteria could deal with such matters as whether threatening processes were occurring in, or whether the species occurred in or had significant (rather than vagrant) presence in, or whether any effective measures could be taken to advance conservation in – the Territory and surrounding region.

However, the wording of s.38 suggests that the purpose of the criteria is not to specify conservation considerations, but to help determine whether the Committee should have reasonable grounds to believe that the species is vulnerable or endangered. Perhaps understandably, this has led the Committee to draft criteria that depart in some respects from the definitions of vulnerable and endangered in the Act – which it was not empowered to do.

### **The meaning of ‘extinction’ in the definitions of ‘endangered’ and ‘vulnerable’ in the Act**

The following definitions appear in the Dictionary in the Act.

‘endangered’ means ... in relation to a species – (i) its likely extinction unless the circumstances and factors threatening its abundance survival or evolution cease; or (ii) the reduction of its numbers or habitats to such a level that the species is in immediate danger of extinction.

‘vulnerable’ in relation to a species ... means a species that within the next 25 years is likely to become endangered unless the circumstances and factors threatening its abundance, survival or evolution cease.

‘Species’ includes a subspecies and a distinct population of organisms prescribed as being a species.

There is no definition of ‘extinction’ in the Act.

The Committee is to specify in writing criteria for assessing whether it should recommend the making of a declaration of a species under s38. In specifying those criteria the Committee is to have regard to factors relevant to ‘the conservation of a species ... in relation to the Territory and the surrounding region’.

Revised criteria were specified in July 2008. In those the Committee states that its function (so far as relevant here) is to recommend the declaration of ‘those species ... which are at risk of extinction in the ACT region’. ‘ACT region’ is defined in the glossary in the criteria as ‘the ACT and surrounding bioregions’, guidance being given as to how the latter expression will be interpreted.

The glossary also contains the following definitions:

**extinct** (see ‘presumed extinct’)

**premature extinction** means extinction occurring as a result of processes that would not normally be considered part of natural evolution, or processes accelerating natural evolution

**presumed extinct:** for a species, means that the species has not definitely been located in the wild during the past 50 years or the species has not been found in recent years despite thorough searching.

It might be noted that, while relying on a concept of 'extinction', none of the above 3 definitions provides a definition of 'extinct or 'extinction'.

The criteria for declaring an endangered species are set out at page 13 of the published 'criteria'. There are indications in the criteria that the Committee is either interpreting 'extinction' in the Act as *meaning* 'extinction within the ACT region', or deliberately broadening the scope of possible recommendations by having regard to the status of a species within that region only. The statement that 'the Committee's primary function is to recommend to the Minister the declaration of those species ... which are at risk of extinction in the ACT region ...' does not reflect the language of the Act.

Under the glossary definition of 'ACT region' (mentioned above) the following is added:

To be eligible for declaration under [the Act], species ... must occur within the ACT itself, or must meet the definition of 'presumed extinct' within the ACT. However, the conservation status of items that meet this requirement will be assessed at the bioregional scale.

To recommend that a species be declared under s.38, the Committee must have reasonable grounds to believe that the species is vulnerable or endangered within the meaning of the Act, the relevant definitions referring to 'extinction' without geographical qualification. The making of a recommendation is also controlled by the criteria, which, at that point, require regard to conservation in the ACT region.

It seems likely that the Committee has been applying a concept of 'regional' extinction, which would, one would think, be easier to satisfy than a concept of universal extinction. It is quite conceivable that a species 'presumed extinct' in the ACT region is, as a species, not likely to become extinct. Whether, in consequence, any opinions formed by the Committee to this point have lacked the required 'reasonable grounds', could not be established without examining the Committee's reasons in support of each recommendation.

It seems clear enough that 'extinction' must have the same meaning for the purpose of s.38 as it does in s.33 (where the conservator might declare a species that is 'threatened with extinction'). If the conservator were to declare a species not 'threatened with extinction' but only absent from or declining in the ACT region, there would be a reasonable argument that the declaration was invalid.

Without examining corresponding legislation in all Australian jurisdictions, the following might be noted -

New South Wales: The *Threatened Species Conservation Act 1995* refers explicitly to risk etc. of 'extinction in New South Wales'.

Victoria: The *Fauna and Flora Guarantee Act 1988* refers to 'extinction', apparently in a general sense. The criteria in the Regulations include, alternatively, 'a demonstrable state of decline ... likely

to result in extinction’ and ‘known to have occurred in Victoria but ... not sighted in the State for 40 years’.

### **Some other points about the criteria**

This part of this note looks only at the criteria for declaration of a species (as defined) as ‘endangered’. Related considerations apply to declaration of a species as ‘vulnerable’ (which should depend on whether the species is likely to become ‘endangered’ within the next 25 years) .

The criteria use the following expression, which is not used in the Act:

#### **presumed extinct:**

*\_ for a species*, means that the species has not definitely been located in the wild during the past 50 years or the species has not been found in recent years despite thorough searching.

Clearly, the definition of ‘presumed extinct’ must relate to a particular area (either the whole world or a smaller area), but no area is specified in the definition. Note that there is no requirement in the definition that the species has ever occurred in the relevant area, although this is required in criterion 1.1.

The following definition is given:

**ACT region** is the ACT **and** surrounding bioregions. Bioregions are not strictly defined but as a guide, the *Revision of the Interim Biogeographic Regionalisation for Australia (IBRA) and Development of Version 5.0 - Summary Report* (Environment Australia, September 2000) recognises that the ACT falls within two bioregions — the Australian Alps and South Eastern Highlands.

To be eligible for declaration under the *Nature Conservation Act 1980*, species, ecological communities or threatening processes must occur within the ACT itself, or must meet the definition of ‘presumed extinct’ within the ACT. However, the conservation status of items that meet this requirement will be assessed at the bioregional scale.

The IBRA version on the website is dated November 2000, but is presumably the same or little different. Together the two specified bioregions (here called ‘the bioregion’) cover a large area, several times that of the ACT, extending some 250km northwards and 400km to the south-west, nearly to Melbourne. It is not clear whether this is meant to be the region described in the Act as ‘surrounding’ the ACT (if so, it seems excessive, but this might not be material).

Now to the specific criteria.

#### **1. CRITERIA FOR DECLARING AN ENDANGERED\* SPECIES**

To be recommended for declaration, a species\* must meet at least **one** of these criteria:

**1.1 Species is known or suspected to occur in the ACT region\* and is already recognised as endangered or presumed extinct\* in an authoritative international or national listing.**

Does the reference to 'endangered' call up the definition of 'endangered' in the Act? One would think so, in which case the 'listing' would need to have been made on that particular basis, not just as a matter of terminology – from an international or national viewpoint. However, 'presumed extinct' is clearly used in the given sense, which would need to be applied worldwide, or perhaps nationally (we don't know the relevant area for the national list). The area where the species is 'known or suspected to occur' is the whole bioregion, not necessarily the ACT. This is inconsistent with what appears in the definition of 'ACT region' (see 2<sup>nd</sup> para, first sentence).

**1.2 Species is observed, estimated, inferred or suspected to be at risk of premature extinction\* in the ACT region in the near future\*, as demonstrated by one or more of: ....**

[In the interest of brevity the list of alternative sub-criteria is omitted here.]

The definition of 'premature extinction' is as follows:

**premature extinction** means extinction occurring as a result of processes that would not normally be considered part of natural evolution, or processes accelerating natural evolution.

Perhaps a scientist can say what that means. It seems doubtful that that can be interpreted in practice as meaning anything more than 'extinction', and in any event it is 'extinction' (proper) that the Act is concerned with. The criteria define 'near future' as 'within the next 10 years or several generations, whichever is appropriate'. This criterion seems to rework the definition in the Act, with some differences. The definition in the Act of 'endangered' requires either likely extinction (not extinction of which the species is 'suspected to be at risk'), within no specified time period, OR reduction of numbers or habitats to such level that the species is in immediate danger of extinction.

There is no stated requirement that the species *occur* in the ACT, as distinct from the ACT region..

**1.3 Species is presumed extinct\* in the ACT region.**

This does not mean, of course, that the species is really extinct, so the choice of that label for use in the criteria may be unnecessarily confusing. It does not mean that anyone presumes the species is extinct, but that 'the species has not definitely been located in the wild during the past 50 years or the species has not been found in recent years despite thorough searching'. Here it is clear enough that 'the wild' refers to the whole bioregion.

Under the definition of 'ACT region', one requirement is that the species be 'presumed extinct in the ACT'. It is not necessary to say that. If the relevant (more onerous) requirement is met for the species to be 'presumed extinct in the [whole] ACT region', then it must be also 'presumed extinct' in the ACT.