# Nature Conservation (Plants) Regulation 2020

Explanatory notes for SL 2020 No. 137

made under the

*Environmental Offsets Act 2014*
*Nature Conservation Act 1992*
*State Penalties Enforcement Act 1999*

# General Outline

## Short title

*Nature Conservation (Plants) Regulation 2020*

## Authorising law

Section 93 of the *Environmental Offsets Act 2014*
Section 175 of the *Nature Conservation Act 1992*
Section 165 of the *State Penalties Enforcement Act 1999*

## Policy objectives and the reasons for them

The policy objective of the Nature Conservation (Plants) Regulation 2020 (Plants Regulation) is to provide for the conservation and management of protected plants in Queensland by:

- listing plant species under conservation classifications (established under the *Nature Conservation Act 1992*), including under the two new classes (extinct and critically endangered) resultant of the common assessment method for nationally threatened species;
- providing a management approach (management principles and intent) for each classification, based on the threat of extinction to the species;
- retaining existing exemptions from section 89 and 90 of the *Nature Conservation Act 1992* which allow for interactions with plants;
- continuing the permitting and authorisation framework for taking, keeping and using protected plants outside of protected areas;
- including administrative arrangements for exemptions, permitting and licencing frameworks;
- specifying offences and associated penalties; and
- including transitional provisions to allow continuity and preserve existing rights.

The Plants Regulation is consequential to the repeal of the *Nature Conservation (Wildlife Management) Regulation 2006* (Wildlife Management Regulation), the *Nature Conservation (Wildlife) Regulation 2006* (Wildlife Regulation), and the *Nature Conservation (Administration) Regulation 2017* (Administration Regulation) by the *Nature Conservation (Animals) Regulation 2020* (Animals Regulation).

In transferring existing provisions from the three repealed regulations into the Plants Regulation, the policy objective is to:

- retain the existing policy intent of the protected plants framework;
- improve its interpretation and administration by updating provisions to comply with contemporary parliamentary counsel drafting standards; and
- remove requirements or offences which are duplicated with *Nature Conservation Act 1992* offences.

## Achievement of policy objectives

The Plants Regulation is the single point of reference for all management and use of protected plants under the *Nature Conservation Act 1992*. The Plants Regulation retains the existing policy intent for the conservation of native plants contained across the Wildlife Management Regulation, the Wildlife Regulation and the Administration Regulation.

**Chapter 1** provides the definitions for interpretation of the Plants Regulation, and clarifies that the Plants Regulation does not apply to a plant in a protected area, with the exception of Chapter 2.

Chapter 1 contains provisions that were previously spread across the Administration Regulation, the Wildlife Management Regulation, and the Wildlife Regulation, including:

- the meaning of commercial purpose, trade, when a whole plant is taken, and relationship to protected areas from the repealed Wildlife Management Regulation;
- the meaning of relevant person and clarifications about references to classes of wildlife and plant authorities from the repealed Administration Regulation; and
- the meaning of scientific names from the repealed Wildlife Regulation.

To simplify and streamline interpretation of the Plants Regulation the following clarifications have been made:

- Section 4 defines ‘trade’ (previous section 6A of the Wildlife Management Regulation) and incorporates ‘commercial purpose’ (previous section 6 of the Wildlife Management Regulation) because the term ‘commercial purpose’ is only used to define trade;
- Section 4 also clarifies that trade excludes the use of plants for personal use in the circumstances previously outlined in the definition of ‘personal use’ in the Dictionary of the Wildlife Management Regulation. For example, a person does not use a protected plant for trade if the person uses the plant in a local government’s botanical garden or park;
- Section 6 defines ‘whole’ plant by merging the definitions previously provided in section 7A of the Wildlife Management Regulation and the definition of ‘whole’ in the Dictionary of the Administration Regulation 2017. Together with the definition of protected plant in the *Nature Conservation Act 1992*, this merge also made sections 261 and 263 of the Wildlife Management Regulation redundant; and

- Section 9 defines 'plant authority' to include all licences, permits and authorities in the Plants Regulation.

**Chapter 2** consolidates the existing disjointed framework for listing plants under the relevant conservation classifications of the *Nature Conservation Act 1992* by:

- carrying over provisions from the Wildlife Regulation which define the conservation classes and management intent for protected plants; and
- retaining provisions for special least concern plants under the Wildlife Management Regulation.

To give effect to the new classes of wildlife, 'extinct' and 'critically endangered' established under the *Nature Conservation Act 1992*, sections 12 and 14 introduce the new conservation classes for plants and their declared management intent. These classes were introduced as part of Queensland's commitment to the Common Assessment Method for assessing and listing nationally threatened species.

Schedule 1 lists the specific plants species under each conservation category. The listing is a result of an independent scientific assessment process led by the Queensland Species Technical Committee.

**Chapter 3** continues the exemptions for taking and/or using protected plants from the Wildlife Management Regulation. This chapter has been restructured to simplify interpretation and remove duplication between offences under the *Nature Conservation Act 1992* and Wildlife Management Regulation.

Sections 89 and 90 of the *Nature Conservation Act 1992* state that it is an offence to take and use a protected plant unless it is authorised under the regulation by a plant authority or an exemption. Chapter 3 provides a clear link between an activity and the exemption from the Act offence.

Part 1 continues the exemptions for taking protected plants under section 89 of the *Nature Conservation 1992*. These exemptions allow for taking plants to manage hazards and risks, for example for fire hazard reduction or avoiding death or injury to people. To comply with contemporary drafting practices administrative requirements in these sections (record keeping, labelling and tagging) will be moved to the new 'plant exemptions code'. These exemptions were carried over from Chapter 4, Part 3, Division 2 of the Wildlife Management Regulation.

Part 2 continues the exemptions in their original intent of Chapter 4, Part 3, Division 6 of the Wildlife Management Regulation for using protected plants under section 90 of the *Nature Conservation Act 1992*. These exemptions continue to allow the use of plants in particular circumstances such as using propagated and cultivated plants. This Part clarifies where personal use is exempt, which was previously scattered throughout the definitions and exemptions of the repealed Wildlife Management Regulation.

Section 28 retains the policy objective that trade is exempt by ensuring that a person who is not authorised or exempt under a specific provision is exempt from section 90 of the *Nature Conservation Act 1992* when that use is for trade. This retains status quo provided by sections 261ZI to 261ZM of the Wildlife Management Regulation.

To comply with contemporary drafting practices administrative requirements in these existing sections (record keeping, labelling and tagging) will be moved to the 'plant exemptions code'. Examples of application include:

- Where a person has acquired a restricted plant via a non-wild source (e.g. a nursery) and intends to use the plant for trade, and it is not provided for by any other exemption, it is provided for by this exemption; and
- Where a person harvests a plant under a protected plants harvesting licence and the licence does not authorise or prohibit the use of the plant, a person is then exempt to use for trade under this exemption.

Part 3 continues the exemptions for taking and using protected plants under sections 89 and 90 of the *Nature Conservation 1992*. Existing exemptions vary in application, including allowing for grazing or fodder harvesting, revegetation programs, use in scientific studies, clearing etc.

Drafting clarifications include:

- omitting two redundant exemptions (section 261L of the Wildlife Management Regulation permitted by section 7 of the *Biodiscovery Act 2004*, and section 261M of the Wildlife Management Regulation permitted under chief executive powers under the *Nature Conservation Act 1992*);
- separating the grazing and fodder harvesting exemptions into private land and state owned land exemptions;
- consolidating exemptions for operational salvage (sections 261W and 261Y of the Wildlife Management Regulation); and
- splitting the existing clearing exemption (section 261Z of the Wildlife Management Regulation) into one exemption for Environmental Impact Statement proponents and another for all others to better reflect when the exemptions apply.

The existing exemptions included a number of administrative, labelling, tagging and operational requirements. To comply with contemporary drafting practices these requirements will be moved to the 'plant exemptions code', including the requirement to keep a copy of the Flora Survey Trigger Map and/or give the chief executive a copy of the flora survey report for clearing outside or within a high risk area respectively. For clearing in high risk areas, the exemption retains the ability for clearing to occur within three years from the date the survey was completed (previously provided in 261ZA of the Wildlife Management Regulation).

Some requirements and offences have also been removed because they were duplicated by offences or requirements in the *Nature Conservation Act 1992*.

The existing exemptions were carried over from Chapter 4, Part 3, Divisions 4 and 5 of the Wildlife Management Regulation.

Part 4 continues the transitional exemption for mining and petroleum leases from the Wildlife Management Regulation and the exemption for using protected plants registered under the *Plant Breeder's Rights Act 1994 (Cwth)* (section 261D of the Wildlife Management Regulation) under sections 89 and 90 of the *Nature Conservation 1992*.

The exemption for the Commonwealth plant breeder rights framework removes administrative requirements because they are already captured under the national framework.

**Chapter 4** continues the plant authorities framework from the Wildlife Management Regulation and Administration Regulation. This Chapter provides for the:

- Protected plant growing licence (Part 3) – can be granted for cultivating or propagating a protected plant;
- Protected plant harvesting licence (Part 4) – can be granted for take for its use, including by 'contingent salvage' (defined in Schedule 5 – taking a whole plant before it is destroyed by a legal clearing activity);
- Protected plant clearing permit (Part 5) – authorises take by clearing and, in particular circumstances, the use; and
- Aboriginal tradition authorities (Part 6) and Island custom authorities (Part 7).

In drafting Chapter 4, no changes have been made to the existing plant authority types, their names, what activities they can authorise and what conditions apply to each authority type.

Part 2 consolidates the general limits and conditions that apply to all plant authorities. Plant authority specific conditions are then located within their respective Parts in Chapter 4. Offences within the previous condition provisions of the Wildlife Management Regulation have been transferred to section 145 of the Plants Regulation, providing an overarching offence for breach of conditions of a plant authority.

**Chapter 5** consolidates existing provisions for applying for, granting and managing (amendments, suspensions, cancellations, replacement and surrender) plant authorities from the Wildlife Management Regulation and Administration Regulation. Division 2 continues the applicant suitability provisions from the Administration Regulation.

In drafting Chapter 5, no changes have been made to who can apply and how they can apply for a plant authority. Plant authority applications will continue to include the same requirements and in deciding an application, the chief executive will continue to consider the same criteria. Plant authorities will continue to be issued in writing, stating the matters listed in Part 3 of Chapter 5. Plant authorities will continue to be granted for the same period of time (5 years for protected plant growing and harvesting licences), 2 years for clearing permits and 1 year for Aboriginal tradition or Island custom authorities.

Drafting changes have been made to align with contemporary drafting practices or streamline administrative actions. To clarify when a sustainable harvest plan is required and how they apply to protected plant growing and harvesting licences, existing provisions (such as sections 268 and 277 of the Wildlife Management Regulation) have been integrated into the relevant sections of Chapter 5.

**Chapter 6** consolidates additional requirements for clearing and harvesting protected plants. Harvest period notice provisions are continued in their current form, allowing the chief executive to declare a harvest period by issuing a notice for the purposes of conservation.

Chapter 6 gives effect to the Flora Survey Guidelines and continues the steps required to identify the regulatory pathway for clearing a protected plant. A person first checks the area to be cleared in the Flora Survey Trigger Map:

- If the area to be cleared is located **outside** a High Risk Area in the Flora Survey Trigger Map then the person may be eligible for an **exemption** under sections 46 or 47 of the Plants Regulation.
- If the area to be cleared is located **inside** a High Risk Area in the Flora Survey Trigger Map then the person must undertake a flora survey in accordance with the Flora Survey Guidelines.
    - If the flora survey **does not** identify a threatened or near threatened plant then a person may be eligible for an **exemption** under section 48 of the Plants Regulation
    - If the flora survey **identifies** a threatened or near threatened plant then:
        - If there is **no clearing** to occur within 100m of the plant then the person may be eligible for the **exemption** under section 48 of the Plants Regulation
        - If clearing is to **occur** within 100m of the plant then the person requires a **protected plant clearing permit**.

A person continues to be required to give a flora survey report to the chief executive when clearing within a high risk area. Section 134 continues the ability for a person to apply for a reduced buffer zone for a clearing impact area (section 249 of the Wildlife Management Regulation), and section 143 continues the ability for agreement to alternative survey methodologies for carrying out a flora survey report.

**Chapter 7** details offences to secure compliance with plant authorities, the 'plant exemptions code' and other dealings with plants. Offences have been reviewed to reflect current drafting practices and the Department of Justice and Attorney-General guidelines.

All existing offences for breaching a plant authority condition have been given a single overarching offence under section 145 of the Plants Regulation. This will ensure a simplified and consistent compliance approach. This includes the requirement to comply with the 'plant authorities code'. This code will continue to include administrative requirements for records and labels for plant authorities.

The Plants Regulation continues the requirement for a person to provide the Queensland Herbarium with a plant part taken under an exemption under section 39. All other existing offences for taking and using plants under exemptions have been consolidated and streamlined into one offence for non-compliance with the new 'plant exemptions code'. The code will include administrative, labelling, tagging and operational requirements under sections 245, 261ZJ, 337, 338, 261ZM, 246, 261ZK and 261ZL of the Wildlife Management Regulation, and sections 136, 138, 133, 134, 135, 137 and 139 of the Administration Regulation. The code does not add any requirement or increase regulatory burden on people operating under an exemption. The code is made under section 174A of the *Nature Conservation Act 1992* and must be tabled in Parliament for consideration.

**Chapter 8** consolidates and clarifies the tagging, labelling and recording requirements for protected plants that were previously spread across the Wildlife Management Regulation and the Administration Regulation. The 'plant authorities code' continues to support the framework by providing the information requirements for records and labels taken or used under a plant authority. Chapter 8 retains the existing offences for these matters.

To ensure consistency with the Animals Regulation and the *Human Rights Act 2019*, section 151 allows an approved person to keep a record on someone's behalf. This ensures a person who is unable to comply with record keeping requirements has another pathway to do so.

To remove duplication, section 348A of the Wildlife Management Regulation is omitted because the requirement is dealt with under Part 2 of Chapter 8 which retains the process for obtaining and requirements for using tags for restricted plants and the 'plant exemptions code'.

**Chapter 9** continues fees payable under plant authorities effective 1 July 2020. Chapter 9 removes redundant provisions which are better suited to other wildlife authority processes. For example, the recovery of fee provision under 149(2) of the Administration Regulation is discontinued because fees under the Plants Regulation are only payable when a person makes an application (for an authority, to amend an authority or for a tag).

**Chapter 10** continues miscellaneous provisions such as

- sections 316 and 318 of the Wildlife Management Regulation which defines processed products for the purposes of the *Nature Conservation Act 1992*.
- section 173 of the Administration Regulation which prescribes a conservation officer for the purposes of 130 of the *Nature Conservation Act 1992*.

**Chapter 11** continues provisions in relation to internal and external review of decisions and property seizure powers, aligned with Chapter 11 of the Animals Regulation.

**Chapter 12** provides transitional provisions designed to retain existing rights, ensuring all processes approved or applied for under the Administration Regulation and Wildlife Management Regulation continue to operate or apply. Transitional provisions continue existing plant authorities, applications for new authorities, record keeping, tags, existing agreements, flora surveys and reports under the new provisions of the Plants Regulation. As the Plants Regulation retains status quo, there are no impacts on existing rights.

Section 224 also ensures that where repealed regulations are referenced in documents, they are taken to refer to the relevant section in the Plants Regulation.

**Chapter 13** contains consequential amendments listed in Schedule 6 which includes amendments to the:

- *Environmental Offsets Regulation 2014* to correct cross-references to the new Plants Regulation and give effect to the new class 'critically endangered' under the *Nature Conservation Act 1992*.
- *State Penalties Enforcement Regulation 2014* to update section numbers, reflect current guidelines and provide for the continuation of existing infringement notice offences and penalties for offences under the Plants Regulation.

## Consistency with policy objectives of authorising law

The Plants Regulation is consistent with the objectives of the authorising law. The object of the *Nature Conservation Act 1992* is the conservation of nature while allowing for the involvement of Indigenous people in the management of protected areas in which they have an interest under Aboriginal tradition or Island custom.

The Plants Regulation is consistent with the objectives of the *State Penalties Enforcement Regulation 2014* and is consistent with section 165 of the *State Penalties Enforcement Act 1999* which allows for a regulation to prescribe an offence to be an infringement notice offence and to provide for an infringement notice fine.

The Plants Regulation is consistent with the objectives of the *Environmental Offsets Act 2014* which allows for national, State and local matters of environmental significance to be prescribed environmental matters, including threatened species listed under the *Nature Conservation Act 1992*.

## Inconsistency with policy objectives of other legislation

The Plants Regulation is consistent with the policy objectives of other legislation.

## Alternative ways of achieving policy objectives

The option of allowing the regulations to expire without replacement would not achieve the objective of ensuring the State has a framework for the ongoing management of protected plants in Queensland.

## Benefits and costs of implementation

The Plants Regulation is consequential to the Animals Regulation. As there are no changes to the policy intent and requirements of the existing framework, there is no impacts or costs to implementation. As part of implementation for the Animals Regulation, materials, such as websites, forms and templates will be updated to reflect the new regulation name and section number changes.

## Consistency with fundamental legislative principles

The Plants Regulation has sufficient regard to the rights and liberties of individuals and the institution of Parliament, and complies with the fundamental legislative principles under the *Legislative Standards Act 1992*.

***Offences and penalties***
The Plants Regulation continues offence provisions from the previous Wildlife Management Regulation and Administration Regulation, which are required to support implementation of the Plants Regulation.

In considering whether the legislation has sufficient regard to the rights and liberties of individuals (Legislative Standards Act, section 4(2)(a)), these offences are only made where it is appropriate and is required to ensure the effective enforcement of requirements relating to the take, keep and use of protected plants. The offences are reasonable given the need to achieve the conservation objectives of the *Nature Conservation Act 1992* and consistent with the way existing offences are established for wildlife under the Act.

Although the Plants Regulation generally maintains status quo of the previous regulations, offences have been restructured to provide a more consistent application of penalties. Conditions of plant authority offences are now aligned to three broad penalty types –

- Minor administrative offences (maximum of 20 penalty units) – this creates consistency between two existing administrative offences, one being reduced from 50 maximum units and one increasing from 10 penalty units).
- Offences that impact the conservation of plants (maximum of 165 penalty units) – to create consistency in drafting this offence, 5 offences have increased from 120 to 165 maximum penalty units, however this is justified because all the offences in this category impact the conservation of plants.
- Other miscellaneous offences (maximum of 80 penalty units) – retains status quo.

***Seizure of property***

The *Nature Conservation Act 1992* provides for the making of a regulation dealing with the seizure of an object (e.g. vehicle, boat, recreational craft, aircraft or appliance) in the interest of wildlife protection. Chapter 11, Part 2 (Seizure of property) of the Plants Regulation continues provisions from the previous Wildlife Management Regulation allowing a conservation officer to seize an object without a warrant, if it is necessary for the protection of native wildlife. Those conditions are: where the object is on land without the landholder's consent or is abandoned.

While this provision may be seen as a breach of section 4(3)(e) of the *Legislative Standards Act 1992*, it is justified in the interest of protecting native plants (e.g. seizing harvesting equipment or chemicals used for the take of plants). In these situations it is often necessary to seize the object immediately in order to protect plants. It would not be appropriate to delay seizure until a warrant is obtained as the delay would likely lead to the death of the plant. In addition, restrictions are placed on the chief executive when the owner or person in control of the object to be seized is or should reasonably be known.

The Plant Regulation enables a seized thing to be returned to the owner provided the chief executive is satisfied the person has a right to the seized thing, and reasonable costs associated with the seizure (such as costs associated with holding the seized thing) are paid by the person to the chief executive. If the item is unable to be returned to the owner and it is sold, the Plant Regulation provides direction regarding how the sale is to be conducted and dealing with the proceeds of the sale.

***Amendment, suspension or cancellation of plant authorities***

Chapter 5, Part 5 of the Plants Regulation includes provisions enabling the chief executive to amend, suspend or cancel a plant authority. These powers may appear to have insufficient regard to the rights and liberties of the holder of a plant authority in relation to section 4(2)(a) of the *Legislative Standards Act 1992*.

The processes that apply to amendments, suspensions or cancellations of plant authorities provide for natural justice by requiring the chief executive to notify the holder of the authority of the action and allowing for review and appeal rights. These provisions in the Plants Regulation are considered to be proportionate with the need to conserve wildlife whilst also considering the rights and liberties of individuals who hold relevant authorities.

***Flora survey guidelines***
Section 142 of the Plant Regulation retains the ability for the Chief Executive to approve a Flora Survey Guideline. This raises whether the delegation of legislative power has sufficient regard to the institution of Parliament (*Legislative Standards Act 1992*, section 4(4)(b)).

The flora survey guideline specifies the technical information for how a flora survey must be prepared, and is used to support the Chief Executive to make a decision on an application given the variable nature of flora surveys. The guideline ensures applicants are aware of criteria and considerations at the application stage. The Plants Regulation provides flexibility by enabling an applicant to seek agreement from the Chief Executive on an alternative methodology for preparing a flora survey (section 143).

Section 142 of the Plant Regulation is appropriate given the highly technical nature of a flora survey. This is consistent with the ability provided under the authorising law and is therefore an appropriate way of handling this policy framework. Any breach of section 4(4) of the Legislative Standards Act 1992 is considered justified.

# Consultation

The Plants Regulation is consequential to the Animals Regulation. No external consultation has occurred in drafting the Plants Regulation because there are no changes to the existing framework, the policy intent or to existing requirements.