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c/o— Biodiversity Coordination Unit
SA Department for Environment and Water
By email: biodiversityact@sa.gov.au

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Dear Biodiversity Coordination Unit

Submission from the Environment, Natural Resources and Energy Law ('ENREL') Research Unit at the Adelaide Law School on the Biodiversity Act for South Australia Discussion Paper

Thank you for this opportunity to respond to the Biodiversity Act for South Australia Discussion Paper (the **Discussion Paper**).

The Environmental Law and Policy Research Unit provides independent perspectives on law and policy issues relating to the environment, land use planning, heritage protection, human rights, sustainability, climate change, and energy and natural resources. The Research Unit is committed to active community engagement and hosts public seminars, workshops and conferences related to our areas of expertise. We draw on the rich background of our experts to develop innovative scholarship, analyse and critique existing and prospective law and policy, and contribute to debate by formulating and promoting law reform initiatives.

The Environmental and Natural Resources Law Research Unit brings together a diverse range of scholars working on issues of law and policy relating to the environment, land use planning, heritage protection, human rights, sustainability, climate change, and energy and natural resources. The Unit is actively engaged in research and advocacy on cutting-edge issues for the effective and equitable management of natural resources and environments in Australia.

We set out our submission and recommendations in the pages that follow and look forward to continuing to be involved in this reform process, including by providing input on any legislative developments.

Sincerely

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Introduction

In South Australia, to date, biodiversity protection has been fragmented across a number of different pieces of legislation including, principally, the *National Parks and Wildlife Act 1971* (SA), the *Planning Development and Infrastructure Act* 2016 (SA), the *Native Vegetation Act 1991* (SA), the *Landscape South Australia Ac 2019* (SA), the *Environment Protection Act 1993* (SA), and the *Mining Act 1971* (SA).

While the interagency referral process as part of the general development assessment process may see a general coordination across agencies administering these pieces of legislation, it is evident from the Discussion Paper's description of the state of biodiversity decline in SA that this fragmented regulatory framework is not working. South Australia needs a significant change in approach to the protection of its biodiversity.

In our submission below, we reflect on the ways in which existing laws have hindered effective conservation, and about new ways of thinking and novel legal mechanisms that are available to help us address the challenges raised in the Discussion Paper.

We have structured this submission to follow the topics from the Discussion Paper, and we address each topic in turn, as follows.

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1. Goals for a new Biodiversity Act

Setting ambitious, realistic and broadly-supported goals for the new legislation is a critical task.[1] The goals proposed – recover, preserve, protect and adapt – encompass halting the slide of species into extinction and landscapes into dysfunction and recovering some of what was lost, but in SA there is capacity to go significantly further. For example, expanding the presence of important ecological environments such as shellfish reefs, seagrass meadows and wetlands can create benefits far into the future, including for future generations. Rather than recovery from past loss, these kinds of interventions may sometimes be more consistent with a goal of 'improvement' or 'enhancement'. The explosion of interest in blue carbon restoration projects in South Australia are good examples, along with seagrass seeding and expansion of marine protected areas. Ecological restoration proponents in SA have demonstrated substantial regeneration potential, and these examples could inform **a new and far more ambitious goal for this new law, to actively expand and improve the State's valuable natural assets**. This is a unique opportunity to articulate a robust commitment to initiatives that foster healthier and more resilient environments, rather than simply preserving what remains.

1.1. Preamble

Before articulating goals to guide the implementation of the Act, an additional tool is available to the South Australian Government which has not been used to date but has precedent elsewhere in the Country and around the world: a statutory preamble. We would be happy to provide more information about the legal significance of a preamble but, in short, it would allow the government to include a statement of why biodiversity matters to South Australians (including for South Australia's First Peoples).

We would love to see the South Australian government include something similar in the new Biodiversity Act, to capture the deep and personal connection that many South Australians feel for the State's unique environments, as well as the State's First Peoples.

An interesting example of a preamble of this kind is Australia's first trilingual statute.[2]

Great Ocean Road and Environs Protection Act 2020 (Vic):

> The Parliament recognises the intrinsic connection of the traditional owners to the land and sea Country that the Great Ocean Road traverses, and that the area has nourished and sustained the traditional owners physically and spiritually and continues to be important to the traditional owners today and into the future.
>
> [in Marr language].
>
> Together body and Country, we know long time (We see all of you), greeting. Mother my Country. Father my Country. Sister my Country. Brother my Country. We are the Maar speaking Peoples. Hear us.
> Our Country is water, air, fire, trees, life.
> Our Country is thought, language, heart, soul, blood.
> Our Country is our Children, our youth, our Elders, our men and women, our Ancestors, our spirit.

[1] Our submission in this part draws heavily (and sometimes verbatim) on the following resource: McCormack, 'The legislative challenge of facilitating climate change adaptation for biodiversity' (2018) 92 *Australian Law Journal* 546. A copy can be provided on request.
[2] See more: www.auspublaw.org/blog/2020/10/australias-first-trilingual-statute.

Our Country is Maar, Maar is Country.
We bring to the light our songs, our stories, our vision, our love.
We bring these things to the light so All can know Country. To care for Country. To think about Country. To love Country. To protect Country.
We invite all that choose to live on or visit our Country to slow down. To tread softly and listen to Country speak.
If you love Country, Country will love you.

[in Wadawurrung language].

We deeply respect our people of the past. Elders, children, men, women. We deeply respect their knowledge of country, water, life, their care of the traditions and of each other, we stand with their spirit.

Great spirit Bundjil told us to take care of the great life within the land. To only take what you need without selfishness.

Wadawurrung shared their knowledge of singing, dance, trade, camps, fishing, hunting, paintings, and homes with us to protect for our future generations.

We all need to help.

Our Wadawurrung family group lived within the great sea, with a large land of forested areas and wonderful banks of the ocean, near many water bodies. Anglesea, Point Addis, Barwon Heads, Jan Juc, Aireys Inlet. These homes all provide ideal life to birds and fish, eels. Reeds turned into our baskets. Life in the forest gave resources like food and lots of tools to use for trade, building, journeys. If there was lots to trade, we would share with our families and celebrate.

We love this earth with all our feeling. We would name our country, by what we could see. Our country is remembered by Wadawurrung, our proud spirit walks to tomorrow to teach others the care of our earth.

The Parliament of Victoria therefore enacts: …

1.2. Purpose or objects

The proposed Act will need a section that sets the purposes of the legislative regime that it creates. This section will set the purpose of the Act in a way that will inform judicial interpretation of substantive and procedural legal obligations, including if a court needs to 'resolve any uncertainty or ambiguity in the operative provisions' of the statute. These purposes may be the factor on which a judicial decision turns. A purpose (or 'objects') section will also guide conservation planning and practice by:

- influencing agency priority setting, funding and decision making;
- communicating, in clear terms and for the benefit of the broader community, what a piece of legislation aims to achieve;
- reflecting and informing the many different ways that society values the environment; and
- providing criteria for evaluating the success or otherwise of conservation policies and programs, including implementation of the proposed Biodiversity Act's substantive provisions.

We generally support the four core goals set out in the Discussion Paper, with the qualification that the goal to 'conserve biodiversity and maintain…' ought to begin with 'enhance' or 'improve' (see next paragraph). We urge the government to exceed the ambition of the goals being contemplated for the new national environmental laws.

The recent review of the *Biodiversity Act 2016* (NSW) ('**NSW Review**') made recommendations that should be considered closely in South Australia when drafting the new Biodiversity Act. In particular, the NSW Review recommended aligning the NSW statutory objects with an overarching emphasis on

achieving 'nature-positive'. We urge the South Australian government to adopt a similarly ambitious approach, emphasising the improvement and enhancement of natural systems and processes rather than simply the conservation and protection and recovery of existing values. Taking restoration and enhancement as a starting point for the goals of the Act should flow through into substantive provisions that enable restoration activities, incentivise improvements to nature, and prevent rapid resort to biodiversity offsetting instead of avoiding (or better yet, improving) biodiversity through development.

We delve into those particular provisions below but, in summary, influential drivers of positive enhancement of environments could include tax rebates and reductions, direct public funding, benefits and enhancements, and could also be factored into permissive legislation such as planning and land use management. An emphasis on spatial planning that goes beyond where ecologies used to thrive to where they could thrive in the future, at different scales, might also be a useful driver of a nature building culture.

In the NSW Review, the independent panel proposed the following 'nature positive' goals (p 16):

- halting and reversing biodiversity loss and ecosystem collapse;
- restoring threatened species and ecosystems, ensuring the ecological and evolutionary potential of species and employing a landscape-level focus to building resilience and adaptive capacity, especially with respect to climate change;
- zero human-induced extinctions of known threatened species; and
- a standard of net gain in biodiversity.

These goals are extremely ambitious, but the South Australian government is less likely to 'lock in' ongoing loss if it commits itself to these kinds of ambitious goals because they can guide practical, real-world decisions about, for example, native vegetation management, development permits and restoration projects. Of course, ambitious statements must be backed up by committed and enforceable management arrangements and regulation of actors, and accountability measures to ensure that harm to biodiversity is halted and restoration enabled (we examine the kinds of substantive rules and arrangements that will be necessary for this outcome, below).

1.3. Directing principles

In addition to specific objects, we strongly recommend that the new Act include explicit principles to guide the *process* of decision making. This is particularly important in the context of climate change, increasingly severe extreme events, and (in part as a result of those changes) the likelihood of substantial, ongoing biodiversity loss. Public decision makers and all land managers must be equipped to balance inevitable biodiversity losses against losses that could have been avoided with greater care, investment and effort; as well as juggling the wicked challenge of protecting human communities and helping them to flourish, conserving non-human natural systems and processes, and allowing economic activity in a way that does not compromise the health and resilience of other important public goods.

Directing principles are rules-based principles that spell out 'matters that decision-makers are obliged to apply when exercising their statutory functions'.[3] These are, in essence, principles that guide *how* decisions are made, rather than *what* decisions are made or what *goals* are being pursued. They are express statutory obligations on decision-makers to act in a particular way when exercising functions

[3] Australian Panel of Experts in Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms, Technical Paper 1* (APEEL 2017) 3, available here <www.edo.org.au/publication/australian-panel-of-experts-in-environmental-blueprint-and-technical-reports/>.

under the Act. The Victorian *Environment Protection Act 2017* provides a particularly comprehensive and forward-looking example of directing principles, including that:

> Actions or decisions under this Act should be based on the best available evidence in the circumstances that is relevant and reliable (s 19).
>
> [*Note: this is a sensible and, we argue, a critical directing principle for the proposed Biodiversity Act in the context of rapidly changing climatic and environmental risks. We recommend adding "under this Act and its subsidiary instruments" to this principle, to capture decisions made under regulations, guidelines, plans of management and other statutory planning instruments*].
>
> Members of the public should— (a) have access to reliable and relevant information in appropriate forms to facilitate a good understanding of issues of harm or risks of harm to human health and the environment and of how decisions are made under this Act; and (b) be engaged and given opportunities to participate in decisions made under this Act, where appropriate to do so; and (c) have their interests taken into account in decisions made under this Act (s 22).
>
> [*Note: this is a sensible and, we argue, a critical directing principle for any new Biodiversity Act in the context of rapidly changing climatic and environmental risks*].

Another important directing principle is the principle of **Free, Prior and Informed Consent for Indigenous peoples**. This principle is examined in detail in Part 2 of our submission, below, and will not be discussed any further here.

If a goal of the Act is to facilitate adaptation, the Act should include a requirement to decision makers to turn their mind to climate change in acting or deciding under the Act. Relevant principles to facilitate this outcome might include:

- **a principle requiring attention to long, medium and short-term futures** for key decisions under the Act (provided the principle is accompanied by an obligation to do something with the 'considering' that is required – i.e. an obligation to act on that information);
- **a principle of adaptive management**;
- **a principle of responsive and/or anticipatory governance**;
- **a principle of One Health** (recognising that human and environmental health is inextricably intertwined – that restoration can benefit humans and nature, and that environmental decline hurts humans and nature).

Directing principles are implemented in all decision-making, or in specific decision-making contexts, under legislation. The Government will need to ensure that the principles guide implementation of the Act, explicitly, through the inclusion of a provision such as:

> It is the intention of Parliament that in administering this Act and the regulations, actions and decisions (including the exercise of any power or making of any plan) under those instruments should be directed at ***achieving*** the objects and ***implementing the principles*** specified here.

Directing principles are legally enforceable and we argue that this is not something that the South Australian Government should shy away from. Many directing principles are a statutory expression of common sense and good practice. For example, few would argue that decisions should be based on

anything other than the best available evidence (e.g. a hunch, a bribe, 'the way we've always done it'), and it should not be surprising that people may wish to review decisions that are based on less.

A range of voices have questioned the use of ESD or Ecologically Sustainable Development as guiding principles under the proposed Act. We also recommend avoiding that terminology. Its use is fraught in conservation contexts, consistently used to justify poor decision making about biodiversity and climate change, and often undermining social and cultural aspirations and values. Some of the sub-principles of ESD could be very valuable if they were defined and implemented effectively (such as intergenerational equity, precaution, and prevention). We strongly recommend identifying those useful sub-principles – defining them clearly, and ensuring they are enforceable in decision making across the Act and subsidiary instruments.

We have had an opportunity to read the submissions made to this review by the Biodiversity Council and the National Environmental Law Association. We support the comments made by both groups about the kinds of directing principles that may be necessary and appropriate in an Act of this kind.

1.4. A strategic approach to achieving the goals

We recommend that the South Australian government take a similarly strategic approach in achieving the goals discussed above, throughout the legislation, to that recommended by the NSW Review. In particular, it recommended six 'key pillars' (pp 18-19):

- A Nature Positive Strategy that sets principles for achieving nature positive outcomes in the State and is integrated across the entire framework of conservation instruments and plans, connecting multiple programs and initiatives (including protected areas on private and public land, biodiversity threat management, threatened species and ecosystem recovery and restoration). The Strategy could be supported by a series of implementation plans to guide targeted action and integrated implementation. Implementation plans should include outcomes targets, accountabilities and indicators to measure progress;
- Nature positive spatial tools (see topic 6);
- Nature positive development (see topic 2);
- Species and ecosystem recovery;
- Data-informed decision-making; and
- Leveraging private investment.

2. Topic 1 – Biodiversity and South Australia's First Nations People

This part of our submission should be read in light of the results of the Department for Environment and Water's engagement with First Nations people in relation to the new Biodiversity Act.

The Discussion Paper has acknowledged the value and importance of the traditional ecological knowledge of South Australia's First Nations people, including land management practices and information passed from generation to generation that provides 'deep insight into the intricate relationships between people, plants, animals and the land' (Discussion Paper, p 5). The 'laws and cultures' of First Nations people 'are embedded in their Country, and this extends to their connection with biodiversity' (Discussion Paper, p 6).

'Country' is the term 'often used by Aboriginal peoples to describe the lands, waterways and seas to which they are connected. The term contains complex ideas about law, place, custom, language, spiritual belief, cultural practice, material sustenance, family and identity'.[4] Legal frameworks that embed the participation of First Nations people in decision-making processes and enable the incorporation of traditional ecological knowledge across a wide range of activities, offer pathways to achieve better outcomes for biodiversity, while conversely, laws must effectively preserve and restore biodiversity in order to protect Aboriginal cultural heritage.[5]

Fragmented and complex rules about biodiversity, cultural heritage and the involvement of South Australia's Aboriginal people in decision making must be clarified, centring Aboriginal voices and elevating Aboriginal aspirations in the conservation of biodiversity.

South Australia's legal framework for preserving and protecting biodiversity in South Australia is piecemeal in nature: it is highly fragmented and complex, with many different statutes playing a role in environmental/biodiversity protection. A patchwork of environment, land use planning and natural resource laws also governs the meaningful participation of Aboriginal people in land use and environmental decision-making – such as the *Mining Act 1971* (SA), the *Petroleum and Geothermal Energy Act 2000* (SA) and the *Hydrogen and Renewable Energy Act 2023* (SA), as well as the *Aboriginal Heritage Act 1988* (SA) and the *Native Title Act 1993* (Cth) – including the co-design of projects, participation in benefits, and the ability to prevent or mitigate harm to biodiversity and cultural heritage. The principles, rules and standards contained in legislation (including subordinate legislation such as regulations, rules and Ministerial Determinations) relevant to biodiversity and heritage protection are also diffuse, fragmented and inconsistent, and highly complex in the way that they interact with each other.

For example, in South Australia, regulating the impacts of mining exploration and production on environment/biodiversity and Aboriginal cultural heritage involves a very complex interaction of different laws, including the EPBC Act, *Native Vegetation Act 1991* (SA), protected areas legislation in South Australia, and water law (the *Landscape South Australia Act 2019* (SA) and water quality policies under the *Environment Protection Act 1993* (SA)), as well as the *Native Title Act 1993* (Cth), the *Aboriginal Heritage Act 1988* (SA), land rights legislation (such as the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) and the *Maralinga Tjarutja Land Rights Act 1984* (SA)). The *Mining Act 1971* (SA), Mining Regulations 2021 and Ministerial Determinations made under the Mining Act and Regulations set out detailed information on the matters that proponents must address in mining proposals and their Plan for Environment Protection and Rehabilitation. It is the Ministerial Determinations that effectively set out the details for environmental impact assessment, and for strategies to avoid, minimise and mitigate impacts, rehabilitate sites, as well as requiring mining proponents to demonstrate how the proponent will comply with the provisions of eg the Aboriginal Heritage Act. The legislative requirements placed on mining proponents, the approvals procedures, and the interaction between legislation, is different to development/infrastructure projects for which development is approved under other legislation, including the Planning, Development and Infrastructure Act 2016 (SA).

[4] Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS'), WELCOME TO COUNTRY, https://aiatsis.gov.au/explore/welcome-country (last visited Jan. 24, 2023, 1.20PM.
[5] See, for example, Graham Samuel, FINAL REPORT OF THE INDEPENDENT REVIEW OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999 (EPBC ACT) (Report, October 2020); Ian Cresswell, Terri Janke and Emma L Johnston, AUSTRALIA STATE OF THE ENVIRONMENT 2021, 28 (Commonwealth of Australia, Report, 2021; A WAY FORWARD: FINAL REPORT INTO THE DESTRUCTION OF INDIGENOUS HERITAGE SITES AT JUUKAN GORGE (Commonwealth, Joint Standing Committee on Northern Australia, October 2021).

Assessment and approval of development activities and protection of cultural heritage will continue to occur under legislation other than the new Biodiversity Act. This means that any substantial change in the ways that biodiversity and heritage are protected together would require change across a raft of legislation.

We suggest that the Biodiversity Act contain a set of principles about biodiversity and Aboriginal cultural heritage that are required to be recognised, addressed and implemented in the approval regimes of all other environment, development and natural resources legislation. Decision-makers under other environment, development and natural resources legislation would be required to act consistently with, and seek to further, these principles, when administering those other legislative schemes.

We support the NSW Review's recommendation about prioritising Aboriginal communities and their knowledge in addressing the shortfalls of the NSW legislation, in the context of South Australia's reforms. For example, we recommend that **key overarching objects or directing principles should be considered in drafting the new Act to ensure these principles are furthered <u>across ALL South Australian environment, development and natural resources legislation</u>**, including:

- the need to protect cultural values in the management of biodiversity and the environment;
- empowering Aboriginal people to participate in conservation decision making in meaningful ways (more than simple 'consultation');
- recognising the value and importance of incorporating traditional ecological knowledge in development and ecological restoration activities, and government decision-making in relation to proposed activities; and
- ensuring Aboriginal representation on key decision making and policy bodies such as advisory panels and scientific committees established by statute.

In addition to these broad ideas, the proposed Biodiversity Act provides an opportunity for South Australia to implement globally-recognised standards for the more specific tasks of consultation, engagement and co-design, to ensure the state's First Nations peoples are fully and appropriately involved in decision-making processes that affect their land and cultural heritage. It is an opportunity to position South Australia as a leader in matters of biodiversity conservation and restoration, and Aboriginal engagement and cultural heritage protection.

The new Biodiversity Act should provide a means of ensuring that the international principle of free, prior and informed consent (FPIC) governs government decision-making across all SA legislation, where the proposed activities for which approval is sought is likely to have an adverse impact on Aboriginal cultural heritage and biodiversity.

The development of the right to FPIC for development projects and resource extraction within the territory of Indigenous peoples is now a fundamental principle of international human rights law. FPIC is more than consultation. Its basic principles are to:

> ensure that [I]ndigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.[6]

[6] Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within*

The Australian Institute for Aboriginal and Torres Strait Islander Studies recommends that, 'although not legally binding, FPIC should be followed as a standard of best practice to support sustainable decision making over Indigenous held lands and waters'.[7] Many other bodies, including the Productivity Commission, have also recognised the principle of FPIC as fundamental to best practice in resources projects.[8]

The Biodiversity Act could explicitly recognise the principle of FPIC in the Objects section of the Act, and/or by introducing it in a section that sets out principles which the Minister must seek to further when administering the Act, or with which the Minister's decisions must be consistent (or 'not inconsistent').

The Act could also require any decision made under government decision-making processes under other legislation, where the proposed activities for which approval is sought is likely to have an adverse effect on Aboriginal cultural heritage and biodiversity, must conform with the principle of FPIC.

Guidance about meeting these requirements could be introduced directly into the Act as a distinct section. An additional option is to introduce further sections or sub-sections that define and/or guide the interpretation and implementation of the principle. Other bodies have provided guidance about how to apply the principle, for example the United Nations Permanent Forum of Indigenous Issues, which among other things has stated that:

- **Free**, should imply that there is no coercion, intimidation or manipulation.
- **Prior** should imply consent being sought sufficiently in advance of any authorisation or commencement of activities and respective requirements of indigenous consultation/consensus processes.
- **Informed** should imply that information is provided that covers a range of aspects, [including, among other things ... the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project ...; the duration; locality or areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a **consent** process.[9]

The Act could give some content to the principle of FPIC, its meaning, and how it is to be applied in the context of actions that are likely to have adverse impacts on biodiversity and cultural heritage in South Australia. Additionally, or alternatively, new Regulations and new Ministerial Determinations, as well as

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International Law, 10 Nw. J. Int'l Hum. Rts. 54 (2011) 54, 54; and see generally U.N. Comm'n. on Human Rights, Sub-Comm. on the *Promotion and Protection of Human Rights Working Group on Indigenous Populations, Working Paper: Standard-Setting: Legal Commentary on the Concept of Free, Prior and Informed Consent*, para 57, U.N. Doc. E/CN.4/Sub.2/AC.4/2005/WP.1, 2005 (July 14, 2005) (prepared by Antoanella-Iulia Motoc and the Tebtebba Foundation).

[7] See <https://aiatsis.gov.au/sites/default/files/research_pub/AIATSIS%20FPIC%20Policy%20Snapshot%202020.pdf>.

[8] Productivity Commission, *Report into Resource Sector Regulation* (November 2020).

[9] United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, New York, United States of America,17-19 January 2005* (E/C.19/2005/3), paras. 46-49. Also see generally, See generally UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent*, FAO, UNDP, UNEP, Jan 2013.

non-binding Guidelines prepared by the government departments/regulators could guide the process for those that seek relevant statutory approvals.

At a minimum, governments and corporations must engage in good faith consultations with Aboriginal people prior to undertaking projects on Country.

However, enshrining an obligation to obtain actual consent from Indigenous peoples – as opposed to making it a goal or aim – would align with international human rights jurisprudence, the evolving principles of FPIC and, in turn, with the lending policies of a growing number of international financial institutions. For example, resource companies operating in overseas jurisdictions are beginning to give effect to the principle of FPIC as one that requires the actual consent of Indigenous people, recognising that a lack of meaningful engagement and opposition to projects leads to risks of legal action, while major law firms in Australia are advising their clients as a matter of good practice and risk management to act according to the principle even where it is not incorporated in legislation.[10]

The provisions of the proposed Biodiversity Act should be consistent with existing and developing international legal norms and Australia's international legal obligations, sitting alongside but not impeding First Nations' rights to culture and land. For example, **requirements under a new Biodiversity Act regarding the provision of environmental information would need to respect the confidentiality of culturally sensitive information**. Another example is the introduction of compliance and enforcement provisions that **enable First Nations peoples to act to prevent breaches of the Act and to seek remedies if harm has occurred**.

The Act should also **introduce 'restorative justice' and 'culturally appropriate remedies' for traditional owners**, for example, apologies to traditional owners (face-to-face and on country) where appropriate. The ways in which the Act could and should best respect the right to FPIC must be determined in consultation with First Nations peoples.

We do not suggest that it will be simple to *implement* a principle of FPIC, nor to define how FPIC will be achieved. For example, the diverse interests of Aboriginal groups – between native title parties and Traditional Owners, and between and within different groups – presents difficulties in identifying 'who speaks for Country', and where there is a lack of consensus among native title parties and Traditional Owners, raises questions about when/whether consent has been obtained.[11] Nevertheless, we recommend that the South Australian government commit to incorporating the principle of FPIC in the Biodiversity Act and through this legislation, in natural resources legislation and approvals regimes across state laws. We recommend that the government begin the process of defining this principle and providing developers with legal requirements and guidance to ensure they meet international expectations and standards in relation to FPIC, biodiversity conservation and Aboriginal cultural heritage protection.

3. Topic 2 – Avoiding Impacts

We strongly support the need to avoid and mitigate impacts on biodiversity, reducing harm from human activities and creating as much adaptive capacity as possible for species, communities and ecosystems that will increasingly suffer from climate impacts.

[10] See Ashurst, *Native Title Year In Review 2020: Free, Prior And Informed Consent* (1 April 2021) <https://www.ashurst.com/en/news-and-insights/insights/free-prior-and-informed-consent/>.
[11] Wawryk, "Mining and the Protection of Aboriginal Cultural Heritage in South Australia" (2023*) William & Mary Environmental Law and Policy Review* 749-825.

3.1. Avoiding impacts to build health, resilience and adaptive capacity

This is perhaps one of the clearest aspects of a new Act, in that governments around the Country and across the world have already grappled in detail with the design of legislative schemes to reduce impacts on biodiversity. What we need to do to reduce impacts is, compared to some of the other challenges that we face, not that complicated.

Consider, for example, the Priority Actions set out in the SA Arid Lands Biodiversity Strategy, which takes a landscape-scale, threat abatement approach to conservation. Priority Actions in that Strategy include, in the arid lands, reducing the impact of:

- climate change on biodiversity (#2);
- invasive species on biodiversity (#3);
- total grazing pressure on biodiversity (#4); and
- land use pressure on biodiversity (#5).

The Strategy demonstrates that a lot of thinking and planning has already occurred about what might be required to achieve those priorities. Achieving reduced impacts on biodiversity in South Australia will, we submit, require: planning at landscape scales (rather than on a site-by-site, species-by-species or case-by-case basis); actively resourcing and implementing laws for reducing impacts (and not simply having good laws 'on the books'); and avoiding the temptation to include loopholes, or statutory mechanisms that will prevent the government from protecting biodiversity effectively.

3.2. Regional planning: take a formal, statutory approach with clear goals and substantive power to achieve them

As new priorities for land uses emerge, regional planning will become an even more important tool for conservation, and we urge the South Australian government to ensure that this kind of landscape scale approach is incorporated into the design of the new Act.

Regional planning has been identified as an extremely useful tool, if designed and implemented effectively, to facilitate climate adaptation, reduce human-induced impacts on biodiversity and transparently balance a range of competing government and non-government priorities such as hazard risk reduction, enhancing drought-resilience and ensuring threatened species protection. Emerging priorities that are competing, or will compete, with biodiversity conservation include: green hydrogen, renewable energy infrastructure, carbon crediting and biodiversity markets, carbon removal technologies (e.g., bioenergy with carbon capture and storage, enhanced rock weathering and direct air carbon capture and storage), and the need to improve food security across the state.

The Adelaide Law School has expertise on many of these emerging challenges and can contribute to thinking about these complex trade offs and their intersections with biodiversity conservation. See, for example, McCormack, McDonald and Brent, 'Governance of Land-based Negative-emission Technologies to Promote Biodiversity Conservation: Lessons from Australia' (2020) 10 Climate Law 123 (copy available on request).

To design a regional planning framework under the auspices of the new Biodiversity Act, we support the principles proposed by the EDO South Australia's report to a 2017 Parliamentary Inquiry (p 15), including that regional planning should–

- improve or maintain the conservation status of listed species, populations and communities,
- improve or maintain the extent and condition of natural habitats, including critical habitat,
- restore or protect ecosystem services, processes and functions,
- improve or maintain ecosystem integrity, resilience and resistance, maintain or improve connectivity within and between ecosystems,
- protect multiple representative examples of ecosystem types and facilitate adaptation to environmental change, including climate change; and
- recognise uncertainty and plan for adaptive management.

Threat abatement planning can go hand-in-hand with regional planning to reduce impacts on biodiversity and promote efficient conservation investment across landscapes (including for species and ecosystems that are not listed or protected in more direct, specific ways). Considerations for threat abatement planning, again, adapted from the EDO Report, p 14, include:

- identifying key threatening processes;
- describing the manner in which the process threatens or may threaten the survival, abundance or evolutionary development of a listed species, population, ecological community or ecosystem;
- identifying the actions that must be taken to abate the threatening process;
- identifying the persons or public authorities who are responsible for the implementation of the actions identified in the plan;
- identifying clear and transparent performance indicators to measure whether the actions identified in the plan are being implemented and are successfully abating the threatening process;
- allow plans to cover state significant threatened species, ecological communities and populations;
- allow plans to cover key state threatening processes;
- provide for flexible threat abatement plans that can be developed and implemented at regional scales – perhaps in collaboration with Landscape Boards; and
- create and empower a new statutory body, such as a state Biodiversity Council, or officer, such as a Biodiversity Commissioner, to direct any statutory planning or approval function which may detrimentally affect a threatened species, population or ecological community with respect to any relevant threat abatement plan.

3.3. Biodiversity Offsets: acknowledge the very high risk that offsetting will lock-in biodiversity loss and design any such scheme with extreme caution and conservativism

Environmental or Biodiversity Offsetting has been used as a mechanism for (purportedly) minimising or limiting environmental impacts of development and related activities across regimes across Australia, at both national and state scales. However, the mechanism has resulted in a tendency to assume that any actual or forseen damage can be 'fixed' and even the most damaging activities for biodiversity should (and usually will) be approved, provided the 'right' offset can be developed. Offsetting arrangements have fostered a culture of permitting, rather than avoiding or minimising, damage, and has been a fundamentally and, arguably, universally negative mechanism for biodiversity conservation. Offsetting is inconsistent with the concept of renewal or enhancement of natural assets that we argue should permeate this proposed new legislation.

To the extent that the proposed Biodiversity Act envisages engaging with offsetting as a tool for managing biodiversity, we recommend extreme caution, and a careful review of the recommendations made in scathing reports published in recent years, including in Western Australia and New South Wales, by independent reviewers, a Parliamentary Committee and the NSW Office of the Auditor General.

In particular, if offsets are to be considered, we highlight the following:

- the proposed **Biodiversity Act should require critical habitat to be identified and listed, providing a pre-emptive indication of 'no-go' areas** where development *cannot* be permitted and offsetting will not be an option;
- as noted in the Discussion Paper, **we strongly support the proposal that avoidance be the first and most important step in the hierarchy.** Only after the avoiding and minimising steps of the hierarchy have been rigorously applied should offsetting be considered. The avoid and minimise requirements must be set in the legislation, rigorously applied and publicly available (see NSW Review p 27);
- **offsets must be – both in design and practice – a last resort**; only to be permitted if a particular development is unavoidable (i.e. not simply commercially desirable) and the damage to biodiversity is unavoidable (i.e. where the damage is not simply inconveniently costly to avoid);
- **any offsetting scheme must apply equally to all types of development (but <u>not</u> to proposed restoration projects)**, based on the level of biodiversity risk, not development type or identity of the proponent. Thresholds for determining whether an offsetting scheme applies should be clear, easy to apply, with no subjective tests or excessive administrative discretion;
- the **offsetting arrangements must provide a mechanism for refusing approval**. That is, where a proposed impact is simply unacceptable, the relevant decision maker should be required to say 'no' to the development proposal (see e.g. NSW Review p 26);
- **the concept of 'like-for-like' should be applied with precision** so that, for example, removing 10 mature trees cannot be offset by an approval to plant 400 saplings;
- **net benefits to natural systems should be guaranteed** where offsets are deemed to be permissible.

We note that the NSW Review has examined, in detail, the kinds of characteristics of a far-more-rigorous approach to biodiversity offsets, particularly on pages 29-30.

4. Topic 3 – Transparent Decision-Making

Australia has a well-developed body of law and scholarship about why transparent decision making is important, and how it can be achieved and improved. There are well-established legal principles and institutions that hold governments to account for the way they use their substantial and highly consequential powers, including to enhance transparency and public access to information (**Topics 3 and 7**), set standards for public decision-making, facilitate efficient government decision-making, support reviews and appeals of those decisions and promote administrative justice.[12]

Importantly, transparency is one of two 'limbs' of the broader legal concept of accountability – a concept that ought to be a core consideration when designing new powers and allocating them to government

[12] In this section, we draw heavily and sometimes quote verbatim the following resource: McCormack and Hansen-Lohrey, 'Accountability, government decisions and future generations: lessons from the Australian Ombudsman' in Lawrence and Linehan (eds) *Giving Future Generations a Voice* (Edward Elgard 2020), ch 7.

decision makers as is proposed in the development of a new Act. Accountability can be understood as both **transparency** (sometimes described as scrutiny or being 'open to inspection') and **consequences** (that is, being answerable for one's actions and open to challenge and, where appropriate, being subject to sanctions for decisions that fall short of what is necessary or expected).

There is a range of reasons why public decision-making ought to be transparent. Without opportunities to scrutinise government action, public decision-makers cannot be held accountable or made 'answerable' for decisions that fail to meet established standards. Moreover, a culture of transparency can improve public decision-making because the *possibility of scrutiny* can trigger self-regulation – that is, improved integrity and rigour in decision making 'just in case' someone seeks information or initiates a review of the decision. That self-regulation can benefit decision-making standards generally. Broader administrative laws already facilitate scrutiny, through substantive rights to publicly held information, i.e., through freedom of information laws such as the *Freedom of Information Act 1991* (SA), and through statutes that facilitate review and oversight such as the *Ombudsman Act 1972* (SA), *South Australian Civil and Administrative Tribunal Act 2013* (SA), and the Supreme Court Civil Rules 2006.

In addition to those existing, generalist arrangements for scrutiny, we strongly recommend that the new Biodiversity Act include specific, enforceable provisions for the *proactive* and *expansive* release of information – including of decisions themselves, but also evidence relied on and reasons for those decision – for as many of the Act's statutory powers to decide and/or act as possible. A culture of proactive information release:

- is consistent with the value of transparency set out above – to improve decision making because information about those decisions is available to be scrutinised;
- will often be more efficient and cheaper – because information being readily available will avoid laborious review processes to seek access to that information;
- may promote higher public support for decision making, by explaining and demonstrating a government commitment to high-quality decision-making processes and strong evidence for decisions;
- may promote better public understanding of decisions about biodiversity;
- will support the government in empowering citizens, community groups, the media, and integrity bodies to scrutinise private, corporate and public actors, potentially reducing the regulatory burden on government agencies and improving compliance overall. This is consistent with the approach taken in many other legal contexts, including national consumer laws; and
- is consistent with democratic principles, including ensuring that citizens are informed about decisions made and money spent on their behalf by elected officials and public servants.

We are happy to discuss with the reform team, the broad range of traditional, novel and emerging legal mechanisms for facilitating effective, efficient, equitable and administratively appropriate consequences – which are the necessary corollary to transparency measures.

Finally, the Discussion Paper mentions the principles of Ecologically Sustainable Development in the context of this topic. **We recommend, in the strongest possible terms, excluding the principle of ESD from this new Biodiversity Act**. To do so is consistent with the best-available science and governance research on the topic, the recommendations of the NSW Review, and with submissions on this point by the Australian Land Conservation Alliance and National Environmental Law Association, which we support.

5. Topic 4 – Threats to Biodiversity

Many of the issues we have raised in the remainder of this submission go to this topic, including the need for threat abatement planning, regional plans, clear guidance to decide between competing values and priorities, and to meet the challenge of climate change.

Rather than restating those points here, we highlight instead one particular issue.

The renewable energy transition will demand an extraordinary increase in critical minerals, which has the potential to benefit South Australia economically, but also to create new and extremely powerful stressors to biodiversity in the state. Mining and infrastructure construction will negatively affect biodiversity, for example, because of habitat modification and destruction, water use and waste disposal. On the other hand, the transition to net-zero is required to avert threats to biodiversity from climate change. **Meeting climate change targets and accommodating economic aspirations in the state, while protecting its unique biological diversity, will inevitably involve difficult decisions and require transparent principles to enable decision makers to balance priorities. The Biodiversity Act must be designed to facilitate these kinds of trade-offs in transparent and defensible ways.**

We recommend allocating a greater statutory weight to considerations of long-term biodiversity conservation and equity, to balance out what will often be extremely attractive short-term economic and employment gains for government decision makers. The government must ensure that, while the Act should not prevent South Australia from contributing to an exceedingly rapid climate transition, biodiversity should nevertheless become a *crucial* consideration in *how* that transition is governed in this state.

Critical minerals will be essential to achieving the energy transition to net-zero greenhouse gas emissions (and so, also offer an indirect biodiversity benefit of contributing to climate action). Among other things, these minerals are necessary to build renewable electricity generation facilities and other infrastructure such as hydrogen generation plants, desalination plants, water and gas pipelines and electricity transmission and distribution lines; to supply batteries that complement renewable energy in electricity generation by allowing for energy storage; for batteries used in electric vehicles; and to build electric vehicles. The projected global demand for minerals to meet the energy transition, including critical minerals such as lithium, cobalt, graphite, manganese, nickel and copper, is staggering. Although some minerals can be recycled, and growing the circular economy is also essential to meeting future demand for minerals, there is projected to be a massive demand for new mineral production and for new renewable energy and other infrastructure.

We urge the government to ensure that this emerging challenge for biodiversity conservation is something that the Act is explicitly equipped to address.

6. Topic 5 – Assessing the Risk of Extinction

At their core, biodiversity laws typically promote the fundamental objective of preventing environmental decline and species extinctions.[13] A variety of legal mechanisms have been implemented in domestic laws around the world to achieve this objective, including protection for habitat, environmental impact assessments and threatened species recovery plans. In practice, efforts to prevent extinction are applied

[13] In this section, we draw heavily (and sometimes quote verbatim) from the following resource: McCormack, 'Implications of extinction in law: Preventing, declaring and learning from species extinctions' (2023) 1 *Cambridge Prisms: Extinction* e21, 1–9 at 3, https://doi.org/10.1017/ext.2023.19.

selectively, often focusing on charismatic species with a particular emphasis on mammals, birds and, to a lesser extent, reptiles. **Other families and even whole kingdoms of life are routinely absent from protected lists, and thus from any assessment, effort to avert, or acknowledgement of, extinction; including funghi, amphibians, arachnids, plants of most kinds, and invertebrates such as molluscs, native bees, wasps and beetles.** When legal mechanisms for protection fail to protect a species, in many places, it can be (but is not always) legally declared extinct, or added to a formal list of those that have been lost.

Existing laws in South Australia do not provide clarity, consistency or transparency for this process of recognising loss, and a mechanism for this form of 'acknowledgement' should be integrated into the proposed new Biodiversity Act. A legal power to recognise a species as extinct has the potential to foster ambition, transparency and rigorous measurement of progress against conservation goals, and to highlight the important motivation behind this proposed conservation law, which is to halt the ongoing loss of South Australia's rich and unique natural systems and promote ecological recovery and restoration.

In addition, **we strongly recommend some form of legal mechanism that would facilitate learning from species extinctions to maximise the possibility that we might become better, more competent and accomplished, at conserving nature in this state.** The South Australian Biodiversity Act could be nation-leading, providing clear pathways for adapting and improving decision making processes based specifically on evidence about loss. Without an obligation to learn from extinctions, a statutory mechanism for recognising a species extinction in law (i.e. declaring something to be extinct) may have perverse effects or no effect at all. For example, a decision maker may delay or avoid declaring a species extinct because there are no implications and no 'next step' required in relation to a species that has become extinct, or they may do so to avoid any ad hoc scrutiny about the extinction occurring, particularly if the species is charismatic, or lost due to a contested decision about development or habitat conversion.

The following conceptual model explains the role for law in relation to extinctions, and illustrates opportunities and options for creating a 'best-practice' legal framework for achieving positive conservation outcomes, even as climate change and other pressures drive many more species towards extinction.

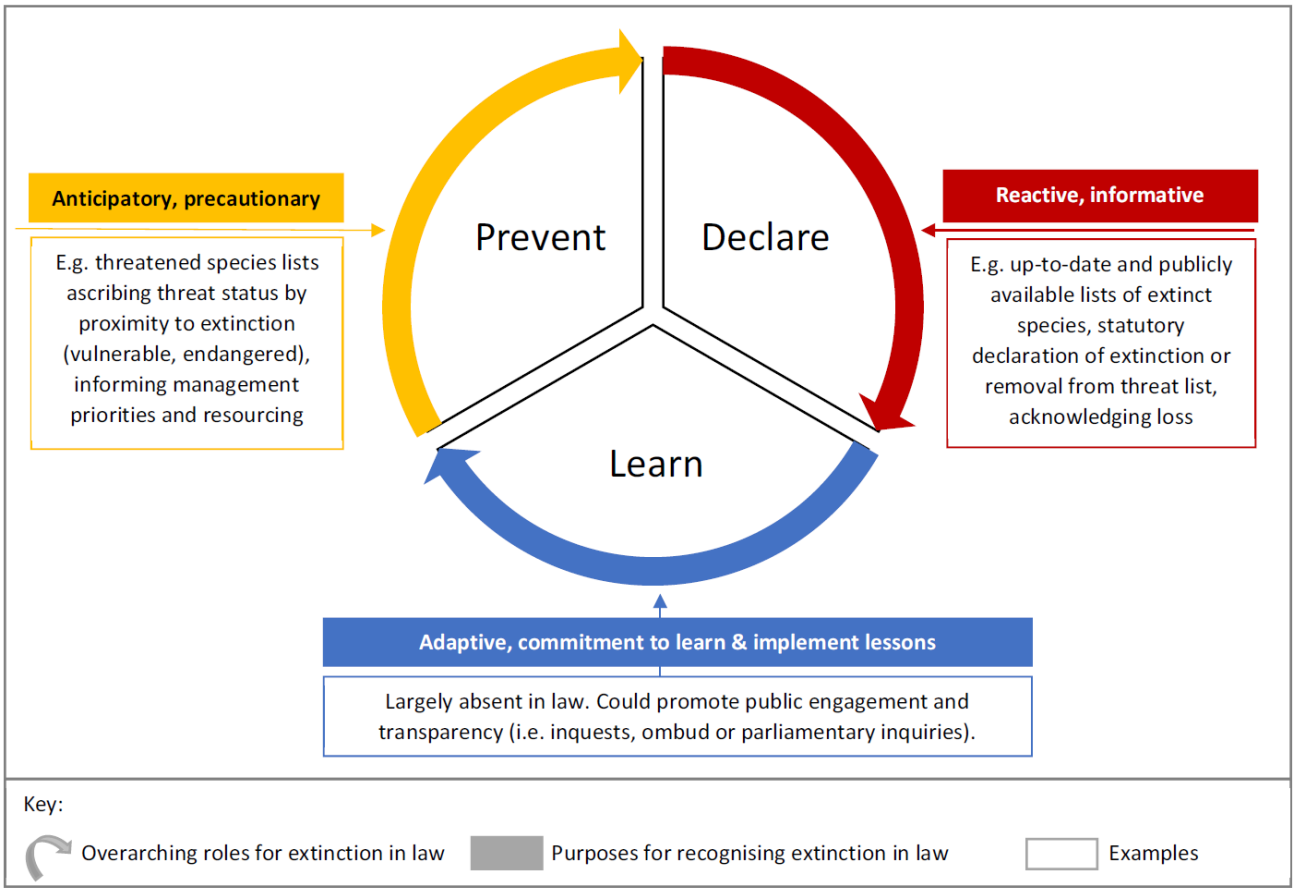


Figure 1. The roles and purposes for laws about extinction, extracted from McCormack PC, 'Implications of extinction in law: Preventing, declaring and learning from species extinctions' (2023) 1 *Cambridge Prisms: Extinction* e21, 1–9 at 3, https://doi.org/10.1017/ext.2023.19.

Institutional arrangements that would support learning in the context of species extinction could include creating a new statutory position or administrative body or a separate, environment-specific mandate for an existing statutory position or administrative body such as:

- **an Environmental Coroner** (a Magistrate with power to investigate species extinctions, sitting in the Coroner's Court, or as a legally-trained expert sitting separate from the judicial system but with similar protections for appointments and tenure, to ensure independence);
- **an Environment Ombudsman** (established as a new body or as a separate topic of administrative decision-making that is amenable to public complaint and Ombudsman's inquiries in the nature of the existing State Ombudsman);
- **an Environment Commissioner** with investigative and review powers such as those exercised by Work Health and Safety Commissioners around Australia (also mentioned briefly above, in the context of threat abatement planning).

The NSW Review recommended introducing a statutory requirement to measure and publicly report on the status and trajectory of each species and ecological community listed under the Act, every five years (Recommendation 42); and that the relevant department should publish a statement every five years, detailing how listed key threatening processes are being addressed (Recommendation 43). These recommendations would support findings and lesson-learning about extinctions by highlighting trends

and bringing those trends to the government's attention in way that should promote pre-emptive action. **We recommend similar provisions be integrated into the South Australian Biodiversity Act.**

7. Topic 6 – Biodiversity Planning and Reporting

We support the development of a state-wide biodiversity plan that is specific, spatially explicit and actionable. We note that regional plans, and/or regional implementation of the state-wide plan, would help to facilitate flexibility and specificity in the state-wide plan's outcomes.

We also highlight related discussions above, including the need for the new Biodiversity Act to include:

- regional planning
- threat abatement planning
- reporting that facilitates both scrutiny and consequences (accountability)
- assessment and public reporting about biodiversity threats, declines and extinction

We also highlight the important role that First Nations culture, knowledge and aspirations should have in all planning under the proposed Act, and the need to ensure that statutory bodies created under the Act include, as a statutory requirement, First Nations representation and expertise.

8. Topic 7 – The Benefits of Information

We acknowledge that information – data – is absolutely crucial to the effective operation of a Biodiversity Act. Reliable, up-to-date and well-maintained data offers valuable evidence to support the kind of adaptation-oriented decision making without which biodiversity will continue to be lost. We also note that guidance on what constitutes 'best available evidence' will be necessary, to inform the operation of a decision-making principle such as that discussed in part 1 of this submission, on the goals of the new Act. We do not have other detailed submissions to make on this point, but suggest that the NSW Review (pages 36-38) on the topic of data (including to underpin rigorous decisions and inform environmental accounting) should be instructive.

9. Topic 8 – Achieving 30-by-30

We strongly support the South Australian government adopting a 30-by-30 target for the state, and implementing it through a focus in the new Act on underrepresented biomes, including on private land. Other jurisdictions in Australia have a single, 'National Parks Act' or similar, where all forms of land, coast and marine protected tenures are collected. This reform process offers a good opportunity to either bring all conservation management – including protected areas – into the Biodiversity Act or, at least, to bring together all of the legal framework for protected areas across the state, including establishment, designation and naming, and management arrangements, into a single 'Protected Areas' statue.

The Biodiversity Act (or whichever legislation provides for protected areas) ought to clearly distinguish between core protected areas – which receive high levels of protection and in which no exploratory or extractive industry is permitted, and no linear infrastructure can be installed – and other areas that are protected, for purposes such as buffer zones, connectivity, climate refugia (current or future), and for active and adaptive restoration. Indigenous Protected Areas are currently a very flexible mechanism in terms of their designation, resourcing and management, as a result of the absence of state-based laws. **We strongly recommend against the inclusion of Indigenous Protected Areas in SA laws, unless Traditional Owners in South Australia specifically indicate that that is something they want to**

happen. However, other forms of protection for First Nations landscapes and values should certainly be considered in discussions with First Nations peoples, to ensure that the protected area network provides for the protection of a wide range of South Australia's biodiversity and cultural values. It may be, for example, that a new protected area designation could be investigated for 'cultural landscapes' or songlines or dreaming stories. These places could be protected in legislation for the particular values that they hold, and the characteristics of their protection would need to be determined by First Nations peoples.

Leveraging private investment (which was identified in the Discussion Paper for consideration) could be facilitated in a new Biodiversity Act through connecting conservation activities in South Australia with national schemes such as the Emission Reduction Fund and Australian Carbon Credit Units (including revegetation, reduced land clearing and blue carbon methodologies) and the new Nature Repair Market (specifically, biodiversity certificates). To the extent that it can, the South Australian legislation should ensure that these projects deliver biodiversity improvements in the real world, not simply lucrative markets. High integrity methods for measuring such improvements in biodiversity would be a valuable inclusion in instruments subsidiary to the SA Act, and may deliver premiums to South Australian landholders.

Protection other than permanent, strict protection could be extremely valuable in this legislation, particularly as the climate changes. **For example, the South Australian government might consider a form of protection for land that is 'experimental' in the way that the United States Endangered Species Act allows for 'experimental' populations of threatened species, to support adaptation-oriented restoration, habitat engineering and the protection or construction of climate refugia.** 'Experimental Populations' receive somewhat lower levels of protection in the United States and can be active managed, in return for the opportunity to undertake novel conservation interventions such as translocating populations into new areas (e.g., for rewilding) or to trial their wild release from captivity or managed populations (as has been the case with grey wolves in states such as Montana). For protected areas in South Australia, an experimental form of protection might be provided so that a private land holder can undertake restoration using climate-adapted seeds from outside the state or, for example, to experiment with the relocation of an entire ecological community that is threatened by climate change in its native habitat but may thrive on that landholder's land. Climate adaptation will increasingly require novel conservation interventions that may not be supported under existing laws, and a new form of experimental tenure in the Act could support that kind of intervention while requiring management oversight and full transparency about lessons learned, to improve future interventions.

Other forms of protected area that have been implemented elsewhere in the world and which could be considered for inclusion in the Act include seasonal or 'pop up' protected areas. These temporary protected areas have been demonstrated to offer effective, critical habitat characteristics for, e.g., migratory birds, while returning to agricultural uses for the remainder of the year, when the birds have resumed their migration. See, in particular, the successful 'pop up wetlands' project in the Western United States, managed by The Nature Conservancy, implemented on private farms, and funded by reverse auctions.[14]

We also support the core recommendation of the Australian Land Conservation Alliance, to legislate a new, independent, statutory entity similar to those that have been established in New South Wales, Tasmania and Victoria, 'whose purpose would be to partner with willing landholders to permanently protect, manage and restore biodiversity across South Australia' (ALCA

[14] See here: https://nature.berkeley.edu/breakthroughs/fa14/pop-up-wetlands.

submission, p 1). In those states, financial arrangements such as revolving funds and philanthropic investments have allowed substantial increases in private land conservation, including in strategically important areas. These bodies can streamline the process of accessing incentives for conservation on private land, and to maximise the conservation gains from limited public resources.

10. Topic 9 – Biodiversity – A Shared Responsibility

We do not have a detailed submission to make on this point, but highlight some common or desirable characteristics of duty of care provisions that may be of value in designing a duty of care for biodiversity. For example, the duty should:

- be linked to an incentive-based scheme to encourage landholders to *improve* (and not simply maintain) biodiversity;
- set an accepted minimum standard for biodiversity management;
- be supported by guidelines or codes which articulate: how the duty of care should be enacted; whether or when it is satisfied; and what the consequences will be for contravening or falling short of meeting the duty; and
- be phased in or introduced with assistance to landholders to manage the costs of meeting the duty for a limited time.

While we certainly support the idea that enhancing and protecting biodiversity should be everyone's responsibility – as a public good that underpins all life, ancient cultural knowledges, social interactions, aesthetic and spiritual connections and economic activity – a duty of care should not be seen as a means of abdicating state government responsibility for effectively protecting, resourcing and enforcing biodiversity protection in South Australia.

In other contexts, particularly in emergency, disaster and hazard reduction laws and policies, the concept of a shared responsibility is seen as essential to the effective functioning of those laws, but is also amorphous, poorly articulated, and has been demonstrated as commonly misunderstood by the public. **If the government seeks to introduce such a duty for the environment, the precise requirements on private landholders, communities and business that will flow from 'sharing' that responsibility will need to be clearly articulated. The fundamentally important role for government should also be articulated and reinforced.**

11. Topic 10 – Consequences of Doing the Wrong Thing

We support the Discussion Paper's suggestion that that stronger penalties be imposed and that there be more options for enforcement in the new Biodiversity Act.

We recommend that the new scheme incorporate as many enforcement mechanisms as possible to ensure that deterrence, both specific and general, is a key element of securing compliance with the new legislation. A wide range of enforcement options will also provide the regulator(s) with the flexibility they need to achieve their goals.

We support therefore ensuring that the full range of administrative, civil remedies, civil penalties and criminal penalties mechanisms be made available and that regulators/authorised officers be empowered with a discretion – guided by clear, procedural, decision-making principles – to use the full range of these mechanisms as is appropriate to the circumstances.

Administrative enforcement mechanisms

We support the inclusion of provisions that empower the regulator to enforce compliance through the following kinds of administrative mechanisms:

- The power to order a compliance and/or enforcement audit, require the disclosure of certain information, or to issue a warning notice, if a breach of the legislation is suspected;
- The power to issue infringement notices for breaches of the legislation;
- The power to issue orders to stop work, to conserve or to remediate or restore; and
- A scheme for imposing enforceable undertakings in response to a breach of the legislation.

Civil remedies

We support empowering the Minister/regulator with a full range of options to seek orders from the Environment Resources and Development Court (**ERD Court**) in response to non-compliance with the new legislation. These powers should extend to injunctive relief and orders to cease any activities in breach of the legislation, to conserve, to remediate or to restore and to compensate.

There should also be open standing provisions that would also allow private individuals to seek these remedies from the ERD Court. All disincentives to the use of such remedies ought to be removed, and we support ensuring a discretionary power in the court to order that each party to a proceeding bear their own costs and/or a protective costs order to a party to the proceedings. Similarly, we support ensuring that the ERD Court is prohibited from making orders for security for costs.

Civil penalties

We support the inclusion of a civil penalties scheme in the new legislation and suggest that the scheme contained in section 104A of the *Environment Protection Act 1993* (SA) would be an appropriate model to adopt. It balances the need for efficient regulatory action and the appropriate protection of the procedural rights of the person alleged to have contravened the law.

Criminal penalties

There should be an extensive scheme of criminal penalties in the proposed legislation to ensure compliance. There should be both strict liability offences as well as offences where there is a mental element. The penalties for each should reflect the seriousness.

These provisions ought to be support by a range of provisions that make the evidentiary and forensic burden as easy as possible for the prosecution. For example, authorised officers should be given wide powers to inspect, search, seize and arrest and possession should be treated as prima facie evidence of an offence being committed.

Ring-fencing penalties for conservation purposes

When designing compliance and enforcement provisions, we urge the government to consider ring-fencing penalties that are imposed, and fees that are collected under the Act, to ensure that that money is fed directly back into conservation activities.