Environmental Defenders Office

Submission on the development of a Biodiversity Act for South Australia

1 March 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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A Note on Language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. *We acknowledge that not all First Nations will identify with that term and that they may instead identify using other terms or with their immediate community or language group.*

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Acknowledgement of Country

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

The Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

Executive Summary

The South Australian Government's commitment to develop a new, stand-alone Biodiversity Act provides an important opportunity to modernise and strengthen the laws aimed at conserving the State's biodiversity, reverse current trends of decline and restore species populations and ecosystems. It can bring the legal framework in line with important international and domestic commitments to halt extinctions and restore ecosystems, and set clear, whole-of government objectives for the conservation and restoration of biodiversity.

In general, the proposals outlined in the Discussion Paper are sound. They draw on key mechanisms in other Australian jurisdictions and will generally align South Australia's laws with existing legal frameworks for biodiversity conservation.

However, on its face, the Discussion Paper mostly lacks the ambition needed to deliver a significant 'step-change' in the face of the current extinction crisis. Recent reviews of other jurisdictions' laws have been critical of the 'status-quo', which has been unable to turn around ongoing biodiversity decline. They have recommended key shifts in mindset and attitude, including substantial reform to current frameworks. Simply bringing South Australia's laws in line with other jurisdictions will not be enough; much more is needed if South Australia wants to be a leader in biodiversity conservation and management.

It is not clear how the new Act will interact with existing legislation, including, for example, the *Native Vegetation Act 1991* (SA), *National Parks and Wildlife Act 1972* (SA) and *Planning, Development and Infrastructure Act 2016* (SA). In our experience, biodiversity conservation laws are unable to achieve their important objectives if they are undermined or overridden by land use laws (e.g. through excessive discretionary decision making, exemptions or lower than best practice policy settings).

It is also unclear how implementation of the new Act will be resourced. A new framework will only be able to deliver on its intended outcomes if there is adequate resourcing and capacity within government to deliver on its new obligations – including, for example, updating threatened species lists, developing recovery plans, injecting funding into private land conservation and establishing new monitoring and reporting programs.

In developing its new Act, the South Australian Government must set its ambition high. While it can draw from existing legal frameworks, it should also take the lead in modelling a robust framework for biodiversity conservation that will lead to improved outcomes and reverse trends in biodiversity decline, in line with international goals.

The Discussion Paper provides a useful platform to continue discussions across the key topics. We look forward to working with the South Australian government to develop this important piece of legislation.

Response to Matters for Consideration and additional EDO Recommendations

Goals for a Biodiversity Act	
Discussion Paper Matters for Consideration	**EDO position**
None	Not applicable
Additional EDO recommendations	

A. Strengthen the goals of the new Act in line with national and international policy commitments. This should include goals to enhance and improve the condition of biodiversity; recover species; and prevent further extinctions.

   For example, the proposed goals could be amended as follows:

   1. To conserve **and enhance** biodiversity and maintain **and improve** the diversity and quality of ecosystems.
   2. To enhance capacity to adapt in the context of a changing climate.
   3. **To prevent further extinctions of threatened species and ecological communities.**
   4. To **identify and** protect threatened and culturally important species **and their habitats** and ecological communities.
   5. To recover threatened species and ecological communities so their conservation status improves.

B. Ensure the goals of the new Act are operationalised within the Act, through specific provisions.

Topic 1 – Biodiversity and South Australia's First Nations people	
Discussion Paper Matters for Consideration	**EDO position**
None	Not applicable
Additional EDO recommendations	

C. Ensure there is ongoing and meaningful engagement with First Nations as the new Act is developed and implemented.

D. Include provisions in the new Act that explicitly provide opportunities for First Nations Traditional Ecological Knowledge to be incorporated into decision-making processes.

E. Consider how the new Act or interrelated legislation can better promote the care and management of Country by First Nations, including for conservation purposes, for example, through private land conservation, new environmental stewardship opportunities or shared governance models.

F. Consider how the new Act and broader regulatory framework could better support First Nations involvement in conservation decisions. For example, by incorporating FPIC into decisions about how important or culturally significant biodiversity is identified, used or impacted.

Topic 2 – Avoiding impacts	
Discussion Paper Matters for Consideration	**EDO position**
1. The Act could seek to prioritise avoidance and minimisation of impacts to biodiversity and make it clear that any negative impacts to biodiversity are the last resort.	General support
2. The Act could provide for a framework that includes clear guidance on the requirements to avoid and minimise impacts to biodiversity.	General support
3. The Act could require evidence is provided justifying how avoidance and minimisation have first been addressed as per the mitigation hierarchy	General support
4. The Act could make it clear that any action taken having impacts to biodiversity must leave biodiversity in a measurably better state than it was before.	General support
Additional EDO recommendations	

G. In formalising the mitigation hierarchy in legislation:
- Establish clear provisions to ensure the mitigation hierarchy is properly implemented and enforced.
- Require strict adherence to the mitigation hierarchy as a mandatory pre-condition for development before any offsetting option is considered.
- Provide appropriate guidance to proponents on how they can demonstrate their endeavours to genuinely avoid and mitigate aspects of proposed development.

H. Strengthen South Australia's biodiversity offsets framework in line with the following best-practice principles:
- Offsets must be designed to improve biodiversity outcomes
- Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
- Offsets must be based on genuine 'like for like' principles
- Legislation and policy must set clear limits on the use of offsets
- Time lags in securing offsets and gains should be minimised
- Indirect offsets must be strictly limited
- Discounting and exemptions should not be permitted
- Offsetting must achieve benefits in perpetuity
- Offsets must be additional
- Offset arrangements must be transparent and legally enforceable
- Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered
- Offset frameworks should build in mechanisms to respond to climate change and stochastic events

I. Build in mechanisms that act as 'red flags' in circumstances where impacts on biodiversity are 'serious and irreversible' or 'unacceptable'. These 'red flags' should signal an 'upfront no' (i.e., mandatory refusal) to such impacts.

J. Introduce critical habitat provisions into the new Act, based on the following principles:
- *Clearly define critical habitat:* A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science. The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance - Significant impact guidelines 1.1*.
- *Make critical habitat identification mandatory*: Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- *Protect and manage critical habitat:* Critical habitat must be protected and managed, irrespective of land tenure.
- *Support landholders:* Areas of critical habitat must be prioritised for conservation and recovery, including funding for landholders were relevant (e.g. in government-led conservation programs).

Topic 3 – Transparent decision-making	
Discussion Paper Matters for Consideration	**EDO position**
5. The Act could require government maintain a public register to ensure decisions made that impact biodiversity are disclosed.	General support
6. The Act could require mandatory reporting so that impacts to biodiversity and actions taken to repair biodiversity are fully disclosed	General support
7. The Act could incorporate a clear definition of Ecologically Sustainable Development and ensure a process is created so that application of the ESD principles are required in the context of decision making about biodiversity	General support, but requires further discussion about how the principles of ESD and their application can be modernised.
Additional EDO recommendations	
K. Adopt, in the new Act, a modernised definition and framework for ESD.	
Topic 4 – Threats to biodiversity	
Discussion Paper Matters for Consideration	**EDO position**
8. The Act could provide for a framework for the identification of threats to biodiversity.	General support
9. The Act could include statutory obligations for actions to address threats to biodiversity.	General support

Additional EDO recommendations
L. Set robust legal obligations in relation to the identification and response to key threats: • insert an objective or goal into the new Act to identify and manage key threatening processes; • adopt a wide definition of threatening process (e.g. a hybrid of the definitions in NSW and Victoria: *threatening process means a process that threatens, or that may threaten, the survival, abundance or evolutionary development of species or ecological communities);* • establish a scientific committee to assess and advise on threatening processes; • include clear statutory obligations in the new Act to address threats; this could include requiring threat abatement plans or strategies to be developed, that outline actions necessary reduce the impact of threatening process on species and ecological communities; • include accountability mechanisms such as mandated reporting against actions or consequences for failure to implement threat abatement strategies; • require proponents of projects to address how key threatening processes impact on identified species and ecological communities;[1] • include clear obligations on decision-makers not to make decisions inconsistent with threat abatement strategies or plans.

Topic 5 – Assessing the risk of extinction	
Discussion Paper Matters for Consideration	**EDO position**
10. A scientific committee should be established to guide listing, assessment and review of extinction risk of biodiversity.	General support
11. The Act could provide greater clarity on the types of native species that can be considered as threatened.	General support. This should align with the Common Assessment Method (CAM).
12. The Act could require the creation of a formal listing, assessment and review process that establishes clear pathways for nomination, consultation and review.	General support
13. The Act could adopt a streamlined process for list amendments to ensure lists remain current.	General support
14. The Act could ensure that programs implemented to address biodiversity decline are evaluated.	General support
15. Where a new extinction occurs, the Act could establish a requirement to examine and report on the causes and actions that contributed to it	General support

[1] For example, in New South Wales a species impact statement prepared in support of a project application must address how KTPs are impacting species impacted by the proposal, see *Biodiversity Conservation Regulation 2017* (NSW) cl 7.6(2)(c) and (3)(b)).

16. The Act could establish a framework to document measures to improve the status of biodiversity assessed as threatened	General support
Additional EDO recommendations	
M. Sign the Intergovernmental Memorandum of Understanding agreeing on the Common Assessment Method for the listing of threatened species and ecological communities. N. Implement the Common Assessment Method, including aligning the threat criteria and categories with the Common Assessment Method (Vulnerable, Endangered, Critically Endangered, Extinct in the Wild, or Extinct). O. Include timely, practical and responsive legal provisions for threatened species protection, including: • Provisions for rapid provisional listing or uplisting of threatened species, until full assessments can be completed. • Mandatory reviews of threatened species lists following a major event. • Mandatory reviews and updating of threatened species protections following a major event. • Provisions for varying, suspending or revoking existing approvals. P. Establish a clear, mandatory process for recovery planning.	
Topic 6 – Biodiversity planning and reporting	
Discussion Paper Matters for Consideration	**EDO position**
17. The Act could mandate a state-wide biodiversity plan or strategy where measurable targets are set and regularly reported on	General support
18. The Act could require any state-wide plan or strategy to be regularly reviewed and updated.	General support
Additional EDO recommendations	
Q. Establish an independent, statutory Biodiversity Commission (or similar body) to support the development and implementation of state-wide biodiversity plan or strategy,	
Topic 7 – The benefits of information	
Discussion Paper Matters for Consideration	**EDO position**
19. The new Act could provide for a framework to enable the sharing of biodiversity information with the community and across all levels of government to assist in decision-making	General support
20. The new Act could establish the Department for Environment and Water as the responsible government agency for the management of South Australia's biodiversity information.	General support

21. The new Act could establish requirements for the submission of biodiversity data collected in South Australia to a central repository	General support
22. The new Act could direct the development of a policy that describes requirements for the collection, collation, interpretation and dissemination of biodiversity information	General support
Additional EDO recommendations	
R. Establish a state-wide biodiversity monitoring program in conjunction with the introduction of the new Act.	
Topic 8 – Achieving 30 by 30	
Discussion Paper Matters for Consideration	**EDO position**
23. The Act could consider broadening or creating schemes to further support the establishment and management of conservation areas on private and other land.	General support, noting discussions about how Australian can achieve 30 x 30 must centre First Nations and align with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), including the principles of free, informed and prior consent.
24. The Act could seek to enable additional incentives, including the provision of financial and technical assistance, to landholders who have entered into formal agreements for conservation	General support
Additional EDO recommendations	
S. Increase investment in and scale up existing conservation frameworks (e.g. Native Vegetation Heritage Agreements, Indigenous Protected Areas and Native Forest Reserves). T. Develop an investment strategy to guide where funding is prioritised in order to deliver outcomes consistent with a state-wide biodiversity strategy and global commitments to achieve 30 x 30. U. Identify and support actions that can be taken by First Nations groups or networks of First Nations peoples and communities to protect, care for or responsibly use the environment in pursuit of environmental, cultural, spiritual and/or social outcomes.	
Topic 9 – Biodiversity – a shared responsibility	
Discussion Paper Matters for Consideration	**EDO position**

25. The Act could be clear about the respective roles and responsibilities of the community by introducing a 'biodiversity duty of care', which makes the protection of biodiversity a continuous legal and social responsibility.	General support, but further discussion required on how this biodiversity duty of care will be established and implemented.
26. If the inclusion of a 'biodiversity duty of care' in the Act is supported, it could be tied to relevant administrative powers and to civil penalties.	General support
27. The Act could include provisions so that guidelines and regulations can be made to ensure South Australians understand and comply with a 'biodiversity duty of care' obligation.	General support
Additional EDO recommendations	
V. Develop a biodiversity duty of care in collaboration with legal and scientific experts.	
Topic 10 – Consequences of doing the wrong thing	
Discussion Paper Matters for Consideration	**EDO position**
28. The Act could seek to align sanctions and penalties for similar offences, having consideration where possible of levels imposed through other jurisdictions.	General support
29. The Act could enable suitable non-government parties to commence proceedings for offences under appropriate circumstances.	General support – see additional EDO recommendations below.
30. The Act could apply a contemporary risk based approach to the types of enforcement actions available such as compliance and remediation orders, civil remedies and other alternative penalties.	General support
Additional EDO recommendations	
W. Include third party judicial review and civil enforcement powers in the new Act. Given the public interest in biodiversity conservation, legal standing under the provisions should be broad, and not unduly restricted. X. Avoid privative clauses. Y. Ensure compliance and enforcement options include opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat. Z. Look at opportunities to strengthen compliance and enforcement beyond the new Act. Related frameworks that regulate activities that impact on biodiversity, such as development, and land clearing have the potential to undermine new Act. Enforcement of those frameworks should also be strengthened.	

Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to comment on the *Developing a Biodiversity Act for South Australia - Discussion paper* (**Discussion Paper**).[2]

The 2018 State of the Environment Report South Australia reported that biodiversity in the state continues to be in decline.[3] For example:

- the statewide trend in populations of land native fauna and flora shows a continuous decline, which is due to a range of ongoing pressures.[4]
- abundance and distribution of native flora and fauna are declining and an estimated 12% are threatened.[5]

Since then, South Australia's biodiversity has been significantly impacted by bushfires that swept through parts of the State in 2019-2020. The fires burnt over 278,603 hectares of land, severely impacting Yorketown, the Adelaide Hills and Kangaroo Island.[6] Over 90,000 hectares of national park were burned.[7] 40-50,000 koalas were lost and more than 40 state and nationally threatened species (27 plants and 13 animals) had more than half of their habitats destroyed on Kangaroo Island, and dozens of other threatened species were affected by the Cudlee Creek and Keilira fires.[8]

The South Australian Government's 2019-20 SA Bushfire Recovery Interim Report states:[9]

> "The consequences of the fires on South Australian communities, the environment and the economy will be felt for years to come, compounding the effects of pre-existing drought conditions and the COVID-19 pandemic that overlapped with the end of the fire season."

Not surprisingly, the 2023 State of the Environment Report South Australia, publicly released last week, found that biodiversity in South Australia was still declining.[10]

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[2] Department for Water and Environment, (2024) 'Developing a Biodiversity Act for South Australia Discussion paper' <https://yoursay.sa.gov.au/89139/widgets/417965/documents/271589>

[3] EPA South Australia (2018) 'State of the Environment Summary Report' <https://www.epa.sa.gov.au/soe-2018/files/14003_soer2018_print-summary_cover.pdf>.

[4] EPA South Australia (2018) 'State of the Environment Summary Report' <https://www.epa.sa.gov.au/soe-2018/files/14003_soer2018_print-summary_cover.pdf> p 21.

[5] EPA South Australia (2018) 'State of the Environment Summary Report' <https://www.epa.sa.gov.au/soe-2018/files/14003_soer2018_print-summary_cover.pdf> p 19.

[6] Government of South Australia (2020) '2019-2020 Bushfire's <https://www.recovery.sa.gov.au/2019-20-bushfires/what-happened>.

[7] Department for Environment and Water (2020) 'Bushfires and South Australia's national parks' <https://www.environment.sa.gov.au/news-hub/news/articles/2020/02/bushfires-and-sa-national-parks>.

[8] Government of South Australia (2021) '2019-20 South Australian Bushfire Recovery Interim Report' <https://www.recovery.sa.gov.au/Past-Events/what-happened/2019-20-SA-Bushfire-Recovery-Interim-Report-Web.pdf>.

[9] Government of South Australia (2021) '2019-20 South Australian Bushfire Recovery Interim Report' <https://www.recovery.sa.gov.au/Past-Events/what-happened/2019-20-SA-Bushfire-Recovery-Interim-Report-Web.pdf>.

[10] EPA South Australia (2023) 'South Australia State of the Environment Summary Report 2023', available at https://soe.epa.sa.gov.au/files/documents/SOER-Summary-Report.pdf

It concluded that *"(u)nless urgent measures are taken, the climate emergency and biodiversity losses will become crises for the environment and our communities*".[11]

The South Australian Government's commitment to develop a new, stand-alone Biodiversity Act (**new Act**) provides an important opportunity to modernise and strengthen the laws aimed at conserving the State's biodiversity, reverse current trends of decline and restore species populations and ecosystems. It can bring the legal framework in line with bold international and domestic ambition to halt extinctions and restore ecosystems, and set clear, whole-of government objectives for the conservation and restoration of biodiversity.

In general, the proposals outlined in the Discussion Paper are sound. They draw on key mechanisms in other Australian jurisdictions and will generally align South Australia's laws with existing legal frameworks for biodiversity conservation.

However, on its face, the Discussion Paper mostly lacks the ambition needed to deliver a significant 'step-change' in the face of the current extinction crisis. Recent reviews of other jurisdictions' laws have been critical of the 'status-quo', which has been able to turn around ongoing biodiversity decline. They have recommended key shifts in mindset and attitude, including substantial reform to current frameworks. For example:

- The *Independent Review of the EPBC Act – Final Report* found that the Federal *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) is outdated and requires fundamental reform.[12]
- The *Independent Review of the Biodiversity Conservation Act 2016 – Final Report* found that operative provisions of the New South Wales (NSW) *Biodiversity Conservation Act 2016* (NSW) (**BC Act NSW**) 'are incapable of supporting its objectives', which it found, are in any event, already obsolete after only five years. The report recommended a substantial 're-crafting of the Act', including giving primacy to biodiversity considerations.[13]

It remains to be seen how the new Act will interact with existing legislation, including for example *Native Vegetation Act 1991*(SA), *National Parks and Wildlife Act 1972* (SA) and *Planning, Development and Infrastructure Act 2016* (SA). In our experience, biodiversity conservation laws are unable to achieve their important objectives if they are undermined or overridden by land use laws (e.g. through excessive discretionary decision making, exemptions or lower than best practice policy settings). A similar observation was made in the context of the 5-year statutory review of the BC Act NSW. The *Independent Review of the Biodiversity Conservation Act 2016 – Final Report* noted challenges with balancing competing interests (e.g. economic, social and environmental) and suggested that biodiversity considerations needed to be given primacy in order to achieve the needed outcomes for biodiversity and future generations.[14] This is something

[11] EPA South Australia (2023) 'South Australia State of the Environment Summary Report 2023', p 5, <https://soe.epa.sa.gov.au/files/documents/SOER-Summary-Report.pdf>

[12] Professor Graeme Samuel AC (2020) 'Independent Review of the EPBC Act – Final Report' <https://epbcactreview.environment.gov.au/resources/final-report>

[13] Dr Ken Henry AC et. al .(2023) 'Independent Review of the Biodiversity Conservation Act 2016– Final Report' <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

[14] Dr Ken Henry AC et. al .(2023) 'Independent Review of the Biodiversity Conservation Act 2016– Final Report' <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

that the Discussion Paper begins to grapple with, and which must be given further consideration as reforms progress, through ongoing early consultation, including on options under consideration.

The Discussion Paper does not detail how implementation of the new Act will be resourced. A new framework will only be able to deliver on its intended outcomes if there is adequate resourcing and capacity within government to deliver on its new obligations – including, for example, updating threatened species lists, developing recovery plans, injecting funding into private land conservation and establishing new monitoring and reporting programs. We acknowledge commitments to date, including $8 million to introduce a modern data system BioData SA to capture, manage and share South Australia's biodiversity data and guide decision-making for protection and restoration programs.[15] However, the full suite of reforms will require significant additional resourcing to be effective and deliver improved outcomes for biodiversity.

In developing its new Act, the South Australian Government must set its ambition high. While it can draw from existing legal frameworks, it should also take the lead in modelling a robust framework for biodiversity conservation that will lead to improved outcomes and reverse trends in biodiversity decline.

This submission addresses each of the ten topics outlines in the Discussion Paper, as well as the proposed goals of the new Act, as follows:

- Goals for a Biodiversity Act
- Topic 1 – Biodiversity and South Australia's First Nations people
- Topic 2 – Avoiding impacts
- Topic 3 – Transparent decision-making
- Topic 4 – Threats to biodiversity
- Topic 5 – Assessing the risk of extinction
- Topic 6 – Biodiversity planning and reporting
- Topic 7 – The benefits of information
- Topic 8 – Achieving 30 by 30
- Topic 9 – Biodiversity – a shared responsibility
- Topic 10 – Consequences of doing the wrong thing

In response to each topic we outline our general response to each of the matters for consideration set out in the Discussion Paper, and provide additional EDO Recommendations.

The Discussion Paper provides a useful platform to continue discussions across the key topics. We look forward to continuing to work with the South Australian Government to develop this important piece of legislation.

[15] EPA South Australia (2023) 'South Australia State of the Environment Summary Report 2023', p 51 <https://soe.epa.sa.gov.au/files/documents/SOER-Summary-Report.pdf>

Goals for a Biodiversity Act

The four goals of the new Act are set out on page 4 of the Discussion Paper, as follows:

1. To conserve biodiversity and maintain the diversity and quality of ecosystems.
2. To enhance capacity to adapt in the context of a changing climate.
3. To protect threatened and culturally important species and ecological communities.
4. To recover threatened species and ecological communities so their conservation status improves.

The goals of the new Act could be strengthened in line with international and domestic commitments.

Since 2021, there has been updated and strengthened international commitment in response to the biodiversity extinction crisis. For example:

- *Kunming-Montreal Global biodiversity framework*: The Kunming-Montreal Global Biodiversity Framework (GBF) was adopted during the 15th Biodiversity Conference of the Parties (COP 15) in December 2022.[16] The GBF sets out 4 goals (Section G) including that "the integrity, connectivity and resilience of all ecosystems are maintained, enhanced, or restored, substantially increasing the area of natural ecosystems by 2050" and "human induced extinction of known threatened species is halted" (Goal A). It also sets out 23 targets (Section H) including targets of conserving 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3).

- *Glasgow Leaders' Declaration on Forests and Land Use*: During the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow from 31 October – 12 November 2021 over 100 countries, including Australia, pledged to halt and reverse deforestation and land degradation by 2030 through the Glasgow Leaders' Declaration on Forests and Land Use (Glasgow Declaration).[17] The Glasgow Declaration includes six key commitments, including to conserve forests and accelerate their restoration; and to reverse forest loss and degradation while ensuring robust policies and systems are in place to accelerate the transition to an economy that is resilient and advances forest, sustainable land use, biodiversity and climate goals.

- *Leaders' Pledge for Nature***:** In September 2022, Prime Minister Albanese, announced that Australia would sign on to the Leaders' Pledge for Nature to reverse biodiversity loss by 2030.[18] Under the pledge, political leaders have committed to undertake urgent action, as part of the UN Decade of Action to achieve Sustainable Development, to put nature and biodiversity on a path to recovery by 2030. This includes commitments to "address the direct and indirect drivers of biodiversity loss and halt human induced extinction of

[16] Convention on Biological Diversity (2023) 'Kunming-Montreal Global Biodiversity Framework' <https://www.cbd.int/gbf/>
[17] UK Government (2021) 'Glasgow Leaders' Declaration on Forests and Land Use' <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>
[18] The Guardian (2022) 'Australia signs global nature pledge committing to reverse biodiversity loss by 2030' <https://www.theguardian.com/australia-news/2022/sep/21/australia-signs-global-nature-pledge-committing-to-reverse-biodiversity-loss-by-2030>

species, to ensure species populations recover, and to significantly increase the protection of the planet's land and oceans through representative, well-connected and effectively managed systems of Protected Areas and Other Effective Area-Based Conservation Measures, and to restore a significant share of degraded ecosystems".[19]

- *Threatened Species Action Plan: Towards Zero Extinctions:* In October 2022, the Federal government released its Threatened Species Action Plan: Towards Zero Extinctions. The Action Plan includes objectives of preventing new extinctions of plants and animals (Objective 3) and ensuring at least 30 per cent of Australia's land mass is protected and conserved (Objective 4).

We also note that the Discussion Paper and proposed goals do not contemplate emerging legal concepts, such as the rights of nature or duties to disclose nature-related risks.[20]

As proposed, the goals of the new Act:

- Do not aim to ***enhance or improve*** the condition of biodiversity. In order to overcome baseline decline and prevent further extinctions, the objects must require improvement in the condition of biodiversity (e.g. maintain and improve, conserve and enhance, or no net loss or better).
- Do not explicitly aim to ***prevent further extinctions***.
- Do not specifically aim to identify or protect ***habitat*** for threatened or culturally important species.

We recommend that the Goals should be strengthened as follows:

1. To conserve **and enhance** biodiversity and maintain **and improve** the diversity and quality of ecosystems.
2. To enhance capacity to adapt in the context of a changing climate.
3. **To prevent further extinctions of threatened species and ecological communities.**
4. To **identify and** protect threatened and culturally important species and **their habitat** and ecological communities**.**
5. To recover threatened species and ecological communities so their conservation status improves.

[19] See Leaders Pledge For Nature (2024) 'United to Reverse Biodiversity Loss by 2030 for Sustainable Development <https://www.leaderspledgefornature.org/> . 'Other effective area-based conservation measures' (OECMs) are areas that achieve long term and effective in-situ conservation of biodiversity, outside of protected areas, and can include areas on private land, such as areas protected under a formal, long-term or in-perpetuity conservation agreement .The International Union for the Conservation of Nature (IUCN) has published guidance on defining and identifying OECMs, see IUCN (2019) 'Recognising and reporting other effective area-based conservation measures' <https://portals.iucn.org/library/sites/library/files/documents/PATRS-003-En.pdf>.

[20] See, for example:

- Global Alliance for the Rights of Nature, https://www.garn.org/rights-of-nature/
- Taskforce on Nature-Related Disclosures, www.tnfd.global/

Additionally, the goals of the new Act should be operationalised within the Act. This could be achieved by:

- A new provision that outlines how the objects will be achieved. For example, section 3 of the *Federal Recycling and Waste Reduction Act 2020* (Cth) set out the objects of the Act and provisions for how those objects are to be achieved.[21]
- Specific provisions that require decision-makers to make decisions consistent with the objects of the Act. See, for example, section 4B(1) of the *Victorian Flora and Fauna Guarantee Act 1988* (Vic), which provides: "In performing any of their functions that may reasonably be expected to impact on biodiversity in Victoria, including a function under this Act or any other Act, a Minister and a public authority must give proper consideration to the objectives of this Act, so far as is consistent with the proper exercising of their functions".
- Specific mechanisms in the new Act to support biodiversity conservation in the context of a changing climate This could include, for example: requiring a state-wide biodiversity plan to consider and respond to the impacts of climate change on threatened species and ecological communities; or ensuring areas of critical habitat identified under the new Act include climate refugia.
- Specific standards and goals embedded in the Act or subordinate legislation. For example, the United Kingdom has set biodiversity targets in its *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK). These include that:
    - The long-term biodiversity target for species' extinction risk is to reduce the risk of species' extinction by 2042, when compared to the risk of species' extinction in 2022.[22]
    - The long-term biodiversity target for the restoration or creation of wildlife-rich habitat is that on or after the day these Regulations come into force, in excess of

[21] Section 3 of the provides:
(1) The objects of this Act are as follows:
a) to reduce the impact on human and environmental health of products, waste from products and waste material, including by reducing the amount of greenhouse gases emitted, energy and resources used and water consumed in connection with products, waste from products and waste material;
b) to realise the community and economic benefits of taking responsibility for products, waste from products and waste material;
c) to develop a circular economy that maximises the continued use of products and waste material over their life cycle and accounts for their environmental impacts;
d) to contribute to Australia meeting its international obligations concerning the impact referred to in paragraph (a).
(2) These objects are to be achieved by:
(a) regulating the export of waste material to promote its management in an environmentally sound way; and
b) encouraging and regulating the reuse, remanufacture, recycling and recovery of products, waste from products and waste material in an environmentally sound way; and
c) encouraging and regulating manufacturers, importers, distributors, designers and other persons to take responsibility for products, including by taking action that relates to: i. reducing or avoiding generating waste through improvements in product design; and
ii. improving the durability, reparability and reusability of products; and
iii. managing products throughout their life cycle.

[22] *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 4.

500,000 hectares of a range of wildlife-rich habitats are to be restored or created by 31st December 2042.[23]

- The long-term biodiversity target to reverse the decline of species abundance is that the overall relative species abundance index by 31st December 2042 is— a) higher than the overall relative species abundance index for 31st December 2022; and b) at least 10% higher than the overall relative species abundance index for 31st December 2030 (the specified date for the 2030 species abundance target).[24]

Response to Matters for Consideration and additional EDO Recommendations

Goals for a Biodiversity Act	
Discussion Paper Matters for Consideration	**EDO position**
None	Not applicable
Additional EDO recommendations	

A. Strengthen the goals of the new Act in line with national and international policy commitments. This should include goals to enhance and improve the condition of biodiversity; recover species; and prevent further extinctions.

For example, the proposed goals could be amended as follows:

6. To conserve **and enhance** biodiversity and maintain **and improve** the diversity and quality of ecosystems.
7. To enhance capacity to adapt in the context of a changing climate.
8. **To prevent further extinctions of threatened species and ecological communities.**
9. To **identify and** protect threatened and culturally important species **and their habitats** and ecological communities.
10. To recover threatened species and ecological communities so their conservation status improves.

B. Ensure the goals of the new Act are operationalised within the Act, through specific provisions.

Topic 1 – Biodiversity and South Australia's First Nations peoples

In making this submission, EDO acknowledges that it is a non-Indigenous organisation and we cannot and do not speak on behalf of First Nations peoples. As part of the development of the new Act, the Government should, as it proposes, consult directly with First Nations peoples. The Government should also refer to the key themes and messages from the '*Reimagining Conservation: Working Together for Healthy Country*' report, recently published by IUCN National Committee Australia, Protected Areas Collaboration and the North Australian Indigenous Land and Sea Management Alliance.[25]

[23] *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 7.
[24] *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK) Regulation 14.
[25] https://www.aciucn.org.au/reimagining-conservation-forum.

We do however provide the following observations and suggestions as experts in planning and environmental law with experience in seeking to protect Aboriginal cultural heritage through the law. We have worked with First Nations clients who have interacted with biodiversity laws in many different ways, from litigation, engaging in other State/Territory law reform processes, through to broader First Nations-led environmental governance of on Country projects. EDO lawyers have assisted First Nations clients around Australia in their efforts to protect their Countries. These submissions are based on this experience in working with Western laws designed to provide some level of protection to biodiversity.

In general, we support the direction for reform proposed in the Discussion Paper, including that the new Biodiversity Act should:

- establish a way to recognise and safeguard biodiversity that has cultural value or importance to First Nations peoples;

- work with First Nations communities to co-design a culturally appropriate framework that enables First Nations peoples' perspectives to be heard and appropriately incorporated into decision-making about biodiversity where First Nations peoples wish for this to occur, including ensuring cultural protocols and conventions are respected to ensure First Nations peoples' perspectives are not misused or appropriated;

- seek to uphold the rights of First Nations peoples by aligning with other Australian jurisdictions and key international commitments (e.g. the United Nations Declaration on the Rights of Indigenous Peoples) and protocols (e.g. the Nagoya Protocol under the Convention on Biological Diversity); and

- establish opportunities to partner with First Nations peoples to manage biodiversity better.

Below we suggest some ways that this vision could be achieved:

- *Incorporating First Nations Traditional Ecological Knowledge* (**TEK**): TEK is defined as 'a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment'.[26] The new Act could include provisions that explicitly provide opportunities for First Nations TEK to be incorporated into planning and programming processes, e.g. the proposed state-wide biodiversity plan or strategy. Partnerships between First Nations experts and non-First Nations environmental scientists could foster an increased understanding of First Nations TEK and help shape conservation and management practices. However, self-determination is paramount, and First Nations must have the ability to decide what to share and how to share it, including with equitable access to TEK and benefit sharing arrangements.

[26] Fikret Berkes, 'Biodiversity, Religion Traditions' in Samuel M Scheiner, *Encyclopedia of Biodiversity* (Elsevier Inc, 2023) Vol 3, 18-29.

- *Building capacity for First Nations to engage in existing private land conservation schemes*: Targeted funding or capacity building could be incorporated into private land conservation frameworks. At a minimum, notions of capacity building must address the specific barriers to participation, the attributes of individual stakeholders that facilitate participation and the characteristics of the decision-making environment.

- *Enabling First Nations to lead the design and implementation of new environmental stewardship programs*: Such opportunities must provide for First Nations governance and decision-making protocols that are agreed and based on cultural histories and geographies. One example of First Nations led design and implementation is the Victorian BushBank program. This program was announced in 2020 and it included a component that was intended to be specifically designed by First Nations, to increase capacity and participation in restoration and carbon markets.[27]

- *Using shared governance models to enable cooperative decision-making between First Nations and Commonwealth, State and local-level government in the management of protected areas:* For example, Part 4A of the *National Parks and Wildlife Act 1974* (NSW) allows for land reserved under that Act to be vested, on behalf of the First Nations owners, in one or more Local Aboriginal Land Councils or the NSW Aboriginal Land Council, and subsequently leased back to the Environment Minister and managed as a reserve, with the Board of Management having a majority of its members appointed from the Aboriginal owners.

- *Better support First Nations involvement in conservation decisions*: This could include facilitating greater First Nations involvement in deciding what is important and culturally significant biodiversity and how it is used or impacted - for example, by incorporating the principle of Free, Prior and Informed Consent (**FPIC**) in relation to impacts on culturally significant species.

Response to Matters for Consideration and additional EDO Recommendations

Topic 1 – Biodiversity and South Australia's First Nations people	
Discussion Paper Matters for Consideration	**EDO position**
None	Not applicable
Additional EDO recommendations	
C. Ensure there is ongoing and meaningful engagement with First Nations as the new Act is developed and implemented. D. Include provisions in the new Act that explicitly provide opportunities for First Nations Traditional Ecological Knowledge to be incorporated into decision-making processes.	

[27] See Department of Energy, Environment and Climate Action (2023) 'BushBank program' <https://www.environment.vic.gov.au/bushbank>.

E. Consider how the new Act or interrelated legislation can better promote the care and management of Country by First Nations, including for conservation purposes, for example, through private land conservation, new environmental stewardship opportunities or shared governance models.

F. Consider how the new Act and broader regulatory framework could better support First Nations involvement in conservation decisions. For example, by incorporating FPIC into decisions about how important or culturally significant biodiversity is identified, used or impacted.

Topic 2 – Avoiding impacts

Mitigation hierarchy

EDO strongly supports formalising the mitigation hierarchy in legislation. In our experience, the mitigation hierarchy is poorly implemented in Australia, and there is too much reliance on offsetting schemes.

The mitigation hierarchy should be clearly set out in legislation as a mandatory pre-condition for development before any offsetting option is considered. It must be properly implemented and enforced. Appropriate guidance should be provided to proponents on how they can demonstrate their endeavours to genuinely 'avoid' and 'mitigate' aspects of proposed development.

Biodiversity offsetting

Concerningly, the Discussion Paper does not explain how the new Act or the proposal to formalise the mitigation hierarchy will interact with the State's existing offsets framework, namely the 'significant environmental benefit (**SEB**)' provisions in the *Native Vegetation Act 1991* (SA) and the *Policy for a Significant Environmental Benefit Under the Native Vegetation Act 1991 and Native Vegetation Regulations 2017 July 2020.*[28] This reform process, aimed at improving the way South Australia protects biodiversity, provides an important opportunity to examine and strengthen how biodiversity offsets are used and regulated in South Australia.

Analysis of South Australia's land clearing laws undertaken by EDO in 2023[29] highlighted that:

- The SEB scheme presently operates in a manner that is contrary to the very objects of the NVA, in that SEBs are used to enable vegetation clearing, rather than as a last resort. This is particularly the case, where one option for meeting SEB obligations is to pay money into the Native Vegetation Fund.

- There are limitations in the information available about both clearance and SEB areas, which has made it very difficult to evaluate the effectiveness of the SEB scheme in

[28] https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2020.pdf

[29] Environmental Defenders Office (2023) 'Analysis of Vegetation Management Regulatory Frameworks in Australia – WWF Trees Scorecard 2023: Evidence Collection' <https://www.edo.org.au/2023/08/29/vegetation-management-regulatory-frameworks-analysis/>

achieving significant environmental benefits, in terms of quantity and quality of vegetation.

- Payments or management costs need to increase significantly to support the restoration of native vegetation to ensure that SEBs are in fact generating gains.

- Assumptions and calculations underpinning the quantification of SEBs are not appropriate.

- There is limited transparency about how SEBs are monitored.

- Key parts of the framework are contained in complex policy documents, rather than legislative instruments that are subject to parliamentary scrutiny and a proper consultation process.

If the South Australian Government is serious about improving outcomes for biodiversity, then this reform process must address concerns about the SEB scheme and seize the opportunity to align South Australia's use of biodiversity offsets with best practice. A strengthened biodiversity offsets scheme could be embedded in the new Act itself.

EDO has written extensively on offsets frameworks in Australia.[30] We have identified best-practice principles that must underpin biodiversity offsetting.[31] These principles should inform ongoing discussions about a new Biodiversity Act for South Australia.

Best-practice principles for biodiversity offsetting:

1. Offsets must be designed to improve biodiversity outcomes
2. Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
3. Offsets must be based on genuine 'like for like' principles
4. Legislation and policy must set clear limits on the use of offsets
5. Time lags in securing offsets and gains should be minimised
6. Indirect offsets must be strictly limited
7. Discounting and exemptions should not be permitted
8. Offsetting must achieve benefits in perpetuity
9. Offsets must be additional
10. Offset arrangements must be transparent and legally enforceable

[30] See, for example:
- Environmental Defenders Office (2021) 'Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme' <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>
- Environmental Defenders Office (2022) 'Defending the Unburnt: Offsetting our way to extinction' <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>.
- Environmental Defenders Office (2022) 'Submission on the Northern Territory draft Biodiversity Offsets Policy and the draft Biodiversity Offsets Technical Guidelines', <https://www.edo.org.au/publication/edo-submission-on-the-draft-northern-territory-biodiversity-offsets-policy/>

[31] Environmental Defenders Office (2022) 'Defending the Unburnt: Offsetting our way to extinction' <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>.

11. Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered, and mechanisms to respond if outcomes are not being delivered.
12. Offset frameworks should build in mechanisms to respond to climate change and stochastic events

'Serious and irreversible' or 'unacceptable' impacts

In the face of the extinction crises, the new Act must build in safeguards that act as 'red flags' in circumstances where impacts on biodiversity are serious and irreversible, or unacceptable – in line with clear, scientifically based definitions. These 'red flags' should signal an 'upfront no' (i.e., mandatory refusal) to such impacts. In NSW, for example, the *Biodiversity Conservation Act 2016* (NSW) mandates the refusal of certain projects that would have 'serious and irreversible' impacts.[32] At the Federal level, the Government plans to introduce mechanisms to safeguard against 'unacceptable' impacts (e.g. no-go zones, and mandatory refusal requirements).

Protection of critical habitat

While the Minister's introductory message suggests that the new Act will help protect critical habitat, this idea is not discussed in more detail in the Discussion Paper. Critical habitat is generally understood to mean habitat that is critical for the survival and recovery of a species or ecological community. The concept was first introduced in the US *Endangered Species Act (*1973),[33] also been adopted in Canada and Australia, although with slightly differing definitions and legal requirements. In Australia, all jurisdictions, with the exception of the South Australia and the Northern Territory, have introduced critical habitat provisions into law.

Critical habitat mechanisms in the new Act can ensure that impacts are avoided in those areas where protection of habitat is critical. If these areas are degraded or lost then species or ecological communities are likely to go extinct or will not be able to recover. If the South Australian government wants to arrest biodiversity decline then properly identifying, protecting and managing critical habitat is key.

As noted above, most Australian jurisdictions have introduced critical habitat provisions into law. While this suggests an intention to protect the habitat of species at risk of extinction, the effective implementation and use of the provisions has been problematic. The provisions are rarely used, and protections are limited.

Concerns about the poor implementation of critical habitat provisions in Australia are well recognised.[34] In general, concerns do not relate to the concept of or intent to protect critical

[32] *Biodiversity Conservation Act 2016* (NSW), s 7.16(2).

[33] https://www.fws.gov/law/endangered-species-act

[34] See, for example:

- Fitzsimons, J. (2020) 'Urgent need to use and reform critical habitat listing in Australian legislation in response to the extensive 2019-2020 bushfires' 37 EPLJ 143
- Australian Conservation Foundation (2018), 'Australia's Extinction Crisis Protecting critical habitat' <https://www.acf.org.au/new_research_reveals_australia_s_critical_habitat_laws_are_broken>
- Various submissions to the Independent Review of the EPBC Act, including:

habitat, but rather with the failure to effectively implement and utilise the mechanism as a key conservation tool.

EDO has identified key principles that should underpin the introduction or reform of critical habitat provisions[35]:

- *Clearly define critical habitat:* A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science. The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance - Significant impact guidelines 1.1*[36].
- *Make critical habitat identification mandatory*: Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- *Protect and manage critical habitat:* Critical habitat must be protected and managed, irrespective of land tenure.
- *Support landholders:* Areas of critical habitat must be prioritised for conservation and recovery, including funding for landholders were relevant (e.g. in government-led conservation programs).

These key principles can underpin the introduction of critical habitat provisions in the new Act.

Response to Matters for Consideration and additional EDO Recommendations

Topic 2 – Avoiding impacts	
Discussion Paper Matters for Consideration	**EDO position**
1. The Act could seek to prioritise avoidance and minimisation of impacts to biodiversity and make it clear that any negative impacts to biodiversity are the last resort.	General support
2. The Act could provide for a framework that includes clear guidance on the requirements to avoid and minimise impacts to biodiversity.	General support

- Environmental Defenders Office (2020), 'Submission to the 10 year review of the EPBC Act', <https://www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf>
- WWF-Australia (2020), 'Submission to the EPBC Act Review', <https://epbcactreview.environment.gov.au/sites/default/files/2020-05/ANON-K57V-XQKR-K%20-%20WWF-Australia.pdf>
- Humane Society International (2020), 'Submission to the Independent review of the EPBC Act', <https://epbcactreview.environment.gov.au/submissions/anon-k57v-xfqb-x>

[35] EDO and WWF-Australia (2024), 'Bushfires, Bureaucracy and Barriers
How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities', publication pending.

[36] https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf

3. The Act could require evidence is provided justifying how avoidance and minimisation have first been addressed as per the mitigation hierarchy	General support
4. The Act could make it clear that any action taken having impacts to biodiversity must leave biodiversity in a measurably better state than it was before.	General support
Additional EDO recommendations	

G. In formalising the mitigation hierarchy in legislation:
- Establish clear provisions to ensure the mitigation hierarchy is properly implemented and enforced.
- Require strict adherence to the mitigation hierarchy as a mandatory pre-condition for development before any offsetting option is considered.
- Provide appropriate guidance to proponents on how they can demonstrate their endeavours to genuinely avoid and mitigate aspects of proposed development.

H. Strengthen South Australia's biodiversity offsets framework in line with the following best-practice principles:
- Offsets must be designed to improve biodiversity outcomes
- Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
- Offsets must be based on genuine 'like for like' principles
- Legislation and policy must set clear limits on the use of offsets
- Time lags in securing offsets and gains should be minimised
- Indirect offsets must be strictly limited
- Discounting and exemptions should not be permitted
- Offsetting must achieve benefits in perpetuity
- Offsets must be additional
- Offset arrangements must be transparent and legally enforceable
- Offset frameworks must include monitoring and reporting requirements to track whether gains and improvements are being delivered
- Offset frameworks should build in mechanisms to respond to climate change and stochastic events

I. Build in mechanisms that act as 'red flags' in circumstances where impacts on biodiversity are 'serious and irreversible' or 'unacceptable'. These 'red flags' should signal an 'upfront no' (i.e., mandatory refusal) to such impacts.

J. Introduce critical habitat provisions into the new Act, based on the following principles:
- *Clearly define critical habitat:* A clear, common definition of critical habitat should be adopted across all Australian jurisdictions, based on the best available science. The definition should be descriptive, drawing on key elements set out in the *Matters of National Environmental Significance - Significant impact guidelines 1.1*.
- *Make critical habitat identification mandatory*: Critical habitat must be identified at the time a species or ecological community is listed or within a specified timeframe via a

clear, mandatory statutory process triggered by listing (e.g. in a mandatory conservation planning document).
- *Protect and manage critical habitat:* Critical habitat must be protected and managed, irrespective of land tenure.
- *Support landholders:* Areas of critical habitat must be prioritised for conservation and recovery, including funding for landholders were relevant (e.g. in government-led conservation programs).

Topic 3 – Transparent decision-making

EDO is generally supportive of transparent and objective decision-making. We generally welcome proposals set out in the Discussion Paper, including:

- introduction of a public register of biodiversity decisions,
- mandatory biodiversity reporting; and
- application of Ecologically Sustainable Development principles in the context of biodiversity decision-making.

Transparency: Registers and reporting

We agree with proposals to:

- require government to maintain a public register to ensure decisions made that impact biodiversity are disclosed; and
- require mandatory reporting so that impacts to biodiversity and actions taken to repair biodiversity are fully disclosed.

Further information is required to understand how these proposals will be implemented and how they will interact with the *Native Vegetation Act 1991* (SA) and *Planning, Development and Infrastructure Act 2016* (SA) and decisions made under those Acts. For example, how and to what extent will information about land use activities and approvals (which are relevant due to impacts on biodiversity) be made available. For example:

- Could monitoring and reporting of regulated activities (e.g. development, land clearing etc.) be improved to ensure that obligations (e.g. conditions of approval) are being met?
- How are environmental outcomes (e.g. from SEBs) tracked and are there processes in place to ensure environmental outcomes are being met, and processes in place to respond if they are not.
- Will information about compliance and enforcement be readily available?

Other mechanisms that could improve transparency include clear, decision-making criteria, set out in legislation; and requirements for decision-makers to provide reasons for decisions.

We look forward to further receiving further information on this point as development of the new Act continues.

Ecologically Sustainable Development

EDO generally supports the new Act incorporating a clear definition of Ecologically Sustainable Development (ESD) and ensuring a process is created so that application of the ESD principles are required in the context of decision-making about biodiversity.

However, EDO recommends that the new Act provide a modernised definition and framework for ESD.

Sustainable development (or ESD, as it is known in Australia) is understood to be development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Generally, under various Australian laws, ESD is to be achieved by integrating environmental, economic, social and equitable considerations in decision making, underpinned by guiding principles (known as ESD principles). Properly applied, ESD recognises that ecological integrity and environmental sustainability are fundamental to social and economic wellbeing, particularly when considering the needs of both present and future generations. However, historically, an imbalance has led to environmental and social considerations often being set aside for economic outcomes. An effective ESD framework cannot be used simply as a 'balance' or 'trade off' exercise. Rather it recognises that long-term environmental health and socio-economic outcomes are deeply interconnected.

The Australian Panel of Experts on Environmental Law (**APEEL**) has called for a national collaborative discussion to inform the next generation of ESD or its successor.[37] In doing so APEEL recognises that ESD is a society-wide goal - it won't be effective if its only implemented through environmental or natural resources legislation - but it remains a core component of environment legislation.

More recently an independent review of biodiversity laws in NSW found that:

> *"In the past few years, a consensus has emerged that this balancing act gives insufficient weight to the interests of future generations. The present generation is the principal beneficiary of government efforts to promote economic activity and address obvious social issues, whereas the burden of any consequential environmental damage, especially that which is irreversible, such as species loss, is overwhelmingly borne by future generations. Future generations are also those forced to bear the negative economic and social consequences of long-term environmental degradation".*[38]

The independent review proposed "*a nature positive framing of the Act, noting that this requires giving primacy to biodiversity considerations in a manner not previously contemplated*".[39]

At a national level, the Commonwealth government is proposing a nature positive framing for its reform of national environmental laws (although at this stage it is still unclear exactly how that

[37] APEEL, (2017) 'Blueprint for the Next Generation of Australian Environmental Law' <www.apeel.org.au>
[38] Dr Ken Henry AC et. al .(2023) 'Independent Review of the Biodiversity Conservation Act 2016– Final Report' <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>
[39] Dr Ken Henry AC et. al .(2023) 'Independent Review of the Biodiversity Conservation Act 2016– Final Report' <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

framing will be delivered in practice) and is also proposing to explicitly recognise cumulative, cultural, economic, environmental, social and equitable considerations in its decision-making framework.

These recent observations about the ongoing role of ESD should be considered as the development of a new Act in South Australia continues.

At a minimum, any definition of ESD should include the following well-recognised ESD principles:[40]

- *Prevention of harm:* taking preventative actions against likely harm to the environment and human health;
- *Precautionary principle:* taking precautionary actions against harm that would be serious or irreversible, but where scientific uncertainty remains about that harm; and engaging transparently with the risks of potential alternatives;
- *Inter-generational equity:* the present generation have an obligation to ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;
- *Intra-generational equity:* the present generation have an obligation to ensure that environmental costs, benefits and outcomes are borne equitably across society;
- *Biodiversity principle:* ensuring that biodiversity and ecological integrity are a fundamental consideration in decision-making, including by preventing, avoiding and minimising actions that contribute to the risk of extinction;
- *Environmental values principle:* ensuring that the true value of environmental assets is accounted for in decision-making – including intrinsic values, cultural values and the value of present and future ecosystem services provided to humans by nature; and
- *Polluter pays principle:* that those responsible for generating waste or causing environmental degradation bear the costs of safely removing or disposing of that waste, or repairing that degradation.

In addition to these principles, we submit that new and additional ESD principles should also be considered and adopted:

- *Achieving high levels of environmental protection:* including by requiring the use of best available scientific and commercial information, continuous improvement of environmental standards, and the use of best available techniques for environmental management;
- *Non-regression principle:* non-regression in environmental goals, standards, laws, policies and protections; and
- *Resilience principle:* strengthening the resilience of biodiversity and natural systems to climate change and other human-induced pressures on the environment.

Further consideration needs to be given as to how the new Act will give effect to these principles. If ESD is to be realised, it should be the outcome that decision-makers strive to achieve. It is not enough for ESD to be part of a process that simply requires ESD to be considered on the way through to making a decision. The new Act should include mandatory requirements for decision-

[40] Developed from Australian Panel of Experts of Environmental Law, (2017) 'The Foundations of Environmental Law: Goals, Objects, Principles and Norms (Technical Paper 1, April 2017)'. See also APEEL, (2017), 'Blueprint for the Next Generation of Australian Environmental Law'.

makers to apply and make decisions consistent with ESD principles (not just consider ESD principle).

Consideration should also be given on how to ensure that ecological integrity and the needs to future generations are not perversely outweighed by short-term economic and social considerations. This may require explicitly giving primacy to ecological considerations.

Response to Matters for Consideration and additional EDO Recommendations

Topic 3 – Transparent decision-making	
Discussion Paper Matters for Consideration	**EDO position**
5. The Act could require government maintain a public register to ensure decisions made that impact biodiversity are disclosed.	General support
6. The Act could require mandatory reporting so that impacts to biodiversity and actions taken to repair biodiversity are fully disclosed	General support
7. The Act could incorporate a clear definition of Ecologically Sustainable Development and ensure a process is created so that application of the ESD principles are required in the context of decision making about biodiversity	General support, but requires further discussion about how the principles of ESD and their application can be modernised.
Additional EDO recommendations	
K. Adopt, in the new Act, a modernised definition and framework for ESD.	

Topic 4 – Threats to biodiversity

EDO supports the new Act establishing a framework for the identification of threats to biodiversity and including statutory obligations to address threats to biodiversity in the new Act.

Key threatening processes

As noted in the Discussion Paper, unlike many other Australian jurisdictions, there are currently no provisions for identifying key threatening processes (**KTP**) in the South Australian laws.

The new Act could model its provisions off other jurisdictions, and in particular:

- insert an objective or goal into the new Act to identify and manage key threatening processes.
- adopt a wide definition of threatening process (e.g. a hybrid of definitions in NSW[41] and Victoria[42]: *threatening process* means a process that threatens, or that may threaten, the survival, abundance or evolutionary development of species or ecological communities);

[41] *Biodiversity Conservation Act 2016* (NSW) s 4.31.
[42] *Flora and Fauna Guarantee Act 1988* (Vic) s 3.

- establish a scientific committee to assess and advise on threatening processes;
- include clear statutory obligations in the new Act to address threats; this could include requiring threat abatement plans or strategies to be developed, that outline actions necessary reduce the impact of threatening process on species and ecological communities;
- include accountability mechanisms such as mandated reporting against actions or consequences for failure to implement threat abatement strategies
- require proponents of projects to address how key threatening processes impact on identified species and ecological communities [43]
- include clear obligations on decision-makers not to make decisions inconsistent with threat abatement plans.

This latter point is of particular importance. In our experience, while many jurisdictions have frameworks to identify key threatening processes, in many instances key threatening processes are merely a consideration in decision-making; there is no obligation to ensure that decisions do not exacerbate threatening processes.

Response to Matters for Consideration and additional EDO Recommendations

Topic 4 – Threats to biodiversity	
Discussion Paper Matters for Consideration	**EDO position**
8. The Act could provide for a framework for the identification of threats to biodiversity.	General support
9. The Act could include statutory obligations for actions to address threats to biodiversity.	General support
Additional EDO recommendations	
L. Set robust legal obligations in relation to the identification and response to key threats: • insert an objective or goal into the new Act to identify and manage key threatening processes; • adopt a wide definition of threatening process (e.g. process (e.g. a hybrid of the definitions in NSW and Victoria: *threatening process means a process that threatens, or that may threaten, the survival, abundance or evolutionary development of species or ecological communities);* • establish a scientific committee to assess and advise on threatening processes; • include clear statutory obligations in the new Act to address threats; this could include requiring threat abatement plans or strategies to be developed, that outline actions necessary reduce the impact of threatening process on species and ecological communities; • include accountability mechanisms such as mandated reporting against actions or consequences for failure to implement threat abatement strategies;	

[43] For example, in New South Wales a species impact statement prepared in support of a project application must address how KTPs are impacting species impacted by the proposal, see *Biodiversity Conservation Regulation 2017* (NSW) cl 7.6(2)(c) and (3)(b)).

- require proponents of projects to address how key threatening processes impact on identified species and ecological communities; [44]
- include clear obligations on decision-makers not to make decisions inconsistent with threat abatement strategies or plans.

Topic 5 – Assessing the risk of extinction

The new Act provides a much-needed opportunity to overhaul the process for identifying and listing South Australian species and ecological communities as threatened. The listing process in South Australia, currently in the *National Parks and Wildlife Act 1972* (SA), is long out-of-date.

Listing process

In June 2015, Australian environment ministers agreed to establish a Common Assessment Method (**CAM**) for the listing of threatened species and ecological communities. The CAM is a consistent approach to the assessment and listing of threatened species across the Australian jurisdictions. It is based on the best practice standard developed by the International Union for Conservation of Nature (**IUCN**), as used to create the Red List of Threatened Species, with some amendments to suit the Australian context.

Our understanding is that to date, South Australia has not updated it laws consistent with the CAM. South Australia is the only State or Territory Government in Australia that has not signed the *Intergovernmental Memorandum of Understanding agreeing on the CAM for the listing of threatened species and ecological communities*.[45] Adopting the CAM would bring South Australia in line with other Australian jurisdictions and provide the logical starting point for these current reforms.

As proposed in the Discussion Paper, we support species being defined to include plants, mammals, birds, reptiles, amphibians, invertebrates, fungi, etc. It should also cover ecological communities.

Recovery planning

The Discussion Paper doesn't provide a lot of detail about how the new Act will build recovery planning into its framework, once a species or ecological community is listed as threatened. While it does suggest that the Act "could establish a framework to document measures to improve the status of biodiversity assessed as threatened" it doesn't provide any further detail on how this would be done.

Similar to other Australian jurisdictions (e.g. NSW, Victoria, Commonwealth), the listing of threatened species and ecological communities in the new Act should trigger a mandatory requirement to prepare a recovery plan (or similar). These plans should outline detailed recovery goals, actions, estimated timeframes to achieve goals and milestones, and metrics to measure progress. A scientific committee could provide play a role in the development of the plans,

[44] For example, in New South Wales a species impact statement prepared in support of a project application must address how KTPs are impacting species impacted by the proposal, see *Biodiversity Conservation Regulation 2017* (NSW) cl 7.6(2)(c) and (3)(b)).

[45] Department of Climate Change, Energy, the Environment and Water (2018) 'Intergovernmental memorandum of understanding Agreement on a Common Assessment Method for listing of threatened species and threatened ecological communities' <https://www.dcceew.gov.au/sites/default/files/documents/mou-cam.pdf>.

including making recommendations for recovery actions during the listing process. The new Act must ensure recovery plans are continually in force and are regularly reviewed and updated. There are likely to be improved opportunities to collaborate with the Federal government on recovery planning for nationally listed species under reformed national laws.

Agile protections

We agree with the observation in the Discussion Paper that the new Act could create a more streamlined and agile process for regular list amendments.

We also submit that the new Act should include provisions to facilitate immediate and wholistic responses to major events (such as bushfires, floods and disease), especially where those events may change the threat status of listed species or ecological communities. This will become more important in the future as the impacts of climate change, including an increase in extreme weather events and more intense fire seasons, will continue to threaten Australia's wildlife. Timely, practical and responsive legal provisions for threatened species protection are a necessary part of the required recovery and management response. This could include:

- *Provisions for rapid provisional listing or uplisting of threatened species, until full assessments can be completed:* NSW is the only Australian jurisdiction with provisional listing powers for threatened species, allowing species to be listed as threatened on an emergency basis, until a full assessment and determination can be carried out. We understand the Federal government is intending to include similar provisions as part of its reforms to the EPBC Act. The new Act in South Australia should consider adopting similar provisions.

- *Mandatory reviews of threatened species lists following a major event:* We agree that a new Act should require for regular list amendments and also submit that the new Act could also require a review of the list following a major event to determine whether any changes are required.

- *Mandatory reviews and updating of threatened species protections following a major event:* In addition to threatened species listings, other protections or policies, such as the proposed state-wide biodiversity strategy, may require revision following a major event that impacts on the conservation status of a species. The new Act should include a trigger for a review of relevant rules relating to threatened species protections in the new Act and any other related legislation following a major event.

- *Provisions for varying, suspending or revoking existing approvals***:** Major events, such as the South Australia's 2019-20 summer bushfires, may have such catastrophic impacts that certain approved activities should no longer be allowed to proceed as originally approved. For example, a situation may arise where an existing approval permits the clearing of an area of habitat that, following a major event, is now a critical remaining stand of habitat for a particular species. Approval frameworks need to provide the ability for decision makers to intervene in circumstances where, if an approved action were to proceed, there is a high likelihood that a species would become extinct. This could be achieved in a number of ways, for example:
    - Standard conditions of consent that trigger a review of relevant conditions following a major event.

- Powers for decision makers to vary approvals or approval conditions, including in response to a material change in circumstances or a major event review.
- Powers for decision makers to suspend or revoke approvals.

More information on these recommended mechanisms is set out in EDO's report *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity.*[46] While written in the context of the east coast 2019-2020 bushfires, the recommendations in the report are equally relevant in the South Australian context.

Response to Matters for Consideration and additional EDO Recommendations

Topic 5 – Assessing the risk of extinction	
Discussion Paper Matters for Consideration	**EDO position**
10. A scientific committee should be established to guide listing, assessment and review of extinction risk of biodiversity.	General support
11. The Act could provide greater clarity on the types of native species that can be considered as threatened.	General support. This should align with the Common Assessment Method (CAM).
12. The Act could require the creation of a formal listing, assessment and review process that establishes clear pathways for nomination, consultation and review.	General support
13. The Act could adopt a streamlined process for list amendments to ensure lists remain current.	General support
14. The Act could ensure that programs implemented to address biodiversity decline are evaluated.	General support
15. Where a new extinction occurs, the Act could establish a requirement to examine and report on the causes and actions that contributed to it	General support
16. The Act could establish a framework to document measures to improve the status of biodiversity assessed as threatened	General support
Additional EDO recommendations	
M. Sign the Intergovernmental Memorandum of Understanding agreeing on the Common Assessment Method for the listing of threatened species and ecological communities. N. Implement the Common Assessment Method, including aligning the threat criteria and categories with the Common Assessment Method (Vulnerable, Endangered, Critically Endangered, Extinct in the Wild, or Extinct).	

[46] Environmental Defenders Office (2022), 'Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity' <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>

O. Include timely, practical and responsive legal provisions for threatened species protection, including:
   - Provisions for rapid provisional listing or uplisting of threatened species, until full assessments can be completed .
   - Mandatory reviews of threatened species lists following a major event.
   - Mandatory reviews and updating of threatened species protections following a major event.
   - Provisions for varying, suspending or revoking existing approvals.

P. Establish a clear, mandatory process for recovery planning.

Topic 6 – Biodiversity planning and reporting

EDO is supportive of mandating a state-wide biodiversity plan or strategy with measurable targets, and mandating regular reviews of the plan or strategy, in the new Act.

The plan or strategy should be a 'whole-of government' document that sets state-wide targets and underpins decisions across all sectors. A state-wide plan or strategy will ensure that biodiversity protection is integrated into all decision-making processes across Government.

To support the development and implementation of state-wide biodiversity plan or strategy, an independent, statutory Biodiversity Commission or similar body could be established under the new Act. The focus of the Commission could be on developing and implementing state-wide plan or strategy across Government, ensuring biodiversity conservation is genuinely a fundamental consideration across all decision making.

Response to Matters for Consideration and additional EDO Recommendations

Topic 6 – Biodiversity planning and reporting	
Discussion Paper Matters for Consideration	**EDO position**
17. The Act could mandate a state-wide biodiversity plan or strategy where measurable targets are set and regularly reported on	General support
18. The Act could require any state-wide plan or strategy to be regularly reviewed and updated.	General support
Additional EDO recommendations	
Q. Establish an independent, statutory Biodiversity Commission (or similar body) to support the development and implementation of state-wide biodiversity plan or strategy,	

Topic 7 – The benefits of information

EDO strongly supports better data collection, collation, interpretation and dissemination of information as proposed in the Discussion Paper.

Central depository of biodiversity information

EDO supports the specific matters outlined in the Discussion Paper, namely that the new Act could:

- provide a framework to enable the sharing of biodiversity information with the community and across all levels of government to assist in decision-making;
- establish a lead agency to be responsible for the management of South Australia's biodiversity information;
- establish requirements for the submission of biodiversity data collected in South Australia to a central repository.
- direct the development of a policy that describes requirements for the collection, collation, interpretation and dissemination of biodiversity information.

While a South Australian framework needs to be designed to meet the specific needs of South Australia, consideration should be given to how the framework can best align with work being undertaken at the Federal level to establish Environment Information Australia - Australia's first independent, national environmental data and information office.[47]

It is noted that, unlike other jurisdictions such as New South Wales and Queensland, spatial data relating to areas of land clearing is not publicly available for South Australia.

Monitoring and reporting

As noted in Topic 5, current legislation does not include obligations to monitor, report on or implement actions for listed species. We agree this is a gap that should be addressed by the reforms. The new Act should require monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions, including any goals or objects established in a state-wide biodiversity strategy.

For example, when the *Biodiversity Conservation Act 2016* (NSW) was introduced in New South Wales, the government established a Biodiversity Indicator Program for NSW to assess the status of biodiversity in New South Wales at the beginning of the Act (baseline) then at regular intervals.[48] A similar program could be adopted in South Australia in conjunction with the introduction of the new Act.

Information about land use activities and approvals

As discussed in Topic 3, monitoring of and reporting on activities that have impacts on biodiversity is strongly supported. We agree with proposals to require government to maintain a public register to ensure decisions made that impact biodiversity are disclosed; and require mandatory reporting so that impacts to biodiversity and actions taken to repair biodiversity are fully disclosed.

[47] https://minister.dcceew.gov.au/plibersek/media-releases/global-search-head-environment-information-australia
[48] https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-indicator-program

Response to Matters for Consideration and additional EDO Recommendations

Topic 7 – The benefits of information	
Discussion Paper Matters for Consideration	**EDO position**
19. The new Act could provide for a framework to enable the sharing of biodiversity information with the community and across all levels of government to assist in decision-making	General support
20. The new Act could establish the Department for Environment and Water as the responsible government agency for the management of South Australia's biodiversity information.	General support
21. The new Act could establish requirements for the submission of biodiversity data collected in South Australia to a central repository	General support
22. The new Act could direct the development of a policy that describes requirements for the collection, collation, interpretation and dissemination of biodiversity information	General support
Additional EDO recommendations	
R. Establish a state-wide biodiversity monitoring program in conjunction with the introduction of the new Act.	

Topic 8 – Achieving 30 by 30

EDO is supportive of broadening schemes to further support the establishment and management of conservation areas on private and other land; this aligns with global 30 x 30 commitments. EDO supports enabling the provision of financial and technical assistance to landholders who have entered into formal agreements for conservation.

Additionally, discussions about how Australian can achieve 30 x 30 must centre First Nations and align with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), including the principles of free, informed and prior consent.

EDO's 2022 *Discussion Paper - Opportunities to expand and enhance environmental stewardship,* highlights key opportunities for supporting conservation on private and public land.[49] While written in the context of protecting unburnt areas on Australia's east coast following the 2019-2020 bushfires, many of the points considered in the EDO's report would have application in South Australia and are directly relevant to the points raised in Topic 8 of the Discussion Paper.

[49] Environmental Defenders Office, (2022) 'Defending the Unburnt: Discussion Paper - Opportunities to expand and enhance environmental stewardship' < https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Opportunities...-environmental-stewardship.pdf>

In particular:

- Existing frameworks, such as those discussed in the Discussion Paper (i.e. Native Vegetation Heritage Agreements, Indigenous Protected Areas and Native Forest Reserves), could accommodate increased investment and scaling up. While these mechanisms are currently available, an increase in investment and targeted outreach by government could see an increased uptake of these stewardship mechanisms and lead to improved outcomes for biodiversity in South Australia. An investment strategy could guide where funding is prioritised in order to deliver outcomes consistent with a state-wide biodiversity strategy (see above) and global commitments to achieve 30 x 30.

- In developing the new Act, the South Australian government should also consider opportunities to develop new schemes to support conservation on private land. In particular, we highlight the opportunity to identify and support actions that can be taken by First Nations groups or networks of First Nations peoples and communities. For example:
  - *Build capacity for First Nations to engage in existing private land conservation schemes*: Targeted funding or capacity building could increase First Nations participation in existing schemes. At a minimum, notions of capacity building must address the specific barriers to participation, the attributes of individual stakeholders that facilitate participation and the characteristics of the decision-making environment.
  - *Enable First Nations to lead the design and implementation of new environmental stewardship programs*: Such opportunities must provide for First Nations governance and decision-making protocols that are agreed and based on cultural histories and geographies. One example of First Nations led design and implementation is the Victorian BushBank program. This program was announced in 2020 and it included a component that was intended to be specifically designed by First Nations, to increase capacity and participation in restoration and carbon markets.[50]
  - *Use shared governance models:* to enable cooperative decision-making between First Nations and Commonwealth, State and local-level government in the management of protected areas.
  - *Enable land to be returned to First Nations ownership and management:* One example of how this is achieved is through the Indigenous Land and Sea Corporation (**ILSC**), which can facilitate the purchase and return of land and water related rights and assets to First Nations. The ILSC is established under Part 4A of the Commonwealth *Aboriginal and Torres Strait Islander Act 2005.* The ILSC is able to acquire interests in land and water-related rights and grant these interests to First Nations corporations.[51]

EDO is a non-Indigenous organisation and we do not speak on behalf of First Nations peoples, therefore the suitability of opportunities outlined above would need to be considered further, in

[50] See https://www.environment.vic.gov.au/bushbank

[51] For more information, see https://www.ilsc.gov.au. According to the ILSC Corporate Plan, "*The ILSC is funded through the Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSFF), established (initially as the Aboriginal and Torres Strait Islander Land Account) to support the purpose of the ILSC. Revenue from the Fund supports our operations, with the ILSC receiving $45 million (in 2010 values) annually*", see ILSC, *Unlocking the Indigenous Estate Corporate Plan 2021-22 - Strategy to 2025*, available at https://www.ilsc.gov.au/wp-content/uploads/2021/08/Corporate-Plan-2021-22-Strategy-to-2025.pdf

collaboration with First Nations. We acknowledge that self-determination (i.e. the ability for First Nations to freely pursue their economic, social and cultural development) should be respected. Further, the interaction between these options and Native Title would need to be considered, both broadly when establishing new policies and programs, and on a case-by-case basis by First Nations considering participating.

In developing any new conservation mechanisms or schemes, the South Australian government should stay informed of work currently being undertaken by the Federal government to establish principles to guide the recognition of other effective area-based conservation measures (OECMs) in Australia.[52]

Response to Matters for Consideration and additional EDO Recommendations

Topic 8 – Achieving 30 by 30	
Discussion Paper Matters for Consideration	**EDO position**
23. The Act could consider broadening or creating schemes to further support the establishment and management of conservation areas on private and other land.	General support, noting discussions about how Australian can achieve 30 x 30 must centre First Nations and align with the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), including the principles of free, informed and prior consent.
24. The Act could seek to enable additional incentives, including the provision of financial and technical assistance, to landholders who have entered into formal agreements for conservation	General support
Additional EDO recommendations	
S. Increase investment in and scale up existing conservation frameworks (e.g. Native Vegetation Heritage Agreements, Indigenous Protected Areas and Native Forest Reserves). T. Develop an investment strategy to guide where funding is prioritised in order to deliver outcomes consistent with a state-wide biodiversity strategy and global commitments to achieve 30 x 30. U. Identify and support actions that can be taken by First Nations groups or networks of First Nations peoples and communities to protect, care for or responsibly use the environment in pursuit of environmental, cultural, spiritual and/or social outcomes.	

[52] https://consult.dcceew.gov.au/consult-draft-principles-for-oecms-in-australia

Topic 9 – Biodiversity – a shared responsibility

EDO is interested in the proposal to introduce a 'biodiversity duty of care' (**DOC**) into the new Act.

In the United Kingdom there is a general duty to conserve and enhance biodiversity under section 102 of the *Environment Act 2021* (UK). This duty applies to public authorities. Section 102 has been in force since 1 January 2023. It requires relevant public authorities to consider what action the authority can properly take to further the general biodiversity objective. It requires the authority to determine such policies and specific objectives as it considers appropriate for taking action to further the general biodiversity objective, and take such action as it considers appropriate, in the light of those policies and objectives, to further that objective.

In Australia, pollution and waste laws in the Australian Capital Territory, Queensland, Victoria, South Australia, Tasmania and Northern Territory mandate a 'general environmental duty' (**GED**) to take reasonable care to not cause harm to the environment.[53] The GED is supported by detailed offences for tiered levels of harm caused by specific levels of intent or neglect.[54]

Similarly, biosecurity laws in the Australian Capital Territory, New South Wales, Queensland and Tasmania include a general biosecurity duty (**GBD**) or obligation in their biosecurity legislation,[55] with some differences in how and when the duty applies. The duty or obligation is also supported by detailed offences for tiered levels of harm caused by specific levels of intent or neglect.[56] The draft Biosecurity Bill 2023 (SA) proposes to mandate a GBD.[57] Victoria is also in the process of reforming their biosecurity laws and are proposing to implement a GBD.[58]

To the best of our knowledge, there is no general duty to conserve and enhance biodiversity in any biodiversity conservation laws in Australian jurisdictions. However, academics have examined options for establishing a biodiversity DOC in Australian laws. [59]

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[53] *Environment Protection Act 1997* (ACT) s 22; *Environmental Protection Act 1994* (Qld) s 319; *Environment Protection Act 2017* (Vic) s 25; *Environmental Protection Act 1993* (SA) s 25; *Environment Management and Pollution Control Act 1994* (Tas) s 23A; *Waste Management and Pollution Control Act 1998* (NT) s 12.

[54] Geoscience Australia (2018) 'Environmental Legislation Guidelines' <https://www.ga.gov.au/__data/assets/pdf_file/0012/72030/Environmental-Legislation-Guidelines-v1.0.pdf>; *Environment Protection Act 1997* (ACT) ss 137, 138, 139, 141, 142; Environmental Protection Act 1994 (Qld) ss 437, 438, 440; *Environment Protection Act 2017* (Vic) ss 25, 27; *Environmental Protection Act 1993* (SA) ss 79, 80, 82; Environment Management and Pollution Control Act 1994 (Tas) s 50, 51, 51A, 53; *Waste Management and Pollution Control Act 1998* (NT) s 83.

[55] *Biosecurity Act 2023* (ACT) s 22; *Biosecurity Act 2015* (NSW) s 22; *Biosecurity Act 2014* (Qld) s 23; *Biosecurity Act 2019* (Tas) s 70.

[56] *Biosecurity Act 2023* (ACT) s 24; *Biosecurity Act 2015* (NSW) s 23, 25; *Biosecurity Act 2014* (Qld) ss 24, 27; *Biosecurity Act 2019* (Tas) s 71.

[57] Government of South Australia (2023) 'Draft Biosecurity Bill Overview – Developing a new Biosecurity Act for South Australia' <https://pir.sa.gov.au/__data/assets/pdf_file/0008/437777/draft-biosecurity-bill-overview.pdf>; Draft Biosecurity Bill 2023 (SA) s 40.

[58] Victoria State Government (2023) Reforming Victoria's Biosecurity Legislation Discussion Paper <https://engage.vic.gov.au/download/document/31630>.

[59] See, for example:

- Gerry Bates (2001) 'A Duty of Care for the Protection of Biodiversity on Land Consultancy Report to the Productivity Commission <https://www.pc.gov.au/research/supporting/biodiversity-duty-of-care/docpobol.pdf>

Earl, Curtis and Allan set out a framework for a biodiversity DOC in Australia.[60] The framework draws on key elements of the common law 'DOC', the concepts of 'taking reasonable care' and 'avoiding foreseeable harm', in its logic. It is intended for use by regional natural resource managers and landholders, and offers multiple pathways for positive management of biodiversity while retaining the capacity to invoke sanctions where management is deemed to be causing foreseeable harm to biodiversity. They suggest that a biodiversity DOC could be phrased in the following way:

> *All land managers have a duty to the community (that values biodiversity), to take reasonable steps to ensure that their management does not cause foreseeable harm to the biodiversity over which they have influence.*

Bates suggests that a biodiversity DOC would need to be complemented by other instruments, such as codes of practice and guidelines, that indicate how the duty may be fulfilled.[61] Standards of care define the boundaries of what is reasonable and practical under the statutory scheme. Standards should be expected to reflect best practice for a particular industry or activity. Best practice has been well documented for some industry practices — pollution control, for example — but will need to be further defined in relation to activities such as land clearance or agricultural practices.[62]

We generally support the idea of introducing a biodiversity duty of care into the new Act. In the face of ongoing biodiversity decline, establishing a clear duty to conserve biodiversity would be a powerful tool to achieve the new Acts objects. We look forward to ongoing discussions about how the duty can be established and implemented under the new Act.

Response to Matters for Consideration and additional EDO Recommendations

Topic 9 – Biodiversity – a shared responsibility	
Discussion Paper Matters for Consideration	**EDO position**
25. The Act could be clear about the respective roles and responsibilities of the community by introducing a 'biodiversity duty of care', which makes the protection of biodiversity a continuous legal and social responsibility.	General support, but further discussion required on how this biodiversity duty of care will be established and implemented.

- Gerry Bates (2003) 'Protecting biodiversity: property rights and the duty of care' Proceedings of the Conference on Rural Land Use Change <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1010668>
- G Earl, A Curtis and C Allan (2010) 'Towards a Duty of Care for Biodiversity' 45(4) Environmental Management 682 - 696 <https://researchoutput.csu.edu.au/files/8780056/PID23015manuscript.pdf >;
- Allan Curtis (2010) 'Towards a Duty of Care for Biodiversity' <https://www.researchgate.net/publication/41414938_Towards_a_Duty_of_Care_for_Biodiversity>.

[60] G Earl, A Curtis and C Allan (2010) 'Towards a Duty of Care for Biodiversity' 45(4) Environmental Management 682 - 696 <https://researchoutput.csu.edu.au/files/8780056/PID23015manuscript.pdf >;

[61] Gerry Bates (2001) 'A Duty of Care for the Protection of Biodiversity on Land Consultancy Report to the Productivity Commission <https://www.pc.gov.au/research/supporting/biodiversity-duty-of-care/docpobol.pdf>.

[62] Gerry Bates (2003) 'Protecting biodiversity: property rights and the duty of care' Proceedings of the Conference on Rural Land Use Change <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1010668>.

26. If the inclusion of a 'biodiversity duty of care' in the Act is supported, it could be tied to relevant administrative powers and to civil penalties.	General support
27. The Act could include provisions so that guidelines and regulations can be made to ensure South Australians understand and comply with a 'biodiversity duty of care' obligation.	General support
Additional EDO recommendations	
V. Develop a biodiversity duty of care in collaboration with legal and scientific experts.	

Topic 10 – Consequences of doing the wrong thing

New laws can only be effective, and achieve their objects, if they are properly implemented and enforced, including through adequate resourcing. In general, EDO is supportive of the new Act introducing stronger penalties and a wider range of civil enforcement options. We strongly support establishing broad provisions for third-party civil enforcement and open standing to enforce breaches of the new Act, including judicial review of erroneous decisions.

In particular, we submit that:

- Third party judicial review and civil enforcement powers are a common feature of environment and conservation laws, and a key accountability mechanism. They should feature in the new Act. Given the public interest in biodiversity conservation, legal standing under the provisions should be broad, and not unduly restricted.

- Privative clauses (clauses that purport to prevent the Court from invalidating the administrative decision in question even where it finds that a jurisdictional error had been made) should be avoided.

- Compliance and enforcement options should include opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

- Opportunities to strengthen compliance and enforcement should extend beyond the new Act. Related frameworks that regulate activities that impact on biodiversity, such as development, and land clearing have the potential to undermine new Act. Enforcement of those frameworks should also be strengthened.

Response to Matters for Consideration and additional EDO Recommendations

Topic 10 – Consequences of doing the wrong thing	
Discussion Paper Matters for Consideration	**EDO position**
28. The Act could seek to align sanctions and penalties for similar offences, having consideration where possible of levels imposed through other jurisdictions.	General support,
29. The Act could enable suitable non-government parties to commence proceedings for offences under appropriate circumstances	General support – see additional EDO recommendations below.
30. The Act could apply a contemporary risk based approach to the types of enforcement actions available such as compliance and remediation orders, civil remedies and other alternative penalties.	General support
Additional EDO recommendations	
W. Include third party judicial review and civil enforcement powers in the new Act. Given the public interest in biodiversity conservation, legal standing under the provisions should be broad, and not unduly restricted. X. Avoid privative clauses. Y. Ensure compliance and enforcement options include opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat. Z. Look at opportunities to strengthen compliance and enforcement beyond the new Act. Related frameworks that regulate activities that impact on biodiversity, such as development, and land clearing have the potential to undermine new Act. Enforcement of those frameworks should also be strengthened.	