

ENREL Submission on the Biodiversity Bill

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OVERVIEW

This submission follows the structure of the Biodiversity Bill 2025 (**the Bill**) but does not include commentary on every provision in the Bill. We occasionally express specific support for provisions in the Bill, where they are novel or, in our view, particularly important to the scheme and worthy of keeping in any future drafts (highlighted in green). We have also made specific recommendations about improvements to the Bill. We would be happy to discuss/explain these recommendations further with the Department.

We have addressed the specific questions that were put to the public in the Department's survey in Annexure A and, where relevant, additional details on those questions are included in the body of the submission.

SUPPORTED INITIATIVES

We support the articulation of a general duty of care, which creates a legislative, values-driven baseline for appropriate behaviour for all actors in this area. We have some caveats – that actions can only be brought by Government and that remedies are limited to 'make good' provisions. However, the duty provides a starting point for addressing the significant impacts of environmental harm, such as the destruction of Mangrove ecology in St Kilda. The duty also creates an opportunity for the Government to develop robust action plans to remediate any such harm, and we look forward to the Government taking such steps when the Act is passed.

We support the new right for third parties to initiate action, appeal, and participate in decision making. There is a long overdue need to include third parties in the decision making and biodiversity protection process. Third parties may also often be in a position to bring value to the decision-making process through expertise and experience in various ecologies. This reform is also consistent with the Bill's objects.

We support the 'No Development' orders which can be made under s 116. A similar power exists under the *Heritage Places Act 1993* and has operated as a powerful deterrent to prevent demolition of heritage places. It will do the same in relation to clearance of habitat.

ENREL'S CORE CONCERNS

Many of the serious issues that have prevented biodiversity legislation from effectively protecting nature elsewhere are replicated in this Bill. In particular, ENREL is concerned to see that:

- the Bill proposes to allow the Minister to 'set aside' or ignore the Act (when passed) for any reason and without any constraints or consequences.
- the Minister has been given substantial discretion on important powers including when to identify and protect critical habitat and the development of important biodiversity policies and these powers need constraints.

- there is limited transparency for Ministerial decision making. We have recommended in relation to other aspects of the Bill that robust provision for evidence-based decision making be incorporated, and that decisions be transparent, accountable, and subject to challenge. We submit that a similar approach should apply to Ministerial decisions.
- We would like to have seen more ambitious goals for the Bill – for example incorporating commitment to no further extinctions and limiting net losses across the biodiversity realm. We feel that the critical urgency underpinning biodiversity loss calls for aspirational goals to demonstrate the importance of this reform.

In addition, the Bill creates inconsistent definitions and treatment of native biodiversity (i.e., animals and plants). This is understandable, given that many of these provisions originated in existing legislation, particularly the *Native Vegetation Act 1991* and the *National Parks and Wildlife Act 1972*. Nevertheless, clarity and consistency are desirable in a new piece of legislation. We make recommendations to improve this aspect of the Bill.

Provision for First Nations expertise in conservation in SA is also a desirable step forwards. However, the Bill falls short of empowering and resourcing First Nations peoples to lead the conservation of cultural significant values, which ENREL considers to be a missed opportunity.

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1. PRECONDITIONS FOR SUCCESS

1.1. Remove provisions that would undermine the Act in its entirety

At present, clauses 4(1) and 6(5) expressly place the Biodiversity Act in a position that is subsidiary to any other legislation. Even given the political sensitivity of strong biodiversity protections, this is unacceptably broad.

In some cases, the Biodiversity Act when passed will *necessarily* affect the operation of other Acts. The *Planning, Development and Infrastructure Act 2016* and the *Mining Act 1971* offer clear examples of when it is precisely the purpose of this legislation to affect how activities under those Acts are undertaken.

Clauses 4(1) and 6(5) (and the associated cl 6(6)) essentially allow the relevant Minister to choose when, where and how they wish to implement the Biodiversity Act; or they could, by proclamation, choose not to implement it at all, in any area of the state without even having to put that change to Parliament! This is an extraordinary power that risks wholly undermining the legislative regime.

RECOMMENDATION: ENREL strongly recommends that clauses 6(5), (6) are removed from the Bill and clause 4(1) is narrowed.

1.2. Give the Biodiversity Act primacy over competing legal instruments

One of the most fundamental flaws in biodiversity legislation around Australia (and elsewhere in the world) is that it is siloed and, either in drafting or in practice, subsidiary to almost all other instruments governing land use (such as land use planning, mining, forestry, pastoral land management). In his recent review of the NSW Biodiversity Act, Dr Ken Henry AC observed that the NSW statute's objectives 'lack primacy, being undermined by a range of other legislation', which limits the Act's effectiveness in restoring, conserving and enhancing biodiversity (p 3).

Having embarked on a process of developing brand new legislation for biodiversity conservation in SA, it is deeply disappointing to see this flaw, in particular, replicated in the draft Bill. We understand the political nature of this issue and the complexity of seeing it implemented. However, we adopt Dr Henry's comments in the NSW review, because they are absolutely relevant to the draft Bill and the protection of nature in this state:

For centuries, economic development has largely ignored the inescapable primacy of the environment. Ultimately, this has damaged both the environment and development (p 15).

[In] order to meet its objects, the Act should have primacy over competing pieces of legislation (p 4).

The case for giving primacy to environmental repair is inescapable. Our future depends upon it... (p iii).

RECOMMENDATION: introduce a 'primacy provision' in the next draft of the Bill to ensure that the Bill can achieve its objects across competing land uses and other activities in SA.

Such a provision may be expressed to clarify that, except where the contrary intention is clear, this Act [the Bill] will take primacy over any other Act. Alternatively, such a provision could state that the objects of the Biodiversity Act are a mandatory consideration in decision making under any other Act that relates to or has an effect on biodiversity in SA. This recommendation will need to be implemented throughout the Act and not only in a statement of ambition that has no legal teeth.

1.3. Mainstream biodiversity across government decision making

Biodiversity mainstreaming (also described as ‘biodiversity integration’) is closely related to the idea of providing primacy for the Biodiversity Act. Mainstreaming involves ensuring that biodiversity and the services it provides are appropriately and adequately factored into all areas of law, policy and practice that are related to (or rely on) nature.¹ The concept is specifically directed at overcoming siloes in biodiversity laws and maximising the coherence and effectiveness of these laws across a whole jurisdiction and all functions of government. Relevant areas of law, policy and practice in SA that affect and are relevant to biodiversity conservation include fisheries, agriculture, development and land use planning, mining and forestry.

Mainstreaming has been a core concern for climate law for many years, and it is emerging as major consideration for biodiversity law reform. This is unsurprising because climate change and biodiversity loss are dual, intersecting, extremely costly global crises and the drivers and effects of both crises are already being felt across society, industry and government, in every sector and every community. Targets 14 to 23 of the 2022 Kunming-Montreal Global Biodiversity Agreement (the implementation agreement for the Convention on Biological Diversity, to which Australia is a signatory and which ought to flow through into Australia’s national and state-based biodiversity laws), sets out ‘tools and solutions for implementation and mainstreaming, including full integration of biodiversity values across government’.²

Mainstreaming can be incorporated at different scales of governance, including through management plans, funding arrangements, and in the biodiversity policies that are foreshadowed in the Bill. However, ENREL recommends that mainstreaming be given legislative effect to ensure that it is prioritised across government. That is, the Bill should provide for biodiversity to be a consideration in all other areas of administrative decision making across the SA government, and for any actor that is bound by the provisions of the Biodiversity Act. This kind of provision is included in the *Climate Change Act 2017* (Victoria) in the following terms:

Section 17 Decision makers must have regard to climate change

- (1) This section applies to any decision made or action taken that is authorised by—
 - (a) the provision of an Act specified in Schedule 1; or
 - (b) any other prescribed provision of an Act specified in Schedule 1; or
 - (c) any prescribed provision of a subordinate instrument made under an Act specified in Schedule 1.
- (2) A person making a decision or taking an action referred to in subsection (1) must have regard to—
 - (a) the potential impacts of climate change relevant to the decision or action; and
 - (b) the potential contribution to the State's greenhouse gas emissions of the decision or action; and
 - (c) any guidelines issued by the Minister under section 18.
- (3) In having regard to the potential impacts of climate change, the relevant considerations for a person making a decision or taking an action are— [...]

¹ Secretariat to the Convention on Biological Diversity, ‘Mechanisms for Implementation: Biodiversity Mainstreaming’ (2024), <<https://www.cbd.int/mainstreaming>>.

² Secretariat to the Convention on Biological Diversity, ‘Mechanisms for Implementation: Biodiversity Mainstreaming’ (2024), <<https://www.cbd.int/mainstreaming>>; and see the targets in full, here: <<https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>>.

RECOMMENDATION: introduce a provision in the Bill along similar lines to the provision extracted above, to promote and support biodiversity mainstreaming across SA government and ensure that biodiversity is considered as a key value to be protected in decision-making that affects nature, whether or not it occurs under the Biodiversity Act.

2. DEFINITIONS

2.1. Comments on specific definitions

Animal Product

Does this include for genetic material or eggs which are not specifically identified in the interpretation section? Where are eggs defined. Should 'animal product' include any part of the body of an animal or any excretion or secretion or other product of the body of the animal? Should genetic material be included as a discreet item? Genetic material might be in the form of sperm or cells in which genetic indicators are present. These may be obtained from live animals for breeding or testing, they might also be obtained from museum specimens and from roadkill, among other things. At present researchers do not have to get a permit other than from the holder of the specimens to obtain or use this material – is it desirable to create another layer of permitting process to cover this? Genetic material that is sourced illegally in the various ways outlined in the Bill, with the intention of being used for breeding or gene editing, would not subject to permit provisions. This would appear to contravene the objects and principles of the Bill.

Recommendation: genetic material to be used in contravention of the objects and principles of this Act be included in this definition, with the proviso that there is no intention to limit or compromise access to genetic material for scientific research.

Ecological community

Ecological entity

Ecosystem

The definition of these terms in the Regulations will be critically influential in the operation of the Act. Clarity (to avoid dispute about definitions) and specificity (to ensure that definitions in the Regulations do not dilute or sections in the Act) will be essential. It is difficult to provide fully informed commentary on aspects of the Bill without these definitions being provided.

Firearm

Does the term 'firearm' include crossbows and bows and arrows (which hunters commonly use)? The Firearms Act (SA) 2015 defines firearms as using bullets propelled by any means or otherwise as defined by regulations.

Recommendation: if the intention is to cover the use of crossbows and bows and arrows for hunting, include them in the definition of firearm.

Harvesting

There is uncertainty around this definition. As described it appears to reflect hunting activities with harvesting of animal products for consumption or display. Keeping an animal in captivity to harvest products, OR removing products from an animal without killing it, should – but do not – come within this definition. This might particularly relate to keeping animals to harvest genetic material for export or breeding.

We also question how the killing of animals to prevent predation or crop damage might interact with this definition in an easy-to-understand way.

Recommendation: that an expanded definition of hunting and harvesting be devised to cover activities in addition to taking and killing animals in the wild or on private property be adopted across the Act. Exceptions (for example permits to cull) can be provided to any unified definition.

Hunting

See comments above on harvesting.

Native Plant

We have had the benefit of reading the submission from the Wildlife Crime Hub and, in particular, their comments about this definition in the Bill. We find it compelling and we support it in full. In particular, we adopt the following reflections from that submission:

We recognise that the intent of a broad definition of native plants is to recognise that non-indigenous native species can have habitat value in certain circumstances, for example providing a food source or nesting habitat for native birds. It also recognises the southerly shift of climate under global warming, although South Australia's northern arid environment provides a pool of species and genotypes for pre-emptive introduction to southern regions.

We propose that the Biodiversity Act definition for native plants should be the same as in the NV Act, that is species found within South Australia. Then a further provision within this definition could allow for Ministerial declaration of species from elsewhere in Australia as native plants for the purposes of the Act, where analysis has shown that protecting these from clearance would have net ecological value for South Australia's biodiversity. The Act could also separately allow for recognition of the rare/threatened status of species in all other jurisdictions and afford them the same protections regarding restrictions on keeping and trade, rather than having to do this via an all encompassing native plant definition.

Plant

Prefer definition "Plant" as "any species included in the Plant Kingdom" replicating the definitional approach to animals. Differences between members of the Plant Kingdom are significant and bundling them together can be problematic, particularly in the case of species such as cyanobacteria which is a serious pest.

Poison

Any substance that endangers an animal. Why is this limited to animals? Substances that harm plants or plant communities are not

specifically referenced in the Bill in this way. This seems to be a gap. There are circumstances when pollutants will poison plants, but also circumstances when poisons *per se* may be used and damage plants or plant communities in the same way that poisons will harm individual or communities of animals.

Protected animal

We note that other submissions will comment on the nuanced implications of a generic inclusion of species among other species. Some species are not necessarily included in these definitions (for example single-celled communal organisms, and bacterial organisms such as cyanobacteria).

Recommendation: that more detailed attention to the practical impact of these generic definitions be obtained with a view to more precise definitions to be applied in different contexts.

Protected habitat

It is not clear if this definition is intended to include nesting holes and habitat in trees.

Recommendation: Noting that in many Australian species only old trees including dead trees offer this kind of habitat, specific protection for this known habitat type should be included in the Act. Additionally, some species use nesting places sporadically so the definitions could also extend to built nests and nesting boxes. We also recommend that the various items included (burrows, nesting holes, etc) be protected whether they are currently inhabited or not.

Possible wording:

protected habitat means—

- (a) the burrow of a wombat; or
 - (b) the habitat of a protected animal declared by the Minister by notice in the Gazette to be protected habitat for the purposes of this definition, including burrows, nests, hollows or shelter provided by trees dead or alive, or any other such habitat used by a protected animal;
- and includes such habitat—
- (c) regardless of whether it is inhabited by a protected animal continuously or intermittently; and
 - (d) regardless of whether the habitat has been built or constructed (including habitat such as built nests and nesting boxes) and
 - (e) regardless of whether the burrow or nest is in living or dead vegetation.

Substantial damage

It is pointed out later in this submission that sometimes stock animals are deliberately grazed in native scrub as part of ongoing management strategies. This activity will usually be covered by permit. However, stock can also be allowed to interfere with native

vegetation strata deliberately or negligently which may result in destruction or significant damage.

Recommendation: allowing stock to damage native plants i.e. via consumption, trampling or ringbarking be specifically included in this definition.

Threatening process

Recommendation: this term should cover both a *single threatening act* and a *process*.

Stratum of native plants

Why is the stratum definition limited to 20 years? This seems to place unnecessary restriction on the capacity to protect and enhance vegetative strata that have not been subject to degradation for longer periods of time. For example, landscapes in arid pastoral land that have not been subject to degradation for more than 20 years may have partially remediated over time and be equally worthy of protection.

3. OBJECTS AND PRINCIPLES (cl 7, 8)

3.1. Objects of the Bill

ENREL generally supports the objects of the Bill set out in clause 7.

We note that, at present, there is no connection between the objects of the Bill and its substantive and procedural provisions. That is, unlike in clause 8, there is no specific obligation on decision makers to implement the Act in a way that gives effect to, achieves, or even helps to promote the objects of the Act. Their significance to decision making under the Act is left to be implied – a statutory interpretation task – but is not expressed as an obligation or directive to decision makers. This approach is insufficient. It undervalues the important objects that are expressed in clause 7 and undermines their potential power to drive better biodiversity outcomes in the State. It will undoubtedly lead to legalistic skirmishes in the event that developers or other actors seek to challenge control or regulation on the basis of uncertain statutory definitions.

RECOMMENDATION: at the beginning of clause 7, insert the phrase ‘A person or body engaged in the administration of this Act must work to achieve the objects of this Act’ (as is the case in clause 8).

The current expression of the objects also misses an opportunity to make robust and ambitious statements such as no new extinctions; no net biodiversity loss; no net native vegetation loss, and a call for the cessation of clearance that results in fragmentation of habitat and transit routes.

RECOMMENDATION: The critical impact of biodiversity protection and remediation begs a more aspirational commitment in the legislation. We endorse more explicit statements about the goals of the Act which will highlight the values that underpin this legislation and commitment to stopping degradation.

In terms of landscape ecology, the Act lends itself to being viewed as a mechanism for managing particular projects or impacts on comparatively limited spatial scales (ie regional or local impacts). However, it does not seem to offer a perspective of landscape scale impacts of activities in particular vegetation clearance. As understanding of the impacts of clearance of any native vegetation, types of vegetation, and connected areas of vegetation, on global

warming generally and on species (including species that are not yet at threat) advances, there must be provision in the Act for viewing proposals and activities from a larger landscape scale than on a local/regional scale.

RECOMMENDATION: that consideration be given to broader statement of objects in terms of sustaining and remediating ecologies at a national and landscape scales.

RECOMMENDATION: reflect preferences of First Nations scholars by using the term ‘knowledges’ rather than ‘knowledge’ (see Part 16, below). Specifically, we recommend the following small but important revisions to cl 7(d), to lift the significance of the role and knowledge of First Nations peoples in this object clause:

to recognise and respect that First Nations persons, who are the enduring custodians of the lands and waters of the State, have a fundamental role in, and knowledges of, caring for Country, including in relation to conserving and restoring biodiversity

3.2. Directing Principles in the Bill

ENREL supports the use of directing principles to guide the implementation of the Bill.

RECOMMENDATION: in addition to the principles set out in the Bill, ENREL recommends explicit recognition of intergenerational equity as a directing principle. In the absence of a commissioner for future generations or similar,³ this principle would help to encourage government decision makers to reflect the long-term thinking that is necessary for biodiversity conservation, particularly as the climate changes and as the government invests heavily in pursuing the benefits to SA of leading the transition to renewable energy (the renewable energy transition has important implications for global, national and state climate mitigation goals, but is also particularly significant for SA environments).

RECOMMENDATION: consider rewording cl 7(e) and 8(a) as follows:

- 7(e) *To ensure that current generations' interactions with, management of, and use of biodiversity, means the health and resilience of biodiversity is maintained or enhanced, for the benefit of future generations;*
- 8(a) *To ensure that current generations' interactions with, management of, and use of biodiversity, support the environment, economy and wellbeing of today's generation and future generations;*

Decision making and risk evaluation to manage environmental and biodiversity threats is an emerging field. Important concepts such as the application of the precautionary principle are regularly incorporated in literature and in judicial decision making. It would be appropriate for this Bill to explicitly reference that concept in providing guidance to decision makers about decision making that meets the interests of future generations.

RECOMMENDATION: include the precautionary principle as a factor in decision making under the Act.

³ The best-known example of which is the Office of the Future Generations Commissioner for Wales, in the UK (<<https://www.futuregenerations.wales/>>); other examples include Scotland's Parliament's Futures Forum, and Finland's Parliamentary Committee for the Future. These administrative bodies are having a beneficial effect on lengthening the horizon for policy and planning in government.

4. THE GENERAL DUTY (cl 11)

ENREL generally supports the concept of clause 11 of the Biodiversity Bill 2025 (SA) ('the Bill') which proposes to create a general biodiversity duty.

We note that the idea of a general duty has long been a feature of the *Environment Protection Act 1993* (SA) and has more recently been included in the *Landscape South Australia Act 2019* (SA). Similar duties have also been included in environmental legislation in other Australian jurisdictions.

As an example of principle-based regulation, we consider that a general duty has a rightful place within the proposed spectrum of compliance and enforcement tools that range from criminal sanctions to civil penalties, civil enforcement, and administrative enforcement tools.

Clearly, the incorporation of a general biodiversity duty such as that proposed is new for South Australia. It is therefore understandable that there will be a need for various 'regulatory conversations' with industry and the community to determine the content of the concept of 'reasonable and practicable measures' under clause 11(1) of the Bill and the matters that are covered under clause 11(2) of the Bill. ENREL would welcome the opportunity to make submissions on those matters at the appropriate time.

We note that the duty, as proposed, is broadly a duty to refrain from harming the environment rather than a duty to take positive actions with respect to biodiversity. In this regard, we highlight that while the clause 7(a) and 7(b) do contemplate promotion, restoration and enhancement of biodiversity such that 'there is an 'improvement in the state of biodiversity at all scales and to build the resilience of biodiversity, including resilience to the impacts of climate change,' we note that the proposed principle in clause 8(a) refers specifically to the requirement to embrace 'new and transformative ways of thinking and acting to support the environment, economy and wellbeing of today's generation and future generations.'

We remain concerned, therefore, that the obligations behind the duty may not be enough to stop and to reverse the decline in the State's biodiversity. Accordingly, we encourage the government to ensure that the legislation adopts to the greatest extent possible an absolute net gain approach to the protection of biodiversity, lest the general duty be pitched unambitiously and simply as a duty to do the same as we're currently doing.

Clearly, however, the inclusion of a duty to prevent more harm is welcome. Nevertheless, we consider that the proposed definition of harm in clause 11(6) of the Bill ought to include the risk of harm.

We note that a failure to comply with the proposed duty itself, will not amount to an offence. ENREL considers it crucial that clause 11(5) of the Bill be retained to ensure that a breach of the environmental duty can trigger other enforcement actions such as the proposed compliance order, the proposed reparation order or the proposed powers of the ERD Court.

As with any consideration about ensuring that the proposed legislation contains appropriate mechanisms for compliance and enforcement, ENREL encourages the Parliament and, through it, the government to ensure that those whose task it is to ensure compliance with the legislation are properly and adequately resourced to carry out this important task.

We also express some concern with the "knows or ought reasonably to know" provision in the general duties. This potentially offers bad actors the opportunity to avoid accountability for

harm and encourages entities not to inquire or understand the rules. There may be good reason for such a provision in the case of small actors with low legislative or bureaucratic literacy but is not acceptable for large operators in any area of industry or production to be able to avoid liability on this basis. A high bar needs to be set to ensure that those harming the environment cannot confidently do so and plead ignorance of relevant scientific, indigenous or environmental information. There must be a demonstrably high duty on entities to understand the impact of their actions and plans, to explore means to avoid or prevent impact, and to have regard to available evidence/technology/ecological solutions to avoid harm.

5. STATUTORY BODIES (DIV 2)

We set out here some general observations on the creation of statutory bodies in the Bill.

5.1. Administrative remedies

The format and structure of these provisions is fairly standard for SA legislation and similar to what happens under other related legislation e.g. the Environment Protection Act. They can be issued by the Minister, the NPCAC or an authorised officer. In our experience, these provisions in other legislation have worked reasonably well. There is a certain skill to drafting them particularly with the directions.

Interestingly, if the requirements of a compliance or reparation order are not complied with the power to take any action required by the order rests with the Minister, *not* with the NPCAC or the authorised officer (see cl 111(1)). An authorised officer can take action on the Minister's behalf but presumably at the direction of the Minister. It does seem a bit restrictive and could make decisions in this area very political. We presume it relates to funding, but why the NPCAC as the expert vegetation clearance body cannot take the action itself is unclear.

5.2. Appeals

There is no apparent merits appeal for applicants if consent is refused for an application to destroy, damage or disturb a critical habitat feature of critical habitat. We note that the NPCAC will be required to undertake some consultation in relation to such applications but with whom and how that consultation will occur is to be set out in regulations cl 89(5). It appears that any person will be able to make a representation to the NPCAC about the proposed clearance and be heard in relation to cl 89(6) and (7). There is no right for third parties to appeal against the NPCAC's decision on those applications. We believe that there should be. Contrary to popular misconceptions spread in the late 1970s and early 1980's, giving the community a comprehensive right of third-party merits review in a forum such as the Environment, Resources and Development Court does not lead to a flood of litigation.

RECOMMENDATION: third party merits review should be available for NPCAC's decisions on clearance applications.

5.3. Miscellaneous provisions

Clause 77 states that the Minister has discretion as to whether to prepare an action plan. Our suggestion is that this is either a mandatory provision, or that the Minister be required to determine if an action plan will be prepared for a nominated species, and reasons for that the decision will be published. This will ensure accountability and transparency, and also provide understanding of the varied considerations (including cost, likelihood of success, competing priorities) that must be balanced in deciding to take action.

Clause 160 sets out the requirements for a State Biodiversity Plan which has to be prepared and published within two years of the date when the Act is proclaimed. We have no indication when that might be. The State Biodiversity Plan must be prepared as soon as possible because so many decisions under the Act are dependent on it. For example, when the Minister's concurrence is required in relation to certain development decisions under the *Planning, Development and Infrastructure Act 2016*, the Minister must have regard to and seek to further the objects and principles of the Biodiversity Act and have regard to the State Biodiversity Plan. (cl 165).

From a funding perspective: the preparation of the State Biodiversity Plan, Biodiversity Policies (cl 161) and the Biodiversity Register (cl 160) will also require significant funds. There needs to be a firm commitment from the government to make that money available. While this is not a task for the Bill, ENREL looks forward to the Government announcing sufficient funding for full implementation of the Act's provisions, when it is passed.

5.4. A general point about terminology

The Minister should not "seek to appoint". The Minister "should appoint". This should reflect an expectation that appropriately qualified people *are* included in these bodies and that the field of appointees is not limited by political preferences.

5.5. Biodiversity Council

Clause 16 lists the functions of the Biodiversity Council. Cl 16(h) provides that the Council "...can enter into conservation agreements and advise the Minister in relation to biodiversity agreements..." However, it is not clear within the Bill whether the Biodiversity Council a legal entity. What is its legal status? Is it able to enforce any agreement, if not how would an agreement be enforced, and by what entity?

At present, the Bill gives the Minister power to appoint every member of the Biodiversity Council. This would allow a future Minister to appoint members to the Council that are more likely to vote in the Minister's or Government's interests. While a wholly independent board – in the nature of a governance board – is another option that has some desirable attributes, we anticipate that the Government will prefer the opportunity to make appointments to this particular body. Nevertheless, ENREL's preference is to avoid the Council from being (or being seen to be) a centralised body that is wholly controlled by government.

RECOMMENDATION: ENREL recommends taking an approach that balances Ministerial and peak body nominations, along the lines of the approach taken in the Native Vegetation Act. For example, certain nominated groups could recommend three people with the appropriate skills and expertise, from among which the Minister would choose the final appointment.

5.6. Native Plants Clearance Assessment Committee (NPCAC)

We support the qualifications set out in cl 18(3), that members of the NPCAC should be able to demonstrate their commitment to action to address conservation, restoration and enhancement, and understand the issues associated with biodiversity conservation.

While we accept that setting out the details of the membership in regulations is a way of improving the flexibility of the Act, at present, every aspect of the composition of the NPCAC is left to the regulations. We suggest that, given the Committee will have an enforcement role

(cl 19(e)), it would be appropriate and desirable to set some boundaries around the kinds of expertise that might be required.

RECOMMENDATION: provide guidance about the kinds of expertise that must be represented on the NPCAC to ensure that it is equipped, and trusted, to play an enforcement role that is seen to be, and is in fact, independent from both government and industry.

We support cl 18(5) providing that the chair of the NPCAC cannot be a member of the Public Service. However, there is no prohibition on the chair being a member of the Property Council or of a major development company, and we submit that such an appointment would be equally problematic for the reputation of the NPCAC and its capacity to fulfil its role.

RECOMMENDATION: include a new provision (as cl 18(6), shifting the current (6) down to become cl 18(7)) that indicates the values or characteristics that must be held by the chair to ensure that the position is held by someone independent, skilled and respected. This could be along the same lines as cl 18(3), or draw on provisions that require certain skills for a statutory appointment, which are common in legislation (e.g. the Chief Public Health Officer ‘must have qualifications and experience in the field of public health, or a related field, determined by the Minister to be suitable for the purposes of appointment to the position’ s20(3), *SA Public Health Act 2011*).

6. TREATMENT OF ANIMALS UNDER THE BILL

In this section, we address the question of animal protection under the Bill. Threatened species and community listings is addressed separately below.

Definition of ‘protected animal’

animal includes any species of the animal kingdom other than a human being;

protected animal means—

- (a) a native animal, excluding a fish, amphibian and invertebrate; or
 - (b) a fish that is a threatened species and is of a class that is prescribed for the purposes of this definition; or
 - (c) an amphibian or invertebrate that is a threatened species; or
 - (d) any animal of a species declared by regulation to be a species of protected animal,
- but does not include an animal of a class excluded from the ambit of this definition by the regulations;

ENREL supports the broad definition of ‘animal’ under cl 3(1) of the Bill.⁴ However, it is disappointing that the definition of ‘protected animal’ under the same provision specifically excludes fish, amphibians, and invertebrates (unless they are a threatened species).⁵ All species of native animals deserve and require consistent protection in line with the Objects and Principles of the Bill.

⁴ ‘[A]nimal includes any species of the animal kingdom other than a human being’.

⁵ See definition extracted above.

The Bill's Objects focus on the promotion, protection, restoration, and enhancement of biodiversity in South Australia. Invertebrates, in particular, are critical to achieving these objects. Whilst we appreciate the difficulties posed by a widespread data deficit in relation to invertebrates, these species are vital to biodiversity and to the objects of the Bill and they require protection. If these species are not captured by the definition of protected animal, they will most likely be excluded from protection because the data deficit will mean, in practice, that they are not able to be listed as a threatened species. The omission of amphibians in the definition of protected animal is similarly concerning – particularly given the importance of their interaction with invertebrate species in ecosystems.

We understand that the protective provisions of this Biodiversity Bill need to be balanced so that enforcement actions are not triggered against activities that should not qualify as breaches of the Act, such as the collection of tadpoles by school children (other than in national parks) or swatting native flies on a hot day. However, we encourage the government to consider an approach that manages that balance but still achieves high levels of protection for invertebrates and amphibians, which are critically important to SA ecosystems.

We make the following recommendation about cryptic or data deficient species as a way of circumventing one of the more common shortfalls in protection for invertebrates (among other species).

RECOMMENDATION: include a new category of 'cryptic or data deficient species' that can be listed on a statutory list, nominated by members of the public or scientific community and recommended for listing by the Scientific Committee. Listed cryptic or data deficient species should be included within the definition of a protected animal, as a precautionary approach to conserving biodiversity that is not well understood.

With regard to fish, we acknowledge that the government is keen to avoid statutory duplication of protections, while also improving the protection of native fish in South Australia. We strongly support this goal. We are disappointed that cl 81(2) relating to the protection of threatened species of fish delegates the protection of these species to a piece of legislation which is primarily focussed on development of aquatic resources.⁶ However, we do understand that the existing fisheries arrangements may be beyond the scope of this statutory drafting task. In this respect, we strongly support the requirement in cl 81 that the Minister must consult with the fisheries Minister to determine appropriate mechanisms for protecting threatened species of fish. **We encourage the government to continue to seek ways to enhance protections for native fish, including by strengthening protection for these excluded species through the Biodiversity Act regime and its regulations and policies.**

Allowing animals to be exempted from the protected animal definition by regulation is a concern. ENREL considers that this should only be allowed if strict processes are in place to ensure vetting and oversight of any such decisions by the relevant Minister or Department.

In addition, we provide the following specific feedback:

Cl 62	Should this definition include genetic material? See comments on definitions (above).
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⁶ *Fisheries Management Act 2007* (SA) s 7.

- Cl 76 It is not clear whether the provisional listing automatically lapses after 2 years. There should be an option to renew provisional listing after 2 years in case it takes longer than expected to manage this process.
- Cl 82 Linking protection of vegetative habitat to threatened species fails to recognise the intrinsic value and importance of vegetation particularly at landscape scale to landscape resilience, climate change limitation, warming, human wellbeing, etc. The Act should recognise vegetated landscapes (native vegetation in all definitional aspects) as valuable *per se*. It is also likely that clearance of vegetation at various scales including landscape wide can result in species that are NOT threatened becoming threatened due to clearance or fragmentation of habitat or transit routes. Rather than ask “are there threatened species in that area” the question should be “will any species in that area be at risk of moving closer to threat” as a consequence of the activity.
- Cl 87 As above – fails to recognise intrinsic value of vegetation.

6.1. Regulated activities

It is encouraging to see such a broad range of acts and activities encompassed by the list in cl 62 of the Bill, though there is a noticeable omission of any reference to ‘harm’ to protected animals - despite references to ‘harm to biodiversity’ being made frequently throughout the Bill. We do not support the exclusions for dingoes that are listed in Schedule 4(d); see ‘dingoes’, below. Schedule 4(e) is expressed in extremely broad terms, creating a discretion that is almost unconfined, provided regulations can be passed. As we noted at the outset of this submission, ENREL strongly advocates against broad discretions given that they risk sidestepping the purposes and operation of the Act.

An alternative view is that all acts or activities in respect of protected animals ought to be regulated – and that cl 62 ought to be redundant. A more appropriate approach would be blanket regulation of acts or activities in respect of protected animals with a list of acts or activities exempted from regulation. Any such exemptions should only be applied in line with the Objects of the Bill and not for the purpose of protecting crops, stock, machinery or infrastructure.⁷

The provision in cl 67 gives the Minister the power to declare that protected animals may be ‘taken’.⁸ The proposed legislation does not require any particular investigations be made by the Minister prior to making such a declaration, nor does it provide avenues for appeal of any such declaration. The declaration is to be made on the basis of the Minister’s ‘satisfaction’ that ‘the taking of the species at levels that could reasonably be expected as a result of the declaration would not reasonably cause the species to be considered for assessment as a threatened species...’⁹ This is woefully insufficient. If a protected animal is to be permitted to be caught or killed, at a minimum, expert opinion should be sought and data collected as to its populations and potential risk to biodiversity.

⁷ See for example, schedule 4, (c)(iii).

⁸ ‘[T]ake – (a) with reference to an animal, includes any act of catching, restraining, killing or injuring...’ cl 3(1), *Biodiversity Bill 2025*.

⁹ cl 67(2)(b).

RECOMMENDATION: place constraints on the power to approve a protected animal being ‘taken’, including an obligation on the applicant to demonstrate that the species will not be caused to become threatened as a result of the activity, including a power to refer the application to the Scientific Committee for recommendation to the Minister.

6.2. Penalties and offences

ENREL notes the increased penalties applicable to offences relating to carrying out or undertaking a regulated act or activity without a permit. These increased penalties indicate the serious nature of the offences, particularly where they relate to interfering with protected species. However, on penalties generally and the limitations on the effectiveness of increased penalty rates, see ‘ENFORCEMENT – CRIMINAL LAW’, below.

6.3. Dingoes

Dingoes are a threatened species in Australia and one of our most ecologically and culturally significant native animals. They are known to have a ‘trophic cascade’ effect on the ecosystem by reducing numbers of introduced predators, protecting plant species, and indirectly helping other native species to survive.¹⁰ Despite this, they are routinely killed, not only in South Australia, but across the nation – in large part due to pressure from the animal agriculture industry. One of the most prominent arguments is that dingoes are harming or killing stock animals such as sheep. This is sometimes referred to as a ‘wild dog’ problem, however in Australia true wild dogs do not exist – recent research has shown the 99% of ‘wild dogs’ caught in Australia were either pure-bred dingoes or more than 50% dingo.¹¹

The Bill proposes to exempt the need for a permit when managing dingoes by including the ‘taking’ of dingoes in the list of exclusions to regulated acts or activities relating to protected animals in Schedule 4. The provision proposes to exempt individuals from requiring a permit to kill dingoes, if they are complying with an obligation under the *Landscape South Australia Act 2019* or the *Dog Fence Act 1946*; or if the dingo is ‘causing, or is likely to cause, damage to stock’. This provision is strongly opposed. It puts far too much responsibility on/trust in individuals to understand and apply the relevant legislation and does not reference any requirement that their compliance be investigated or monitored. It also does not provide any interpretation of what is meant by ‘damage’, or ‘stock’. Consequently, individuals are essentially given discretion in the killing of a threatened native species.

6.4. Kangaroos

Clause 66 of the Bill refers to ‘[m]anagement plan in relation to harvesting relevant protected animals’. The list of ‘regulated protected animals’ under cl 66(9) consists solely of five species of kangaroo and one wallaby (with the addition of any further species ‘prescribed by regulation for the purposes of this definition’). It is concerning that there is a lengthy provision dedicated to the commercial slaughter of one of Australia’s most prominent native animals.

The use of the word harvesting, while perhaps technically accurate, is misleading and confronting. A more appropriate term would be ‘exploiting’ or simply ‘killing’. The term is defined by the Bill to mean ‘to kill the protected animal in the wild; or to capture the protected animal from the wild and then kill it, in order to sell an animal product of the animal or to use it for any other purpose’.

¹⁰ <https://animalsaustralia.org/our-work/wildlife/dingoes/>

¹¹ <https://animalsaustralia.org/our-work/wildlife/dingoes/>

Kangaroos have existed in Australia for millions of years and are a critical part of the Australian bush – and therefore our biodiversity. They are one of the few species who control their own breeding and will limit their own populations. In addition to feeding on native grasses they are a vital component of regenerating the bush, and ecosystem processes, which they participate in through behaviours such as soil turnover in their diggings.¹² Unfortunately for kangaroos there is now an international market for their meat and skin, which has resulted in a thriving commercial slaughter industry in Australia (including South Australia). Despite public concern for the brutal treatment of the kangaroos and joeys caught in this trade and the concerns relating to habitat destruction and threats to native wildlife in SA, the kill quotas for these animals have recently been *increased*.¹³

Concerns have been raised by stakeholders about the methods by which kangaroo populations are estimated and there is some argument that the populations are greatly overestimated for the purposes of justifying lethal measures of control. Should the killing of native species such as kangaroos be lawful, it must only be after scientific methods of data collection are reliably used to determine the current populations and the likely impact of any lethal methods of control on both the species to be killed, as well as the ecosystem in which they participate and the risks to biodiversity at large.

There are differing perspectives on the concept of harvesting native species in Australia. There are arguments that humane harvesting of native animals is environmentally beneficial and is consistent with efficient use of natural resources whilst reducing the damage of other introduced species. On the other hand, there are arguments that management of native species should never involve lethal force and harvesting is never appropriate. We have indicated above (in our comments on the Bill's definitions) that the definition of harvesting and hunting are somewhat vague and possibly contradictory. The Bill appears to accept at a principled level that harvesting of native animals is acceptable subject to conditions.

7. LISTING ARRANGEMENTS – THREATENED SPECIES, COMMUNITIES, ECOLOGICAL ENTITIES

7.1. Threatened species and ecological communities

ENREL supports formalising threatened species and community listing processes in legislation. This is a significant improvement on existing arrangements, and we look forward to seeing South Australia adopt the Common Assessment Method for listing species and communities that is in place elsewhere in the Country.

Clause 71 of the Bill allows the Governor, on recommendation by the Minister, to regulate the criteria to be applied to determine the eligibility of native species, ecological community or ecological entity. ENREL is concerned that delegating this process to the regulations avoids oversight on an extremely important issue. It is also odd that cl 72 provides that the list will be established by the Minister 'in accordance with processes determined by the Minister or prescribed by the regulations'. This has the potential to be haphazard, non-transparent and unreviewable.

¹² <https://www.kangaroosalive.org/about-roos>

¹³ <https://animalsaustralia.org/our-work/wildlife/sa-kangaroo-killing-inquiry/>

RECOMMENDATION: remove the words ‘determined by the Minister or’ from both s 72(1) and (2).

We support the Bill expressing specific circumstances in which the Minister may reject a nomination for listing. This improves the rigour and transparency of the process.

RECOMMENDATION: the criteria to be applied to determine the eligibility of native species to be included on the threatened species list needs to be legislated and overseen by appropriately qualified individuals. Further, the listing process set out in cl 74 should be undertaken by a Committee of qualified individuals (i.e. the Scientific Committee), making recommendations to the Minister that best meet the objects and principles of this Act. In the interests of transparency and accountability, the Minister should be required to abide by a recommendation of the Committee or explain in published reasons why they are not going to do so.

In NSW, where the most recent review of threatened species listings has taken place, shortfalls in the process stemmed primarily from the ‘demanding workload’ of the NSW Threatened Species Scientific Committee, and the lack of adequate resourcing. In that review, the independent panel proposed that:

- assessments be prioritised based on risk; and
- the Department could more actively support the Committee and ensure that lists are up to date including by resourcing (and perhaps requiring) a system of planned, rapid, regular assessments of all NSW species, say every decade. The panel considered that this approach would support active management and intervention, and assist in species recovery.

RECOMMENDATION: taking on board lessons that are being learned elsewhere in Australia, we recommend that the Bill includes a prioritisation process for threat listings, as part of the criteria for listing that we have recommended immediately above.

RECOMMENDATION: the Bill should include a power for the Minister to order a rapid assessment of all SA species either every decade (perhaps as part of the state of the environment reporting) or as recommended by the Committee.

7.2. Ecological entities

ENREL strongly supports the introduction of a new mechanism for listing ecological entities (cl 70). We presume that the definition of ecological entity would allow the Minister to list local and regional populations of a species that are uniquely threatened, as well as hybridised species, and species that have not yet been described by a taxonomist. This is an excellent development and offers opportunities to protect aspects of biodiversity that have historically been ignored by the law.

While we support the idea of a dedicated list, the protective arrangements for ecological entities are limited (unlike for animals and plants). Protections appear to include only: action plans, threatening processes, threat abatement plans and critical habitat, all of which are discretionary – that is, the Minister can elect not to develop or implement any such plan, and does not require evidence or justification for that decision. Native plants may be protected from clearance if they comprise part or all of a listed ecological entity (Sch 3) and we support that arrangement. However, if the ecological entity is an animal (i.e. an invertebrate species about

which little is known, but to which the Minister has taken a precautionary approach and listed it), that entity may receive little or no protection from potential harm.

RECOMMENDATION: ecological entities should be able to be protected if they are listed. To achieve this, the Bill could supplement those protections that do exist for native vegetation that makes up an ecological entity with the following revision:

- **revise sub-clause (d) of the definition of ‘protected animal’ as follows, ‘(d) any ecological entity or animal of a species declared by regulation to be a species of protected animal’.** This is not ideal, given that it brings ‘entities’ under the banner of ‘animals’, but if an animal such as an invertebrate is not a (taxonomically defined) ‘species’ but is an ‘entity’, this approach could quickly and easily provide some additional protection to that entity;
- **alternatively, the Bill could include a new definition of ‘protected ecological entity’ and provide protection for such entities throughout the Bill** (acknowledging that this approach could involve a large number of consequential amendments to the Bill and risks unintended consequences and additional administration when the Bill comes into force).

Biodiversity conservation must be adaptive to emerging ecological challenges and having the flexibility to protect intact landscapes or other critical ecological entities could strengthen environmental protections. However, it would be important to ensure that the regulatory framework includes clear safeguards, consultation processes, and scientific oversight (such as the advice proposed to be given in cl 25, through the operation of the Scientific Committee), to prevent arbitrary or politically motivated listings.

8. EXTINCTION INQUIRIES

We support the introduction of an extinction inquiry, as set out in cl 80 of the Bill. This is a mechanism that will support learning over time and, we hope, help to improve the management of threatened species and broader ecosystems, and enhance conservation outcomes across the State.

We note with some concern that there is currently no obligation or mechanism for responding to an extinction inquiry once it is complete, nor publishing its results. If the Government is to spend money on conducting inquiries into species extinction, we urge revisions to the Bill to ensure that the product of any such inquiry is made public, and the recommendations from that inquiry are addressed in practical and meaningful ways.

RECOMMENDATION: include a new cl 80(4) indicating what the output of an inquiry will be. It should, at least, include a statement of lessons and recommendations which must be (a) delivered to the Minister within a reasonable time of the inquiry concluding; and (b) posted on the Biodiversity Register or a government website.

RECOMMENDATION: include a new cl 80(5) requiring the Minister or Department to respond to the recommendations of any inquiry initiated under this section. That response could take the form of:

- (a) **a published response (also posted on the Biodiversity Register or government website); or**

- (b) **a mandated section of the five yearly report on the operation of this Act (cl 167) dedicated to this section of the Act, that provides a detailed explanation of how lessons are being learned and implemented for any inquiries conducted in the relevant period.**

We also note an important qualification to our support for this initiative. While it is important to inquire into reasons for any extinction in the hope of learning lessons to prevent future extinctions, these inquiries will necessarily occur too late to protect the species that has become extinct. The Bill must be a tool that complements this post-extinction learning with a more proactive and effective approach to preventing extinction. Species at risk of extinction must be identified sooner and more consistently, and urgent action taken to avert that outcome. Noting that the path to extinction can be long and unnoticed, a more proactive approach in this Bill would be to trigger a pre-emptive inquiry – perhaps in the form of a review by the Scientific Committee – at any point that a species or ecological community moves upwards in the conservation listings (i.e. from threatened to endangered).

RECOMMENDATION: empower the Scientific Committee to inquire into the trends and actions needed to protect biodiversity for any species or ecological community that is ‘uplisted’ from a lower to a higher threat level, to maximise the chances of avoiding extinction.

9. CRITICAL HABITAT

We are pleased to see a mechanism in the Bill for protecting critical habitat in South Australia (cl 82). A large proportion of threatened species are threatened precisely because of a loss or decline in their habitat. It follows, then, that protecting habitat is a fundamentally important task for protecting biodiversity more generally.

The definition of critical habitat is quite vague and introduces a great deal of discretion. An area is eligible to be critical habitat if:

- **in the opinion of the Minister**, taking into account advice from the Scientific Committee, public consultation and any submissions received
- **after considering** [but nothing more] **any relevant biodiversity policy**
- with a primary focus on **the area in which the habitat is located**
- **significantly contributes to the conservation** of a threatened species or ecological community or listed ecological entity
- **such that its loss would increase the risk of extinction or negatively impact on recovery.**

This definition may, perhaps, allow for protection of an area that is broader than the specific habitat in which the species, community or entity is located. Because it does not make any specific characteristics explicit, this provision will not provide strong backing to a Minister that wants to protect a large area, or an unconventional suite of habitat arrangements. In litigation, for example, brought by a developer that is restricted by a critical habitat declaration, the Minister is likely to struggle to justify, under this provision, any unusual or ambitious declaration.

In a recent report about critical habitat protections for threatened species and communities, the following definition was provided:

Critical habitat, for a listed threatened or migratory species or ecological community, means a habitat that is critical to the survival and recovery of a species or ecological community, and can include:

- Habitat used during periods of stress (including floods, drought or fire);
- Habitat used to meet essential life cycle requirements (including foraging, breeding, nesting, roosting, social behaviour patterns or seed dispersal processes);
- Habitat necessary for the long-term maintenance of the species or ecological community (including the maintenance of species essential to the survival of the species or ecological community, such as pollinators);
- Habitat necessary to maintain genetic diversity and long-term evolutionary development;
- Habitat necessary for use as corridors to allow the species to move freely between sites used to meet essential life cycle requirements;
- Habitat necessary to ensure the long-term future of the species or ecological community through reintroduction, re-colonisation or recovery;
- An area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife; and
- Any other habitat that may be critical to the survival of a listed threatened species, listed migratory species or a listed threatened ecological community, including but not limited to climate and fire refugia and Biologically Important Areas.¹⁴

We understand that this definition is lengthy and complex. However, it would provide strong support for critical habitat protections and ‘back up’ for an ambitious approach to protecting biodiversity.

RECOMMENDATION: include in cl 82(4)(a) of the Bill a reference to a detailed definition of critical habitat features in the Regulations, with the goal of defining those features along the lines of the definition above.

Unfortunately, the critical habitat provisions in this Bill replicate the underused and ineffective provisions in laws elsewhere in the country. The first and most important problem is that declaring critical habitat is discretionary – and the Bill enshrines this same shortfall (cl 82(1), ‘the Minister may... declare habitat... to be critical habitat’).

In the United States, where a large number of threatened species have been recovered and removed from threat listings over the years, critical habitat *must* be identified and declared at the time of listing for any listed threatened species (*Endangered Species Act 1973* (US), s 4(3)(A), ‘the Secretary... shall, concurrently with making a determination [to list an endangered species]... designate any habitat of such species which is then considered to be critical habitat’). In this way, the habitat that each species needs to survive and recover is (usually) secured for them. There is strong evidence to demonstrate that this clause – on its own – has greatly increased the likelihood of conserving US threatened species and recovering their populations in the wild. Around Australia, however, biodiversity laws do not mandate the

¹⁴ WWF and EDO, ‘Bushfires, Bureaucracy and Barriers’ (March 2024) <<https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>>.

identification of critical habitat, and statutory protections for any habitat that is listed, are limited.¹⁵

RECOMMENDATION: make a critical habitat declaration mandatory at the time that any species, community or entity is listed, or within a specified timeframe (such as the six-month timeframe within which the Minister may currently decide whether to make a declaration). As a transitional process, critical habitat may not necessarily need to be declared for all existing listed threatened species, but should be mandatory for any new species, and should be identified for existing species over a transitional period.

We support the provision in cl 82(6) that allows the Minister to amend critical habitat declarations if appropriate. This may become necessary when, for example, catastrophic bushfires destroy most of the habitat of a threatened species and additional areas need to be identified for its survival and translocation.

10. NATIVE PLANTS (Part 4)

10.1. Native to Australia or to South Australia

We note that non-native species may become intrinsic biologically valuable parts of ecosystems as climate change alters habitats and results in different assemblages of species making up functional ecosystems. This means that this legislation may have to accommodate shifts in what is ‘normal’, desirable and valuable (‘worth protecting’) in changing environments and landscapes.

There may be circumstances when native SA plants are pests and need to be removed. For example, in some cases (e.g., phragmites) this might be appropriately dealt with by permitting. In others (e.g., control of cyanobacteria in waterways) no processes that delay the management of the pest should be required.

Whilst there is benefit in expanding definition of ‘native plants’ to Australian natives, these can and do become pest species in SA, threatening existing SA species. Defining plants as native to the whole continent rather than the State is therefore problematic. The generic definitions proposed do not seem nuanced enough to manage these likely practical implications, and they need to be refined. This might require listing of species to be given particular status (as pests); listing of areas subject to invasion by nominated species. This is likely to be a dynamic evaluation process so the use of Schedules to the Act to specify specific inclusions or exclusions may be beneficial.

10.2. Landscape scale values

On a broader values-driven level, the Bill consistently addresses the value of Native Vegetation by reference its provision of habitat to threatened species. This is an important factor. But it is not the only reason to protect Native Vegetation. In general terms the Bill fails to recognise that that native vegetation particularly at landscape scale as an essential bulwark against climate change impacts, and an essential part of national and regional resilience. Refining the Bill to allocate intrinsic value to Native Vegetation across the board would be our preferred approach.

¹⁵ WWF and EDO, ‘Bushfires, Bureaucracy and Barriers’ (March 2024) <<https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>>.

We also question the limitation of application to vegetation not interfered with for 20 years. Why not 40 or 60? Across decadal timeframes elements of native vegetated ecosystems will have regenerated – perhaps not to original condition – but to functional ecosystems in a changing environment. Potential for protection should be extended beyond 20 years.

10.3. Mitigation hierarchy

The mitigation hierarchy has been consistently abused or misunderstood in Australian environmental laws, with cultural acceptance by proponents, decision makers, and courts that encourages the assumption that avoidance is not possible, and offsetting can be a starting point rather than a last resort. This has not protected biodiversity and results in accelerated biodiversity loss.¹⁶

Shifting to a meaningful use of the mitigation hierarchy will require leadership by Government, not least in legislation. The urgency of turning the tide on vegetation clearance and recognizing intrinsic values of vegetation requires robust and directive strategy. Embedding evidence-based decision making into this process will encourage and educate proponents to seriously consider avoidance, but this will require that **decision makers must be satisfied that there are no other options, failing which, applications to clear legislation and harm biodiversity must be refused**. It may be necessary to consider the appropriate standard of proof for such decisions – civil or criminal.

We make the following specific comments about the mitigation hierarchy and native vegetation in the Bill more generally:

- | | |
|----------|---|
| Cl 48(4) | (b) should require applicant to include credible evidence concerning why “avoidance” is not possible. In Australia and internationally the practice of assuming avoidance is not a (legal) option but moving directly to offsetting is rampant. This culture should be directly addressed by requiring proponents who claim that avoidance is not feasible to provide evidence of that assertion and for decision makers to require such evidence before making a decision. |
| | (c) should require net SEB to be demonstrated; via scientific economic or other evidence if unable to achieve a SEB. |
| Cl 49 | NPCAC must have access to persuasive evidence of compliance with mitigation hierarchy. |
| Cl 51 | Consultation is flagged as a principle of the Act. However, it is difficult to see how the community can be engaged in these decisions if these matters are determined by the organisations/areas mentioned and there is not a specific consultation or procedure. |
| Cl 53 | There should be a requirement that frivolous and vexatious applications is a reason for refusal, consistent with other areas of the Act. |

¹⁶ We have charted the history of environmental offsets and their dire consequences for nature in Australia in a recent research article: Robert J. Fowler, Phillipa C. McCormack, Alexandra S. Wawryk, Margaret Castles, and Emily Whenan, ‘The Australian Experience with Environmental Offsets: An Illusory Tool for Addressing Biodiversity Loss and Climate Change?’ 31 *Hastings Env’tl Law Journal* 29 <https://repository.uclawsf.edu/hastings_environmental_law_journal/vol31/iss1/3>.

Cl 60 The provision presumes that exclusion is the only approach to native vegetation protection. (e) should include “the exclusion *or management* of livestock in the management of access to or control of native plants”. It may be appropriate for permission to be sought to use livestock in this way. This practice may become more widespread and may be used at quite small scales on small managed properties balancing native vegetation with restorative farming strategies. It may be necessary to provide some limits on when permission is required for the use of livestock in this way depending on the location, ownership and status of the land in question.

After initial excitement about the role of offsetting, it has become apparent that offsetting has become an industry that does not meet its initial aspirations. In some instances, offset projects are lacking and compensation payments in lieu of offsetting accumulates, unused. In most other instances, any offset provided is a far cry from the original harm. Because offsetting has no geographic limits, harm in an area can go un-managed at scale, with benefits being distributed thousands of kilometres away.

RECOMMENDATION: any provision for offsetting should be underpinned by a proposition that the remedial work should be completed as close as is reasonably practical to the area of harm inflicted. At the very least a presumption of local planting plus offsetting should be the benchmark for any offsetting arrangement. The present offsetting system does not require like-for-like or geographic proximate replacement. We propose that there be a presumption that any offsetting proposal is as close to the location of landscape in question and as near as possible, to replicate the vegetative ecosystem removed. If this is not possible revegetation or management of proximate ecosystems should be achieved. There should be compelling evidence if it is asserted that like-for-like of both plant assemblage and geography and spatial spread is not possible.

11. ECOLOGICAL RESTORATION

Division 3

Cl 97 Permission to remove or interfere with native vegetation as part of a revegetation project may be required, but it is not clear why landowners seeking to engage in revegetation on private land require permission to do this? The provision uses the word ‘may’ and so perhaps it is intended to give permission to landowners to seek advice? That is not clear from the provision, though. If the provision is intending to require approval for revegetation works, more detailed parameters around what “revegetation” means in this context is desirable. It is not desirable to make it difficult for individuals or entitles to engage in revegetation or protective work unless there are good reasons to do so.

We support a clear and straightforward approach to approving restoration work, especially on private land. An easing of the regulatory burden for restoration work is critical – particularly if SA and the rest of Australia is to meet the targets under the Global Biodiversity Framework of 30% of land and waterways under effective restoration by 2030. With this in mind, we make the following comments on the Bill.

First, we acknowledge that Schedule 2 cl 25 includes a specific exemption for restoration-related work, in the following terms, which appears to go directly to the question of streamlining restoration work:

25—Conservation, management and restoration of biodiversity

(1) Clearance of native plants for the purposes of conserving, managing or restoring biodiversity if it is undertaken in accordance with—

(a) guidelines relating to clearance of that kind adopted by the Council under section 61; and 30 (b) if the guidelines referred to in paragraph (a) specify that a native plant management plan must be made in relation to clearance of that kind—a native plant management plan that is approved by the NPCAC and relates to the clearance.

(2) The NPCAC may, in considering whether to approve a native plant management plan 35 for the purposes of subclause (1), seek and consider the advice of the regional landscape board for the landscape management region where the relevant land is situated.

(3) If, in considering whether to approve a native plant management plan for the purposes of subclause (1), the NPCAC, is of the opinion that the clearance would be likely to 40 result in residual significant adverse impacts despite the application of the guidelines or management plan (or both), the plan must not be approved.

We note that there is no Biodiversity Council yet (and may not be for some time, even after the Act is passed by Parliament). Moreover, there is not yet any guideline in place to give us an indication of what might be required for this exemption to operate. There is a number of obligations under the Native Vegetation Act to produce guidelines that are very similar to this provision but – despite that Act having been in force for more than 30 years – many of those guidelines were never produced.

Presuming that the Biodiversity Council will, in fact, prepare a guideline relating to clearance for conservation, management and restoration of biodiversity – and hoping that such a guideline is prioritised! - ENREL generally supports this exemption arrangement. It is consistent with exemption processes in other statutory contexts.

However, in the absence of an operational exemption under Schedule 2, the remainder of the Bill replicates challenges for restoration that have been experienced by practitioners around the Country.

RECOMMENDATION: to emphasise the importance of restoration and conservation to the work of the Bill, clause 97 should be revised as follows: ‘An owner of land who wishes to revegetate the land with native plants may undertake that activity without specific approval from the Council, provided that revegetation meets an exemption under Sch 2’.

We strongly support the financial and other assistance mechanisms available under cl 101, including the opportunity for landholders to apply for assistance to restore their land. Acknowledging our comment on the definition of native plants at the outset of this submission, this financial assistance context would be a valuable context in which to highlight the preference for South Australian native plants to underpin restoration projects? At present, proponents seeking to undertake ecological restoration of landscapes are subject to a variety of regulatory constraints. Restoration usually requires proponents to obtain development and other land use planning permits, governed by statutory regimes primarily built to deal with

development and infrastructure applications. Those development and infrastructure regimes are ill-fitted to the urgent and large-scale task of restoring South Australian biodiversity.

12. PRIVATE LAND CONSERVATION

12.1. Categories of protection for biodiversity on private land

A large proportion of underrepresented ecosystems are located wholly or predominantly on private land and an effective arrangement for incentivising and then monitoring and facilitating the protection of those ecosystems is long overdue in South Australia.

We have strong reservations about biodiversity offsetting but we are particularly concerned to note that conservation agreements do not appear to be required to be registered on title. If an offset is used to justify the acceptability of a proposed development, and the development is then undertaken, the offset must be able to be protected even if the landowner changes. Without this kind of protection, the offsetting tool – which is already questionable – loses any capacity to generate and sustain neutral (not positive) outcomes for biodiversity.

In addition to the question of registration on title, cl 94(3) states that ‘If a conservation agreement specifies the term for which the agreement is to operate, the term of the agreement must not be for a period of less than 20 years’. If an agreement does not specify the term for which it is to operate, how can it offer any secure kind of benefit to biodiversity?

Finally, there is a lack of clarity about how ‘conservation agreements’ will be administered (monitored, enforced, stewarded) by the Biodiversity Council. In most cases (except *perhaps* where the landholder agrees to express the agreement as extending for at least 99 years) they will not be sufficient to meet the requirements of a private protected area for the purposes of the National Reserve System.

RECOMMENDATION: given that offsets are unavoidable in this regime, the agreements that are intended to secure offsets must be required to be registered on title to protect the benefit that they offer even if the land changes hands. These agreements must also *all* be required to be sustained over the medium-to-long term, otherwise the benefit that they purport to secure is meaningless.

We take this opportunity to highlight the missed opportunity to introduce a ‘gold standard’ covenanting or agreement option for conservation on private land in South Australia. The Queensland Government introduced a new category of private land protection some time ago, called ‘Special Wildlife Reserves’. These reserves have been given exceptionally high levels of statutory protection from harmful activities such as mining and exploration. The Biodiversity Bill offers an opportunity for South Australia to join Queensland as a state with internationally significant high levels of protection for biodiversity on private land. Such an arrangement would be worthy of overseas and domestic investment (which we are told will be forthcoming but, without protective arrangements to guarantee integrity to investors, may not be forthcoming to all parts of Australia, equally). A mechanism that is equivalent to the Special Wildlife Reserves would also be consistent with the expectations about security of protection offered under the law, by landholders, philanthropists and others that seek to protect private land for its biodiversity values.

RECOMMENDATION: The Bill ought to include a new category of agreement for private landholders (which would need to be registered on title and secured in perpetuity) that

provides a high standard of protection for biodiversity on private land, a kind of ‘enhanced private land agreement’ along the lines of Queensland’s Special Wildlife Reserves.

We support the opportunity to develop novel legal mechanisms to protect and manage biodiversity values under, for example, the ‘Other Effective Conservation Measures’ arrangements and the *Nature Repair Act 2023* (Cth).

12.2. Administration of conservation agreements

ENREL supports the Bill creating a new statutory trust for private land conservation. Trusts with this mandate are common elsewhere in the country and have been fundamentally important for the expansion of the private protected area estate. Clause 27 appears to allow for such a trust to be created in the future, though the absence of any details about that *potential future* trust, or even a clear expression of intention to create such a trust in future, does not bode well for such a body being established any time soon. In our view, this is a missed opportunity.

RECOMMENDATION: clause 27 is not the kind of transparent and ambitious expression of support for private land conservation that we think is essential. While it is better to have a possibility of creating such a trust in future over nothing at all (and we would reject a call to remove the provision without something stronger to replace it), ENREL recommends instead a new Division in the Bill that creates clear, modern and transparent governance arrangements for a new, custom designed, statutory body for conservation on private land.

13. PLANNING AND DEVELOPMENT

13.1. Overview of the Biodiversity Bill and *Planning, Development and Infrastructure Act 2016* (SA)

The Explanatory Guide states that the new Biodiversity Act would be prescribed as a special legislative scheme for the purposes of the PDI Act.

We welcome prescribing the New Biodiversity Act as a special legislative scheme for the purposes of the PDI Act. In particular, the PDI Act, Regulations and Planning and Design Code are inadequate to address ecological/ecosystem restoration, with very little to no specific mention of restoration in the SPP for Biodiversity (and other SPPs), Overlays, Zones and General Development Policies. There is little to no guidance given to persons responsible for assessing and authorising restoration projects that fall within the definition of ‘development’; nor how they are to balance performance outcomes for industrial development and restoration, where such activities may conflict within a zone. We submit the government should consider introducing a specific SPP for ecological restoration, but at the least, the Biodiversity SPP needs to be considerably strengthened to deal more rigorously with restoration.

Specific comments Below are our comments on the draft Bill’s provisions relating to planning, development assessment and the PDI Act.

Part 4 – Native plants - Division 3 – Authorisation

Clause 50 – Circumstances in which consent may be given etc.

S 50(1) provides that, subject to s 50(2), the Native Plants Clearance Assessment Committee (‘NPCAC’) cannot give its consent to the clearance of native plants if the plants contain, or are constituted of, a stratum of native plants that is substantially intact. Under s 50(2) the NPCAC

may give its consent in ‘specified circumstances’, being the circumstances listed in cl 50(12)(a)-(g). The circumstances that are specified in paragraphs (b), (c) and (d), each of which concerns clearance for work in the nature of ‘development’, are subject to the proviso that any development authorisations, as required under the *Planning, Development and Infrastructure Act 2016* (‘PDI Act’), must have been obtained.

ENREL considers that the above proviso is necessary and appropriate.

Section 55 – referrals of development applications to NPCAC

Under cl 19 of the draft Biodiversity Bill, the proposed functions of the NPCAC’ include assessing development applications that may be referred to it under the PDI Act. In circumstances where NPCAC is considering such a referral, cl 55 provides that clause 49 (*Matters NPCAC must have regard to when determining application for consent to clear native plants*), 50(6) and 50(7) (*NPCAC discretion to consent to a clearance proposal that includes a significant environmental benefit (SEB)*) also apply to the NPCAC’s consideration of the referred development application.

ENREL supports the inclusion of cl 55.

Part 10 – Miscellaneous

Clause 165 – Concurrence under PDI Act

Under cl 165, if the Minister is requested to concur with an amendment to the Planning and Design Code under clause 73 of the PDI Act (as amended by cl 83 of the Biodiversity Act), the Minister must, in determining whether to grant concurrence, have regard to, and seek to further, the objects and principles of the Biodiversity Act and have regard to the State Biodiversity Plan.

ENREL supports the inclusion of cl 165.

Part 25 – Amendment of PDI Act

Clause 81 Amendment of section 11—Recognition of special legislative schemes

This amendment adds the Biodiversity Act to the definition of special legislative scheme.

ENREL considers that this amendment is reasonable.

Clause 82 Amendment of section 68—Significant trees

This amendment replaces several terms, currently appearing in s 68 of the PDI Act, with terms defined in the Biodiversity Act (plant, native plant, protected animal and threatened species).

ENREL considers that this amendment is reasonable. Please note, however, that proposed additional cl 68(4) needs a minor correction so that it reads, “plant, native plant, protected animal and threatened species have the same meaning as in the Biodiversity Act ...”.

Clause 83 Amendment of section 73—Preparation and amendment

This amendment requires the Planning Minister to seek the concurrence of the Biodiversity Act Minister for any Planning and Design Code amendment that affects a zone or overlay of importance to biodiversity (as prescribed by the regulations).

ENREL considers that this amendment is reasonable.

Clause 84 Amendment of section 76—Minor or operational amendments

This amendment empowers the Planning Minister, by notice in the Gazette, to amend the Planning and Design Code to include information relating to critical habitat (within the meaning of the *Biodiversity Act*).

ENREL considers that this amendment is reasonable.

Clause 85 Amendment of section 137—Interaction of controls on trees with other legislation

This is a minor, consequential, amendment.

14. ENVIRONMENTAL BENEFITS

The role of offsets in contributing to biodiversity decline has been well documented. Despite enshrining the mitigation hierarchy in the Act, we are concerned that the continued use of offsets under the ‘significant environmental benefit’ (SEB) scheme will inevitably lead to future losses of biological diversity. Consent to clearance may still be granted on the basis of a SEB (sub-cl 50(6)(7)) – an offset – even where clearance is seriously at variance with the principles of clearance (cl 50(6)). This means that certain species that are difficult, expensive or challenging to ‘save’, or which are located in areas where infrastructure developments are deemed more important than the species, will continue to decline and eventually be lost entirely, in favour of potential (though not guaranteed) benefits to other species or ecosystems. If an applicant cannot provide a SEB, the Bill still anticipates that they will be entitled to pay into the Fund instead of securing a benefit to the biodiversity that will be lost as a result of the proposed development (cl 52(1)(c)).

In planning law, development that is ‘performance assessed development’, i.e., that is assessed and approved on its merits, cannot be approved by the relevant authority if it is ‘seriously at variance’ with the *Planning, Development and Infrastructure Act 2016* (SA) (**PDI Act**) and Planning and Design Code (disregarding minor variations). The PDI Act does not contain exceptions to this rule. The line is drawn there to ensure that the Objects of the PDI Act and provisions of the Act and Code are meaningful and effective, and the benefits of good planning are achieved.

RECOMMENDATION: if the government is serious about protecting and conserving biodiversity, clearance should not be permitted if it is seriously at variance with the principles of clearance, even with a SEB or payment into the Fund.

RECOMMENDATION: NPCAC should not be able to issue an authorisation to clear native vegetation unless satisfied that an absolute net gain in biodiversity will be achieved, relative to a baseline year. The state of nature is now such that halting the loss of nature and

biodiversity is no longer sufficient: recovery and restoration are essential. Recent research on this point suggests that, “without requiring absolute net gain as the standard outcome from all decisions affecting biodiversity, and having a baseline year from which to measure outcomes, biodiversity losses will likely continue to accrue”.¹⁷

RECOMMENDATION: clause 48 should be amended to add an additional matter: that in deciding whether or not to consent to an application to clear native plants, the NPCAC must be satisfied that an absolute net gain to biodiversity will be achieved, relative to a baseline year. This may be the year in which consent to clear is granted, or another year.

Although subs-s 50(6) and (7) refer specifically to the requirement the NPCAC may only give its consent to clearance if satisfied a SEB is to be achieved, which incorporates a concept of net gain, introducing a broader principle in s 48 will highlight and enshrine the principle of ‘absolute net gain’ as a fundamental principle.

RECOMMENDATION: it should be a condition of all authorisations to clear that the applicant must be required to measure, monitor and report on the achievement of the SEB, at specified intervals of time, relative to the baseline year. This requirement should be expressed in the Act (eg in cl 52) and not only in regulations or other subordinate legislation. This requirement can operate whether or not a principle regarding absolute net gain is introduced. This will be essential to tracking the performance of offsets over the short, near and long term.

15. BIODIVERSITY REGISTER (cl 62)

We support the establishment of an online Biodiversity Register that contains a wide range of information. The list seems reasonably comprehensive. However, we submit that it should be a condition of all authorisations to clear that where offsets (‘environmental benefits’) are used, these should be measured, monitored and reported at specified intervals of time, and that this information should be made available on the Biodiversity Register. There is currently a dearth of information on how well the significant environment benefit (SEB) provisions have worked, and whether the proposed SEBs have been successful or effective, and over what period of time. Like the Mining Register under the *Mining Act 1971* (SA), the Biodiversity Register should contain categories and subcategories for searching information, so that researchers can search for conditions on authorisations, including information on environmental benefits.

Although the Biodiversity Bill states that the ‘decision’ of the NPCAC will be published on the Register, it is not expressly stated in s 62 that the authorisation itself, with conditions, will be published. Also, although certain matters in relation to environmental benefits must be published, these relate to the application and assignment of credits, and ‘achievement of an EB by accredited third parties’; there is otherwise no clear and specific requirement to publish the onground achievement of an EB in the Biodiversity Register (or indeed, any failures to achieve an EB, or loss of EB for example, through bushfire or other events). The role of offsets is so significant in permitting clearance that the public should have access to information to conduct research into the way a SEBs are provided (eg credits, onground, or payment into the Fund), across industries, and locations, and track their effectiveness.

¹⁷ Hannah Thomas et al, ‘Achieving “Nature Positive” Requires Net Gain Legislation’ (2024) 386 *Science* 383, 383.

16. FIRST NATIONS EXPERT BIODIVERSITY COMMITTEE

We note that the Bill uses the term ‘First Nations knowledge’ to describe the particular information, expertise and experiences that are held and stewarded by First Nations Peoples (i.e. cl 10). First Nations scholars around Australia and overseas typically (and intentionally) use the plural form, ‘knowledges’ to refer to the places, things, processes, cultures and histories that First Nations Peoples know and understand.

While we have not seen the term used in its plural form in legislation, to date, that likely reflects the status and power of law (and law makers) and the relative powerlessness of most First Nations ways of knowing. We prefer the term ‘knowledges’, as a way of respecting the distinct, Country-based multiplicity of ways of knowing and the terminology that First Nations scholars themselves use to describe them.

16.1. Recognition of culturally significant biodiversity entities

ENREL supports the recognition of culturally significant biodiversity entities as outlined in the Bill. Clause 3 defines these entities as native species or ecological communities to which First Nations people attribute cultural value, and which are critical to their relationship with, and adaptation to, Country. Recognising and protecting these entities is important for maintaining biodiversity and respecting First Nations’ knowledges and cultural heritage.

The Bill includes several provisions that reinforce the role of First Nations knowledge in identifying and managing culturally significant biodiversity entities. Under cl 10, those administering the Act must seek, consider, and apply First Nations knowledge (where endorsed by knowledge holders) in the identification and management of these entities. Additionally, the First Nations Expert Biodiversity Committee (FNEBC) has a role in advising the Minister on First Nations perspectives, co-developing biodiversity policies, and establishing a framework for recognising culturally significant biodiversity entities.

However, the Bill requires Ministerial recognition of these entities, which means the final decision rests with the Minister rather than First Nations communities themselves. While the Minister must engage with First Nations people when developing action plans for these entities, the extent of this engagement is left to Ministerial discretion. To ensure the recognition of culturally significant biodiversity entities is meaningful, clear guidelines should be established to ensure consistent and transparent decision-making.

16.2. Biodiversity and First Nations People

This part of our submission should be read in light of the results of the Department for Environment and Water’s engagement with First Nations People in relation to the Bill.

Fragmented and complex rules about biodiversity, cultural heritage and the involvement of First Nations people in decision-making must be clarified, centring Aboriginal voices and elevating Aboriginal aspirations in the conservation of biodiversity. South Australia’s legal framework for preserving and protecting biodiversity remains highly fragmented, with multiple statutes governing biodiversity protection, cultural heritage, and land use planning. This Bill represents an opportunity to ensure that First Nations peoples’ participation is meaningful and structurally supported.

We present the following key issues and recommendations with the goal of enhancing First Nations’ rights and interests within the Bill, acknowledging that the voices of First Nations

peoples themselves, particularly the State First Nations Voice, should be central in discussions regarding this Bill.

16.3. Definition of First Nations Person

The Bill adopts the definition of a First Nations person as provided in the *First Nations Voice Act 2023* (SA). This definition is based on the tripartite test established in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, meaning a First Nations person is:

- of Aboriginal or Torres Strait Islander descent,
- regards themselves as Aboriginal or Torres Strait Islander, and
- is accepted as such by the relevant First Nations community.

While this definition is well-established, the Bill does not specify criteria for holding membership on key biodiversity committees, including the First Nations Expert Biodiversity Committee (**Expert Committee**). This lack of clarity raises concerns about potential exclusionary provisions that could arise through future regulations.

Under the *First Nations Voice Act 2023* (SA), several grounds disqualify a First Nations person from nominating for or holding office as a member of a Local First Nations Voice, including:

- (a) being imprisoned for an offence or remanded in custody,
- (b) having been found guilty of a serious offence within the preceding two years, and
- (c) being subject to travel restrictions under bail, parole, or other agreements.

A similar exclusion from biodiversity committees would be problematic. Given the over-representation of First Nations people in the criminal justice system, such restrictions may disproportionately limit First Nations participation in biodiversity governance. These exclusions would reduce the pool of individuals who can contribute valuable lived experience and perspectives, particularly in relation to First Nations encounters with land use policies, ecological management, and legal frameworks.

Dani Larkin, a Bundjalung, Kungarakany woman, and Kate Galloway have argued that ‘[t]o refuse membership of a cultural collective for the very reason that it is needed, ignores the nature and purpose of the Voice.’¹⁸ This reasoning is equally applicable here—excluding people from biodiversity committees for reasons that disproportionately impact First Nations people risk undermining the very inclusivity the Bill seeks to promote.

To ensure that regulations do not create unintended barriers to participation, the Bill should:

- Clearly specify the eligibility criteria for committee membership within the legislation itself, rather than leaving it solely to regulations.
- Avoid exclusionary provisions that would disproportionately disadvantage First Nations people, particularly those with lived experience of the justice system.
- Ensure that biodiversity governance structures remain inclusive by recognising the value of diverse lived experiences in shaping effective and representative decision-making.

¹⁸ Dani Larkin and Kate Galllway, “Constitutionally Entrenched Voice to Parliament: Representation and Good Governance” (2021) 46(3) *Alternative Law Journal* 193, 196. See also Cornelia Koch, Anna Olijnyk and Madeleine Perrett, ‘A Fresh Bridge: South Australia’s First Nations Voices’ (2024) 35 *Public Law Review* 112.

Without careful drafting and safeguards, the Bill risks perpetuating structural exclusions that could weaken First Nations participation in biodiversity governance.

16.4. Strengthening the Role of the First Nations Expert Biodiversity Committee (Expert Committee)

Advisory Role Only

The establishment of the Expert Committee in cl 20 of the Bill is a positive step forward in acknowledging the critical role of First Nations people in biodiversity. The Expert Committee is tasked with providing advice to the Minister on biodiversity matters from a First Nations perspective, including the application of First Nations' knowledges, the management of biodiversity, and the recognition of Culturally Significant Biodiversity Entities (cl 22).

However, as currently drafted, the Expert Committee remains purely advisory, with no decision-making authority. The Minister retains ultimate control over biodiversity policies, which significantly limits the influence of First Nations knowledges and perspectives in shaping biodiversity governance. While the Bill acknowledges the importance of First Nations' participation, it does not provide the Committee with the power to directly implement or enforce policies that align with First Nations ecological expertise.

Criteria for members

Additionally, the criteria for appointing Expert Committee members are not yet defined, as they are left to be determined by future regulations (cl 21). Without clarity on how members will be selected, there is uncertainty about whether the Expert Committee will truly represent a broad and diverse range of First Nations voices. The plural – voices – is essential. Transparent and inclusive selection criteria are necessary to ensure that the Expert Committee reflects the depth of First Nations ecological knowledges, cultural expertise, and regional diversity across South Australia.

Chair of the Committee

Furthermore, cl 21(5) of the Bill allows the chair of the Expert Committee to be a member of the Public Service, which raises serious concerns about the Committee's independence and ability to genuinely represent First Nations perspectives.

The Expert Committee is intended to provide expert advice on biodiversity matters from a First Nations viewpoint, ensuring that traditional ecological knowledges are recognised and incorporated into environmental decision-making. However, if the chair is a government-appointed public servant rather than a First Nations expert, it risks shifting the Expert Committee's priorities away from community-driven perspectives towards government policy objectives. This could create a situation where the Committee's role is merely to validate Ministerial decisions rather than provide independent and culturally grounded advice.

Why This Matters:

- **Potential Conflict of Interest:** A public servant is ultimately accountable to government leadership, which may prioritise political and administrative considerations over First Nations ecological knowledge and cultural responsibilities. This compromises the

Committee's ability to challenge or influence biodiversity policies that may not align with First Nations interests.

- **Loss of Trust and Legitimacy:** The Committee's credibility relies on First Nations communities seeing it as a genuine representative voice for their biodiversity governance concerns. If its leadership is tied to government bureaucracy, it risks losing community trust and failing to achieve meaningful engagement with First Nations stakeholders.
- **Undermining First Nations-Led Decision-Making:** The Bill already limits the Expert Committee to an advisory role rather than granting it decision-making authority. Allowing a government official to chair the Committee further weakens First Nations leadership in biodiversity governance, reinforcing a structure where First Nations voices are heard but do not have real influence.

RECOMMENDATIONS:

- **The chair of the Expert Committee should be a First Nations person with expertise in biodiversity and cultural governance,** rather than a government-appointed public servant.
- **The appointment process should be transparent and determined through consultation with First Nations communities,** ensuring the chair represents a diversity of perspectives.
- **The Committee should be structured to operate independently** from direct government influence, so that its advice is given without political or bureaucratic pressure.

If the Expert Committee is to serve its intended purpose of embedding First Nations knowledges into biodiversity management, it must be truly independent, community-led, and free from undue government control. This change would not only strengthen First Nations participation in biodiversity governance but also enhance the credibility and effectiveness of the Expert Committee in delivering outcomes that reflect both cultural and environmental priorities.

- **Grant decision-making powers** to the Committee in key areas related to First Nations biodiversity governance.
- **Ensure transparent and inclusive selection criteria** for Expert Committee members, developed in consultation with First Nations communities.
- **Guarantee independence** by establishing clear safeguards to prevent government overreach in the Committee's operations.

Without these changes, the Expert Committee risks being a symbolic inclusion rather than a meaningful mechanism for First Nations participation in biodiversity protection.

16.5. Mandating Free, Prior and Informed Consent

The Bill must also embed the principle of Free, Prior and Informed Consent (FPIC) to align with international best practices and Indigenous rights frameworks. The current drafting only requires the Minister to 'consider' First Nations' knowledge, without a clear obligation to apply it. This weakens the ability of First Nations people to protect their cultural and ecological interests effectively.

FPIC is not merely consultation – it is about ensuring that First Nations people have the right to give or withhold consent regarding activities that affect their lands, waters, and biodiversity. The Bill should explicitly recognise FPIC in its objectives and include provisions requiring all government decision-making processes that may impact Aboriginal cultural heritage and biodiversity to conform with this principle. Without such safeguards, the Bill risks perpetuating historical patterns of exclusion and marginalisation in environmental governance

17. ENFORCEMENT – CRIMINAL LAW PRINCIPLES

Criminal law is a ‘coercive and censoring machinery’.¹⁹ There must be clarity regarding the ‘conditions that must be satisfied before the state may enact a statute that subjects offenders to criminal liability’,²⁰ to ensure the ‘legitimation of the criminal law and criminal process.’²¹

The seriousness of the stigma and penalties associated with criminal liability mean that

- (i) there must be a clear reason why proscribed conduct is classified as criminal, and
- (ii) the criminal nature of proscribed conduct must be clear so that members of the public will not inadvertently breach the criminal law and be exposed to the penalties that follow from it.

The Biodiversity Bill lacks clarity on:

- which conduct is criminal (17.1),
- the elements of the criminal offences (17.2), and
- distinction between criminal and civil provisions and processes (17.3).

We address each of these issues in turn.

17.1. Which conduct is criminal?

For a number of reasons, it is unclear throughout the Bill which of the offences are criminal.

Labelling of criminal provisions

There is a lack of clear flagging of the criminal provisions. The criminal provisions are only identifiable where they include a term of imprisonment as a penalty, and it is unclear if the offences that do not attract a sentence of imprisonment are civil obligations or less serious criminal offences. By comparison, in the *Corporations Act 2001* (Cth) the criminal and civil provisions are clearly articulated and distinguished. The following example that would serve as a useful model for the Bill:

Chapter 2D—Officers and employees

Division 1—General duties

180 Care and diligence—civil obligation only

¹⁹ Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2016) 22.

²⁰ Douglas Husak, ‘Criminal Law Theory’ in Martin P Golding and William A Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2008) 107, 107.

²¹ Nicola Lacey, ‘Principles, Policies, and Politics of Criminal Law’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 33.

- 181 Good faith—civil obligations
- 182 Use of position—civil obligations
- 183 Use of information—civil obligations
- 184 Good faith, use of position and use of information—criminal offences

Location of the offences in the Bill

There are multiple instances throughout the Bill (for example, s 64 Offence to carry out or undertake regulated act or activity without permit, s 65 Illegal possession of protected animals etc s 84 Offence to destroy, damage or disturb critical habitat without authorisation and s 107 Offence to hinder etc authorised officers that are included in sections on administrative conditions. The administrative issues and the criminal offences are clearly related, but the criminality of the conduct is unclear as it is ‘lost’ through its inclusion in general provisions, which does not provide adequate notice of the criminal conduct and its consequences.

Breaches of administrative remedies

The provisions on compliance and reparation orders seem reasonable and effective. However, its unclear whether breaches of the orders in ss 109(8)(9), 110(8), 113(3) are criminal or civil, and this should be express.

Grounds for criminalising certain conduct

It is not evident in the Bill where the ‘line’ is drawn between criminal offences and civil obligations, although this may be clearer if the labelling of the offences was clearer. Some possible criteria could be: level and significance of harm, level of premeditation, effect fauna rather than fauna or whether the conduct was intentional or inadvertent. There could be other principles that determine the distinction, but they should be clear or at least readily ascertainable.

17.2. The elements of the criminal offences

Where elements of offences not specified

Clause 122(2) Recovery of civil penalty in respect of contravention distinguishes criminal offences that do and not require a criminal state of mind, and yet the offences do not specify if fault is required or whether the offence is of strict or absolute liability. This lack of clarity will create issues of statutory interpretation that could be readily avoided through specifying the characterisation of the offence. For example, the Commonwealth *Criminal Code Act 1995* requires the characterisation of provisions to be express. The indicative provision below could be a useful model for the Bill.

72.12 Trafficking in unmarked plastic explosives etc.

- (1) A person commits an offence if:
 - (a) the person traffics in a substance; and
 - (b) the substance is a plastic explosive; and
 - (c) the plastic explosive breaches a marking requirement; and
 - (d) the trafficking is not authorised under section 72.18, 72.19, 72.22 or 72.23.

Penalty: Imprisonment for 10 years.

- (2) The fault element for paragraph (1)(b) is recklessness.
- (3) Strict liability applies to paragraphs (1)(c) and (d).

Where elements of offences are specified

Various sub-clauses of cl 127 do, helpfully, specify that full fault attaches to certain elements of the offences. For example, according to cl 127(7) for native plants and 127(9) for protected animals, protected eggs or protected animal products, ‘the prosecution must establish that the person knew, or was reckless with respect to’ native or protected nature.

However, the requirement of proof of fault may not be appropriate here, and could undermine the purposes of the provision by leaving open the defence of lack of fault regarding the protected or native character. In this case, it might be preferable to impose an obligation to be aware of these factors and include an objective fault element such as that the defendant should have known the protected or native character, or making the offence one of strict liability, and allowing a defence of honest and reasonable mistake of fact to apply.

17.3. Distinction between criminal and civil provisions and processes

Discretion and decision-making

A distinction needs to be clear between criminal penalties that are (primarily) intended to punish, deter and signal the seriousness of conduct, and civil penalties that are (primarily) intended to restore or repair damage. This distinction is not currently clear in the Bill, as evidenced by, for example, cl 122 Recovery of civil penalty in respect of contravention. This provision confers on the ‘relevant authority’ a very broad power to determine whether conduct is treated as criminal or civil. This is a common approach to environmental harms in both Australia and internationally, but it is not without its problems and may be unfair to both defendants and the community. It does not uphold the principle that members of the community should know what conduct will be treated as criminal, and may impose injustice on certain defendants who have an expectation, based on other cases, that particular conduct would be treated under the civil law. Similarly, it could create inequity as similar conduct could be treated differently on different occasions. On the other hand, it may undermine the intent of the Bill by allowing defendants to escape the intended criminal consequences of certain conduct.

Vicarious liability

Clause 140 imposes vicarious liability on an employer or principal for the acts or omissions of an employee or agent unless it is proved that the act or omission did not occur in the course of the employment or agency. It is unclear if this provision applies only to civil obligations. The general concept of vicarious liability (not recognised by that term in criminal law) is covered by complex and well-developed principles of extended criminal liability. The application of a civil concept of vicarious liability would be highly problematic as it would extend criminal responsibility to a party that was not sufficiently connected to the criminal offending to warrant the stigma and penalties imposed by the criminal law. We recommend this provision only apply to civil obligations.

18. ENFORCEMENT – OTHER CRIMINAL LAW ISSUES

18.1. Enforcement

Part 8—Enforcement, cl 104—Powers of authorised officers

This part (deliberately) confers very broad and intrusive powers on a wide range of statutory authorities.

The cl 105 provisions on the issue of warrants offer good protection for the rights of suspects.

It is clear that provisions related to taking forensic samples and seizing documents need to be authorised by the issue of a warrant, but it is not clear (due to the numbering and wording of the clauses) which powers require warrant and which (if any) are conferred by statute alone.

The powers to search and seize are still very intrusive and we recommend that such powers can only be exercised pursuant to a warrant, and that this requirement is made clearer in the section. If any powers are conferred by statute alone this needs to be made clearer.

18.2. Limitation period

Clause 125 Proceedings for offence provides that a prosecution must be commenced within 5 years of the date on which the offence is alleged to have been committed.

Most serious crimes under other statutes are not subject to a limitation period. Given the difficulty of identifying environmental crime, the delays in the manifestation of certain harms, and the intention to deter offending through the use of criminal law, this limitation could undermine the purposes of the law and could be removed.

18.3. Evidentiary provisions

The evidentiary provisions in cl 127 are sensible and the reverse burdens and presumptions are clear and reasonable in the circumstances.

18.4. Sentencing considerations

Clause 128 Sentencing considerations could reference the *Sentencing Act 2017* (SA) so that the usual factors in 10 General principles of sentencing, and cl 11 Individual sentencing factors would also influence penalty, and so be consistent with sentencing under other criminal provisions.

18.5. Defences

Clause 129 Application of defences states that a defendant bears an evidential onus in relation to establishing a defence. The wording of the defences under cl 130 indicates that the defendant actually bears a legal/persuasive burden to prove the defence, and this could usefully be reflected in cl 129. The reverse burden is appropriate it just needs to be express rather than implied.

Clause 130 General defence provides that it is a defence if the 'defendant proves that the alleged offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.' This is an unusual defence as it imports a quasi-fault element into offences where the characterisation of the offence as full fault, strict or absolute liability is not clear. Further to the discussion above under elements of the offence, it could be preferable to clarify the offences as requiring subjective or objective fault (or not) rather than offer this defence.

18.6. Additional details in response to the survey: Question #28

Question 28 asks, 'Do you support the penalties for criminal offences proposed under the Act?'

We are agnostic on the increase in penalties (summarised in Appendix 1: Penalties of the Explanatory Guide). However, we dispute the rationale on page 6 that ‘Tougher penalties will serve as a deterrent for those who commit an offence’. That proposition is a law and order principle used broadly in criminal law that runs counter to well-established evidence on crime deterrence and desistance.²² Higher penalties may be adopted to signal the seriousness of the offending, and have an educative role within the community about its existence and seriousness. However, much research suggests it will not deter crime. The likelihood of detection has been proven to be a much greater deterrent than penalty.

RECOMMENDATION: resources must be invested in investigating and enforcing environmental crimes in South Australia, including under the Biodiversity Act when it is passed, and in community education to encourage deterrence.

19. ENFORCEMENT – CIVIL/ADMINISTRATIVE REMEDIES

19.1. Third party enforcement

The opportunity for third parties to participate in enforcement activities for a breach of the Act is welcome. Third parties can play an important role in supporting regulators and enforcing environmental laws, and they are an appropriate stakeholder in enforcement given that the environment is a common good and concern (and given that such involvement is consistent with the ‘community participation’ object of the Bill). While allowing third party enforcement for a breach is a provision drawn from the *Landscapes Act* (SA) and should therefore not be controversial, ENREL strongly supports its inclusion in the Act.

19.2. Administrative remedies

ENREL supports the range and structure of Administrative remedies, noting that they are largely based on other legislation (such as the Native Vegetation Act 1991). This remedial strategy reduces the cost and time of civil or criminal penalty, and may have a valuable educative effect. However, if this approach is to be effective, it is essential that adequate resources to issue, enforce, and inspect remedial orders is provided. Strong well resourced administration will ensure capacity to enforce compliance and lend credibility to the administrative remedy process. Weak underfunded administration will have the opposite effect and result in poor compliance and lack of credibility.

Permits

Question whether it makes sense to have permit appeals directed to SACAT rather than ERD, thus splitting expertise across two jurisdictions. I think this a question of resource allocation and confines smaller and often petty appeals to the appropriate lower level jurisdiction.

Cl 146 (5) This clause suggests that public interest will outweigh the objects and principles. Is this intended? If so, this indicates a significant weakness in the Bill. Public interest is not defined, and this wording inferentially suggests that there is no public interest in biodiversity.

²² Ben Knight, ‘Do Harsher Punishments Deter Crime?’ *UNSW Newsroom* (online, 16 July 2020) <https://www.unsw.edu.au/newsroom/news/2020/07/do-harsher-punishments-deter-crime>.

Cl 149 (3) should also include genetic material. See comments on definitions section. It is not clear how this permitting for scientific research would interact with animal ethics approvals within research institutions. See comments on definitions section.

Civil enforcement

ENREL supports the structure and strategy for enforcement of the Act via the civil processes outlined. Whilst these are in some cases complex and detailed, they appear to offer an effective process similar to process offered in other enforcement areas at this time (such as pollution under the Environmental Protection Act 1993 (SA)).

We are particularly pleased to see the incorporation of a civil penalties scheme that appears to have been drawn largely from the model developed in the Environment Protection Act 1993 (SA). We consider that it is crucial to ensure that those charged with ensuring compliance with the new legislation have as many tools available to them.

We note and endorse the potential for use of Alternative Dispute Resolution through the conferencing process proposed in clause 142 (4) and otherwise through the direction of the ERD Court in managing a matter. This might include mediation, arbitration, expert evaluation. Efficient use of resources in civil enforcement would benefit from proactive use of ADR processes if necessary, under the auspices of the Court.

20. FINANCIAL CONSIDERATIONS

As we have indicated throughout this submission, the success of this initiative in achieving actual protection and improvement of biodiversity is both critical and will come at a cost. This legislation will depend on funding to support the initiative in a meaningful way, not in the typical shoestring model that often applies in Government departments. This does not mean opening the coffers. There are legitimate compromises to be made in balancing environmental and biodiversity needs with other demands. However, the practice, decades long, of putting environmental concerns last in prioritising economic, development, and other human interests, is a serious challenge to this Act.

We are of the view that all income generated from the operation of the Act should be directed to the restoration, protection, and conservation of biodiversity. The cost of administering the Act should be borne by the Government as its responsibility and not defrayed to minimise administrative cost to the Government. We also note that the Biodiversity Conservation Fund (cl 38(2)) and the Biodiversity Administration Fund (cl 39(2)) are subject to the management and control of the Minister. **Anticipating significant funds being available, we suggest that the permissible uses of those funds be specified in the legislation.**

There is uncertainty about where the funding is to come from to enable the implementation of Action Plans or processes for defining critical habitat. Just to undertake the large-scale ecological restoration which will be required to meet one of the Bill's objects of improving the State's biodiversity is going to be very expensive. Extinction inquiries, and investigation of potential high-risk movements across the conservation spectrum, may also be costly, but are absolutely imperative if this Act is to be successful. The Act does not clearly indicate how such work will be funded. These are all examples that we feel support the position that income from the administration of the Act should be directed to biodiversity enhancing activities on the ground.