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Re – Biodiversity Act

Thank you for contacting the Murraylands and Riverland Landscape Board (the landscape board) requesting input to the first draft of the state Biodiversity Act.

The development of this first draft of the new Biodiversity Act (the Act) has generated valuable discussion and interest within landscape board staff and with board partners. There is widespread support for the objects and intent of the Act, and the mechanism by which it will replace the *Native Vegetation Act 1991* and the wildlife provisions of the *National Parks and Wildlife Act 1972*.

The landscape board's primary message is that the Act must function effectively to ensure that avoidance of native vegetation clearance is the highest priority without exception. Erosion of this value will support continued loss and decline of biodiversity across the state, and degradation of functional ecosystems.

In this response we offer our feedback as based on the themes presented in the explanatory paper, with a summary of the survey responses tabulated at the end of the document to support consultation evaluation.

General comments

The landscape board welcome and support the draft Biodiversity Bill, which is a major step in addressing the needs of biodiversity for the state. There are areas of policy or wording where the Act represents a risk of not being strong enough or making it too hard to undertake conservation action thus suggestions are provided throughout to address this.

This Act is silent on the topic of fire. While it is understood this is not its purpose, it is unclear how the Act will address decisions on fire management that will lead to a decline in biodiversity.

While the Act does address climate change in its objects, it could highlight more clearly that biodiversity can connect well with many climate change adaptation intentions. For example, implementing more greening should also be an opportunity for improving biodiversity through infrastructure works, or as part of installing or upgrading WSUD or stormwater basins. There needs to be clearer connections between infrastructure (which happens a lot) and potential biodiversity outcomes. This could be an element of the State Biodiversity Plan which will support the Act, through linkages to the Planning, Development and Infrastructure Act and Planning and Design Code.

Where there is urban biodiversity with cultural values, but it is not significant at a State level, the Act or plan will need to consider how best to include them for cultural protection.

Similarly, urban biodiversity values or the values of highly modified habitats are unlikely to be recognised or listed under the Act but can still offer significant ecosystem services at a local scale. It is hoped that the new wording will enable greater consideration of biodiversity values for these sites and not identify them as having no biodiversity value.

Part 1 – Preliminaries and definitions

The proposal to include fungi and algae under the definition of 'plant' for the purpose of the Act is supported as an important inclusion, acknowledging the challenges of confirming fungi presence at a project site. There is an opportunity for the Act to speak more clearly on the value of soil in supporting biodiversity and climate adaptation. Losing soil from a site, whether through washout, dust storms or compaction/covering severely limits what is possible with biodiversity outcomes. A mine or development site that removes and then reinstates soil layers, however carefully, is changing the soil properties and capacity. The Act could include provisions for soil protection to address this.

The proposal to change the definition of 'native plant' to include any plant indigenous to Australia, rather than a plant indigenous to South Australia, could be controversial. The Act includes provisions to enable management of native species which are causing problems, such as native apricot *Pittosporum angustifolium* in the Mount Lofty Ranges, however there are other fundamental issues with this approach. There is value in enabling a broader range of native plant species to fill gaps that might be left as species disappear. There is potential for these interstate species to provide ecosystem components or similar services, and revegetation strategies and planting philosophies need to embrace them with caution of their weediness or other traits. However, this should be considered an option and not a default position, which should be justified by an ecological case for using those species. Using a species not native to SA may provide some functionality but the natural ecosystem on its own and the plant species it consists of still have values that need to be considered as part of the assessment and replaced where possible.

Part 2 – Objects, principles and general duty

The objects are strongly supported and well defined. It is particularly good to see the inclusion of climate change in Object 2. The landscape board has been involved in workshops with CSIRO to evaluate the most plausible change scenarios, and is currently working with the NRM Adapt protocols, which talk about 'accepting change' and the development over time of 'novel ecosystems'. While this is quite technical for the Act to deal with, if an ecosystem is changing because of climate change, it is not clear how these new values might be assessed, recognised and protected, or if such a change would mean that the habitat is no longer critical and therefore not protected. These novel ecosystems could be critical to future biodiversity, albeit in a different presentation to now.

The new Act could align with the intent of the federal 30 by 30 target, presumably through increase and expansion of existing protected areas, thus it may be useful for the objects to indicate how the Act supports them.

A minor wording change is proposed for Object 5, to add the phrase "regenerative" to complement "sustainable" and encompass "enhances the health and resilience of biodiversity".¹

The use of the term "appropriate" is not clear and could be replaced with "ecological knowledge". This would support sustainable 'take' and support the intent for regeneration of a resource, in a way that does not impact the rest of the ecosystem.

Alternative wording proposal: "...is sustainable, regenerative and based on ecological knowledge...".

The guiding principles are supported, although an additional principle is proposed:

That the precautionary principle should apply such that a lack of knowledge does not prevent actions being undertaken for restoration and conservation.

Under General Biodiversity Duty, the definitions and reasoning are supported due to the clarity regarding establishing 'harm' to a species or ecosystem. The landscape board particularly supports the inclusion of cumulative impacts. Cumulative impacts from multiple developments, fires, routine clearance exemptions etc are poorly assessed and mitigated for in the development and clearance systems. Additional guidance is required to expand on how proponents will need to meet this requirement in their applications.

Part 3 – Administration

The framework for the four new committees which will administer the Act is acknowledged and supported, providing the range of committee members are balanced across a number of organisations or bodies. We assume that the Scientific Committee will have a key role in the process of reviewing and advising on assessments and listings for species, communities, critical habitats, action plans and threat abatement plans. The workload for this committee could be considerable, and it will be important that they meet regularly and have time to consider new nominations frequently. Similarly, the process to list a species must be rigorous and efficient without being cumbersome, to avoid extinctions occurring while data and reports are still being prepared.

It is noted that requirement 8(1)(d) in the existing Native Vegetation Act, that the committee assessing clearance applications and administering the SEB offset fund include a representative responsible for the administration of the Landscape South Australia Act 2019 appears to have been removed in the new Act. The landscape board are concerned that this omission could reduce the capacity of the new committee to understand the landscape scale impact of clearances, land management changes and potentially limit the effectiveness of offset strategies to provide restoration or connectivity at a landscape scale. With regard to offset payment administration and calculation, it is not clear if offset payment strategies will increase commensurate with fees administered interstate.

Part 4 – Native plants

¹ <https://designsciencelab.com/resources/Regenerative-Development.pdf>

The landscape board note the intent to develop a guideline to help proponents to understand and apply the mitigation hierarchy; the guideline should focus on avoidance as the key action or decision step in the process. The Act should adopt the Victorian Government system which requires the proponent to submit a plan of how they are going to replace the ecosystem or vegetation before clearance approval is given. The advantage of this approach is that where there is no practical way to replace an ecosystem, clearance approval is denied. This also provides the proponent with a true cost of what it might take to replace an ecosystem which may also be a disincentive to clear.

The new policy proposal to protect planted native plants more than 20 years old is not fully supported, as there can be considerable value in plantings that fall under the 20-year timeline. Setting this qualification for revegetation protection could mean that many younger revegetation areas could be cleared. This is particularly relevant given the turnover rates in property in some areas of South Australia i.e. the Adelaide and Mount Lofty Ranges area is frequently quoted as having a turnover rate of 7 years.

The Native Plant Clearance Assessment Committee (NPCAC) should be able to request further information from applicants, and proponents should be able to resubmit applications. However, the process should not be designed such that it encourages inappropriate clearance applications (with insufficient information or justification for clearance) from reapplying and overloading the system.

Part 5 – Native animals

These changes are supported.

Part 6 – Threatened species, threatened ecological communities and other ecological entities

The inclusion of threatened ecological communities (TEC) is an important step in advancing biodiversity protection for the State and is strongly supported by the landscape board. This approach should be strengthened by the creation of a new offence for damage or loss to a TEC. The system needs to strongly disincentivise proponents from damaging or destroying TECs, by defining and quantifying their loss proportionally to other patches of remnant vegetation. TECs may consist of non-threatened species and could be missed from compliance fees if offences are purely based on species lists.

The declaration of critical habitat is supported. It should assist to clarify biodiversity priorities across the State and regions, to support more targeted efforts to improve biodiversity outcomes.

The landscape board assumes that the interim or provisional lists of species or ecological communities will be created by the Scientific Committee, which will be an important step in the listing process. It should enable a level of consideration, if not protection, while further information or data is gathered to support a listing.

The creation of action plans for the protection and recovery of threatened species is generally supported. The lack of an action plan for a species or community should not redirect funding from on ground actions to protect that species/community, nor should it add significant delay

to actions to protect that species. Furthermore, the creation of action plans is just one step in the process, they will still require funding and appropriate expertise to implement, monitor and update.

Part 7 – Conserved areas

The renaming of Heritage Agreements to 'Biodiversity Agreements' will likely better reflect their intent and purpose. The landscape board's preference is for these agreements to be committed in perpetuity with a broader definition which also supports recognition of non-native plant values. For example, a proponent may wish to protect important fauna habitat which includes non-native flora in perpetuity, and this should be encouraged and supported by the Act. It did not appear that areas of high biodiversity that consisted of non-native plants would be eligible for protection under the new Conservation Agreements either, and it was unclear if Conservation Agreements could be in perpetuity.

Existing sanctuaries like Yookamurra have mentioned that they found the Heritage Agreement (HA) too restrictive as they needed to live on site as well. For example, if a tree limb dropped across a track, they wanted to have an option to use it for firewood etc. This disincentivised them from taking up a HA and potentially exposes the sanctuary to losing its vegetation if the title changed, as well as missing out on grants to improve condition of HAs. The landscape board is aware of other examples where landowners have been unwilling to undertake a HA due to the difficulties it imposes when managing the land for conservation outcomes (such as burning and, in some instances, grazing). It would be useful if these disincentives could be considered and addressed as part of the new Conservation Agreements.

Part 8 – Enforcement

Monitoring, compliance and enforcement are essential components of the Act and will need to be resourced and funded appropriately if they are to be effective. The creation of a provision for enforceable undertakings gives a compliance officer something to work with to get a suitable resolution to an incident. The undertakings need to ensure that they can be enforceable so the authorised officer can take steps in the future for a resolution. The penalties need to be commensurate with the offence, this could range from expiations to court files.

It is not clear why a breach of a duty of care should be excluded from civil enforcement proceedings if there is evidence to support.

The creation of 'no development' orders should prevent further unauthorised clearance, whether accidental or intentional, and is a welcomed provision to the Act.

The landscape board recommend that criminal offences come before civil offences, for breaches of the Act. It is the landscape board's experience that civil matters can take a long time (in some cases years to come to a resolution) whereas criminal matters have time restraints.

The changes to the penalties for criminal offences are generally supported, however the landscape board recommend strengthening the provisions as follows:

- Some penalties in part 10 appear to be low in value. This could be improved by adding a stipulation "whichever is greatest" in part 4, as implied in the text.
- For Part 9 expiations to be appropriate with the other expiations, they need to be raised to \$500.00, especially for breach of a permit. The aim is to deter alleged offenders, and a \$250.00 expiation is likely to be sufficient.

To ensure the legislation is properly enforced, significant improvements in the current agency capacity to undertake monitoring, compliance and enforcement is required. The State Biodiversity Plan may be an appropriate place to consider how this might occur and could consider future arrangements with landscape boards and the capacities of officers currently authorised under the Landscape SA Act 2019.

Part 9 – Permits

These changes are supported.

Part 10 – Miscellaneous

The landscape board support the creation of a State Biodiversity Plan (Plan) to communicate the intent of the Act and further the objects of the Act. The landscape board would like to see further clarity around statewide indicators to better understand their function in supporting the Act, and how the Plan might interact with the State Landscape Strategy.

It is currently ambiguous as to whether the new biodiversity register is constrained to only applications such as development and clearance applications which have the potential to have a negative impact on biodiversity or whether this register is to include all applications (e.g. on-ground projects and grants) which have a positive impact on biodiversity. The landscape board supports the new biodiversity register if it is constrained to the former but are concerned that this could lead to perverse outcomes of discouraging people to undertake conservation action if all applications which pertain to biodiversity were to be included. It is recommended that the register consider how it could include cumulative impacts or data for species, ecosystems, regions or landscape regions. This would be useful for agencies and proponents to assess future clearances against existing impacts.

The register could also consider including losses or impacts from excluded activities (e.g. tree trimming, clearance for irrigation or fence maintenance/repair). The increase in energy generation and transmission has led to more requests for upgrades to existing high voltage lines, requiring ongoing tree trimming or clearance. Coupled with additional transmission lines to connect new energy production sites to battery storage areas, or existing grid infrastructure, there is a lot of incidental clearance occurring on mature trees. The impacts and potential losses from this are not currently captured or accounted for.

Schedule 2 – Regulated acts or activities exclusions

The landscape board recommend a change to the proposed rewording of the current clearance exemptions as follows:

"The current clearance exemptions relating to 'ongoing grazing practices', the 'maintenance of existing agriculture, forestry or farming' and the 'grazing of domestic stock' are removed and

replaced with one exemption that clarifies that farming and grazing does not require clearance consent if it does not result in permanent degradation."

Suggest that the word 'permanent' be replaced with 'significant'.

Schedule 3 – Principles of preservation of native plants

The removal of clauses (k-i) from the principles of clearance in Schedule 1 of the Native Vegetation Act would likely mean that these considerations on land use suitability are lost from discussions and advice from landscape boards. It is suggested that the new Act retain these three elements for clarity.

Related Amendments

The amendments to the National Parks and Wildlife Act 1972 are supported.

For further information regarding this matter, please contact [REDACTED] at the Murraylands and Riverland Landscape Board on [REDACTED] or [REDACTED]

Yours sincerely

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Enc – Attachment 1 – Table 1 – Responses to consultation survey questions

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Survey Question	Support (Y/N)
1. Do you support the definition of 'plant' to include fungi and algae to allow for their protection under the Act?	Yes – comments provided
2. Do you support adopting the definition for 'native plant' from the National Parks and Wildlife Act 1972, meaning any plant indigenous to Australia can be protected?	Yes – comments provided
3. Do you support the proposed objects of the Biodiversity Act?	Yes – comments provided
4. Do you support the proposed guiding principles of the Biodiversity Act?	Yes – comments provided
5. Do you support what constitutes 'harm' and what is considered 'reasonable measures' for the purposes of the general biodiversity duty?	Yes – comments provided
6. Do you support the governance framework for the Act, including the roles and reporting structure of the committees proposed to be established?	Yes – comments provided
7. Do you support committees being appointed based on their skills and expertise?	Yes – comments provided
8. Do you support the establishment of a Biodiversity Administration Fund as a means of providing transparency on which funds can be used for the administration of the Act?	Yes
9. Do you support the 'regulated activities' and 'unregulated activities' approach to native plants?	Yes
10. Do you support the development of a guideline which provides proponents with advice on how to apply the mitigation hierarchy?	Yes – comments provided
11. Do you support the new measure aimed at protecting planted native plants more than 20 years old, excluding those in people's gardens or commercial forests?	Yes – comments provided

Survey Question	Support (Y/N)
12. Do you support the ability for the NPCAC to request further information and allow clearance applications to be resubmitted in favour of a more formal review process?	Yes – comments provided
13. Do you support the 'regulated activities' and 'unregulated activities' approach to protecting and managing native wildlife?	Yes
14. Do you support introducing targeted controls for managing impact causing species in favour of an 'unprotected' list of species?	Yes
15. Do you support the approach of determining trafficable quantities of species with higher penalties?	Yes
16. Do you support the concept of listing threatened ecological communities (similar to the process used for threatened species)?	Yes
17. Do you support enabling a head power to list other ecological entities in the future, based on criteria to be prescribed in regulation?	Yes
18. Do you support relying on the existing offences for plants and animals, instead of creating a new offence for threatened ecological communities or other listed ecological entities?	No – comments provided
19. Do you support the ability to apply a 'provisional listing' of species and ecological communities where appropriate?	Yes – comments provided
20. Do you support the ability to declare critical habitat to provide increased protections for threatened species, threatened ecological communities, and other listed ecological entities?	Yes – comments provided

Survey Question	Support (Y/N)
21. Do you support the ability to develop action plans for the protection and recovery of a threatened species, threatened ecological community, or listed ecological entity?	Yes – comments provided
22. Do you support renaming Heritage Agreements to 'Biodiversity Agreements' to better reflect their role?	Yes – comments provided
23. Do you support the introduction of new types of protected areas for private land, including the proposed Conservation Agreements?	Yes – comments provided
24. Do you support provisions for enforceable undertakings as a method to manage breaches of the Act?	Yes – comments provided
25. Do you support the proposal to introduce wider standing for people to make an application to the court for civil enforcement of a breach of the Act?	Yes – comments provided
26. Do you support the concept of 'no development' orders?	Yes – comments provided
27. Do you support the option of civil penalties for breaches of the Act?	Yes – comments provided
28. Do you support the penalties for criminal offences proposed under the Act?	Yes – comments provided
29. Do you support the permit provisions proposed in the Biodiversity Act?	Yes
30. Do you support the provisions that set the scope of the State Biodiversity Plan?	Yes – comments provided
31. Do you support the recognition of culturally significant biodiversity entities?	Yes
32. Do you support the requirement for decision makers under the Act to take the State Biodiversity Plan into account?	Yes

Survey Question	Support (Y/N)
33. Do you support the proposal to establish a Biodiversity Register?	Yes – comments provided
34. Do you support the framework that the Bill proposes for the regular review of the Act?	Yes
35. Do you support moving the clearance exclusions into a schedule to the Act so they are in one place?	Yes – comments provided
36. Do you agree with the changes to the unregulated activities in Schedule 2?	Yes – comments provided
37. Do you support updating the existing 'principles of native vegetation clearance' to 'principles of preservation of native plants' to align with provisions in the Biodiversity Act related to threatened species, threatened ecological communities and listed ecological entities?	No – comments provided
38. Do you support the amendments proposed to the National Parks and Wildlife Act 1972?	Yes – comments provided
39. Do you support the amendments proposed to other legislation?	Yes – comments provided