



Conservation Council SA

Biodiversity Coordination Unit
Department for Environment and Water
81-95 Waymouth Street
Adelaide SA 5000
By email: biodiversityact@sa.gov.au

18 February 2025

Dear Biodiversity Coordination Unit,

RE: Submission on the draft *Biodiversity Act*

Conservation Council SA welcomes the opportunity to provide a submission on the South Australian Government's exposure draft of the *Biodiversity Act* (the Act).

Conservation Council SA is an independent, non-profit, and strictly non-party political organisation representing approximately 40 of South Australia's environment and conservation organisations and their 90,000 members.

Conservation Council SA kindly requests that this submission be published in full and made accessible to the public.

Summary

Nature is deeply important to South Australians. We rely upon nature for our recreation, for our economic prosperity, and for our health and wellbeing.

It is also uniquely idiosyncratic to every South Australian's sense of place and identity – our plants, animals, and our environmental landscapes – they are a cornerstone of what makes us who we are.

However, South Australian biodiversity is under siege from land use change, invasive species, and increasingly climate change. Our natural world is on a trajectory of accelerating decline¹, and with it, the benefits, values, and identity that nature provides to all South Australians is also in decline.

The natural legacy we wish to leave to our children and grandchildren is in serious and increasing jeopardy. Already, future generations will not be able to enjoy nature and its benefits to anywhere near the extent current generations have had the fortune to enjoy. And so, we have a profound need to protect, restore, and rebuild South Australian nature before it is too late.

As Conservation Council SA stated in our response to the Discussion Paper on the development of this Act, there is a clear imperative to act with ambition such that that this new legislation matches the severity and urgency of the nature crisis we all face.

¹ 2021 *State of the Environment report*, Commonwealth Government; <https://soe.dcceew.gov.au/>; SA *State of Environment Report 2023*, South Australian Government; <https://soe.epa.sa.gov.au/>

However, overall, our view is that the Act predominantly rearranges provisions from existing Acts and does not set out substantive changes that would create the step change that is urgently needed for protecting South Australia's remaining biodiversity. Neither do the provisions included in the Act provide for its own stated objective of driving the upscaling of ecological restoration in SA, as the South Australian Nature Alliance has highlighted in its submission.

Conservation Council SA concurs with the Environmental Defenders Office (EDO) that the provisions laid out in the Act do not match the Government's laudable ambition to halt biodiversity decline and put biodiversity on a pathway to recovery.

However, whilst the Act does not deliver on the profound need to reverse the accelerating decline of South Australia's nature at scale, it *is* – overall – a modest but positive step forward in certain areas.

Given this opportunity is to provide constructive feedback on the Act as drafted, our submission outlines 9 Key Recommendations, followed by a series of detailed recommendations for the Act.

The Good

There are a range of new, positive measures in the proposed Act – Conservation Council SA is particularly supportive of the following measures:

- The introduction of a general duty not to undertake an activity that harms or has the potential to harm biodiversity [section 11], whilst noting that only the Government may bring any action under that duty;
- The introduction of third-party enforcement provisions similar to those found in the *Landscape South Australia Act 2019* and the *Planning, Development and Infrastructure Act 2016* [section 114(1)(g)]; and
- The requirement that payment into the Biodiversity Restoration Fund is only possible where a significant environment benefit ('SEB', i.e. an on-ground offset) is not achievable in accordance with the SEB scheme (albeit only for 'regulated' clearances that will be considered under the Act rather than 'unregulated' clearances which will be captured by Schedule 2) [section 50(3)]; and
- The introduction of 'critical habitat' provisions which create higher hurdles for the vegetation clearance in areas so declared (even though we note that the declaration of 'critical habitat' is subject to Ministerial fiat rather than being based purely upon the available scientific evidence) [Division 5].

Key Recommendation 1: That the general duty provisions [section 11] be retained in the Act, with minor amendments (see Recommendation 7 below).

Key Recommendation 2: That the third-party enforcement provisions [section 114(1)(g)] be retained in the Act.

Key Recommendation 3: That payment into the Biodiversity Restoration Fund as a last resort be retained.

Key Recommendation 4: That, noting their limitations through Ministerial direction and control, the provisions relating to 'critical habitat' [Division 5, and elsewhere] be retained in the Act.

The Bad

Conservation Council SA is highly disappointed that our calls for legal primacy of the Act – as aligned with and echoing the key recommendation of former Commonwealth Treasury Secretary Dr Ken Henry is his independent review of the NSW *Biodiversity Conservation Act 2016*² – has not only been unheeded, but actively transformed into legal subservience in the proposed Act. It is worth reproducing Dr Henry’s recommendation for legal primacy for environmental repair here yet again:

*“...the natural environment is now so damaged that we must commit to ‘nature positive’ if we are to have any confidence that future generations will have the opportunity to be as well off as we are. The Review Panel appreciates that this implies a major reset in public policy thinking, which many will find challenging. Even though sustainability concepts have been central to policy development for more than a generation, many in the community, and even within government circles, still struggle with the notion that policies to promote human progress should recognise any constraints, social or environmental. Yet the fact of humanity’s dependence upon the quality of the biosphere, in both social and economic dimensions, is as immutable as the laws of physics. **The case for giving primacy to environmental repair is inescapable. Our future depends upon it.**”*

Specifically, section 6(5) of the proposed Act allows for the wholesale abrogation of the vast majority of the Act by the Government of the day, if and when, where, and for however long it so chooses. This is further aggravated by section 4(1) which does not allow the Act to limit any provision of any other Act. In short, the Act seeks to entrench the opposite of the primacy which was the key appeal of the environment sector to the Government in its development of the legislation.

If unaltered, these sections would be a major step backwards from South Australia’s existing environmental legislative architecture.

Also at odds with South Australia’s existing environmental legislative architecture is that the proposed Act has wholly concentrated the power to appoint members of the Biodiversity Council and the Native Plants Clearance Assessment Committee into the hands of the Minister, removing the role of community representation through key and relevant peak bodies, and risking politicisation of the key institutions of the Act.

Further, the proposed Act reallocates responsibility for the key native vegetation / environmental ‘offsetting’ policy under the Native Vegetation Act, the Significant Environment Benefit (‘SEB’) policy, from the Council to the Minister. The policy, and especially the environmental ‘offsetting’ formula contained within that policy, is the centrepiece of South Australia’s environmental ‘offsetting’ regime, and should not be beholden to the whims of the Minister of the day, and, furthermore, without even any requirement to regard or reflect the science and the true public cost of environmental ‘offsetting’. Just as the independent and expert Reserve Bank Board sets interest rates, and independent and expert Biodiversity Council should set the ‘offsetting’ formula.

The Act also does not provide any ‘absolute protection’ for biodiversity when it is most needed – i.e. when the impacts of a proposed action on biodiversity are simply unacceptable. This relates to our earlier comment on the importance of legislative primacy for the Act (for example, over decisions relating to individual development applications made through the land use planning system), but also pertains to applications made directly under this Act. There needs to be a mechanism by which native plant clearance applications (as well as other proposed biodiversity-damaging actions that do not involve plants, such as damage to non-living habitat such as rocky outcrops) can be refused.

² See:

<https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

The *Biodiversity Conservation Act 2016* (NSW) includes a mechanism of this kind, where serious and irreversible impacts trigger a mandatory refusal for certain applications (see: section 7.16(2) of that Act³). Specifically, there needs to be a limit placed on ‘offsetting’ whereby the Native Plants Clearance Assessment Committee is able to refuse an application in particular circumstances, for example, where it is clear that a threatened species, ecological community, or ecological entity is so scarce that a suitable ‘offset’ would not be available.

Conservation Council SA and the SA environment sector we represent will not be able to support the Act progressing unless the issues outlined in the following recommendations can be resolved:

Key Recommendation 5: That section 6(5) be deleted or otherwise seriously modified such that the Government of the day does not have the power to abrogate most of the Act if and when it so chooses.

Key Recommendation 6: That section 4(1) be deleted or otherwise seriously modified such as to not undermine the efficacy of the Act.

Key Recommendation 7: That the role of peak community interest bodies – including Conservation Council SA – as nominating organisations for members of the Biodiversity Council (that replaces the Native Vegetation Council) be retained, mirroring the current process under the Native Vegetation Act.

Key Recommendation 8: That the power of the Minister to determine the Significant Environment Benefit (‘SEB’) Policy under section 161(4)(c) – and especially the environment offset formula contained within that policy – should instead sit with the independent and expert Biodiversity Council, and not require the political approval of the Minister.

Key Recommendation 9: Refusal mechanisms for acts or activities that would have an unacceptable impact on biodiversity be incorporated into the Act.

Specific concerns relating to ‘offsetting’

‘Offsetting’ is widely recognised as a fraught practice with questionable environmental outcomes^{4,5,6}.

Conservation Council SA is concerned that the Act does not reform the environmental ‘offsetting’ regime in any major way, other than:

- the requirement that payment into the Biodiversity Restoration Fund is only possible where a significant environment benefit (‘SEB’, i.e. an on-ground offset) is not achievable in accordance with the SEB scheme (albeit only for ‘regulated’ clearances that will be considered under the Act rather than ‘unregulated’ clearances which will be captured by Schedule 2) [section 50(3)], and
- a requirement for on-ground ‘offsetting’ rather than a payment in lieu if declared ‘critical habitat’ will be impacted.

Given that the decision has been taken to continue with the practice of ‘offsetting’ in a manner largely consistent with current practice, our comments focus on seeking improvements to the Act, including

³ <https://legislation.nsw.gov.au/view/html/inforce/current/act-2016-063>

⁴ <https://hsi.org.au/blog/nature-laws-explainer-why-biodiversity-offsets-are-failing-wildlife-part-2/>

⁵ <https://www.sciencedirect.com/science/article/abs/pii/S000632071730349X>

⁶ <https://www.sciencedirect.com/science/article/pii/S2590332222002664>

through inserting an explicit mechanism that allows for the Native Plant Clearance Assessment Committee to refuse an application in certain circumstances, as outlined above.

Further, from discussions with the Government, Conservation Council SA understands that the policy intention is to be able to draw a link between actions destructive to biodiversity approved under this Act and the 'offset' – either on-ground or a payment in lieu – provided to create 'net gain'. As drafted, the Act does not make this explicit nor include provisions that would make this possible. Our recommendations to address this are provided as part of our detailed recommendations below.

Detailed recommendations

This section provides detailed recommendations on legislative amendments, cross-referenced to a track-changed copy of the draft Act. Whilst the Key Recommendations above are not reproduced below, they do feature in the track-changed copy.

Definitions [section 3]

Conservation Council SA is deeply concerned that 'significant environmental benefit' is insufficiently defined, being left to the determination of the Clearance Assessment Committee, in accordance with the SEB Scheme, which is determined by the SEB policy, which is, in turn, ultimately determined by the Minister [which we strenuously oppose, see: Key Recommendation 8, as above].

Appropriate components of the description of significant environmental benefit from the *Native Vegetation (Miscellaneous) Amendment Bill 2024* should be drawn up to expand the definition; Conservation Council SA recommends these elements in particular:

"environmental benefit that has been or will be achieved by measures, actions or requirements to establish, regenerate, enhance, manage or protect native vegetation on specified land" (noting this should be expanded from 'native vegetation' to 'biodiversity').

Further, it should be a requirement that there is an absolute net gain relative to the biodiversity loss incurred.

Recommendation 1: That the definition for 'significant environmental benefit' should be expanded to reflect the description in the *Native Vegetation (Miscellaneous) Amendment Bill 2024* [section 3, definition for 'significant environmental benefit'], but expanded from 'native vegetation' to 'biodiversity', and require an absolute net gain relative to the biodiversity loss incurred.

Regarding the definition for 'native plants', Conservation Council SA recognises that there must either be a positive list of native, but non-South Australian plants under the regulations that is 'added' to the definition, or a negative list of excluded ('subtracted') Australian native plants under the regulations. Either approach will, by necessity, create unwanted administrative complexity, but on balance, the first approach will lead to less complexity and would guard against more unintended outcomes.

However, the Department should review the detail of the approach to regulating native plants, native weeds, and exotic weeds with the assistance of subject matter experts prior to finalising the Bill. Further consideration also needs to be given to the definition of 'intact stratum', as outlined in Recommendation 4, below.

Recommendation 2: That the definition for 'native plant' should be limited to plant of a species that is indigenous to South Australia rather than Australia, drawing upon the definition from the existing *Native Vegetation Act 1991* [section 3, definition for 'native plant'].

Recommendation 3: That the Government work with native plant and invasive weed experts to further refine the regulatory approach to be fit-for-purpose.

Recommendation 4: The inclusion of the word ‘contiguous’ in the definition of intact stratum is confusing and may result in small or patchy areas of otherwise important habitat not being protected.

The legal definition for ‘protected area’ needs to be reworded or otherwise revised to avoid policy confusion with the nationally agreed (National Reserve System) and internationally agreed (International Union for Conservation of Nature) definition for protected areas. This is especially important given the draft Act’s definition currently includes termed agreements under 99 years, which is directly inconsistent with the national and international definitions for protected areas⁷. The easiest way to address this issue is to replace ‘protected area’ with a similar but different phrase, such as ‘stewarded area’.

Recommendation 5: Replace the defined term ‘protected area’ with ‘stewarded area’ (or similar) to avoid unnecessary policy confusion with set national and international definitions for ‘protected area’.

Legislative primacy [sections 4 and 6]

Refer to Key Recommendations 5 and 6, as above.

Objects [section 7]

It does not make logical sense for all members of society to share responsibility for biodiversity equally, predominantly due to capacity issues – for example, the disability sector, or kindergarten education sector, cannot be expected to share ‘equal’ responsibility for biodiversity alongside well-resourced corporate interests, or the State Government, or even an under-resourced but expert environmental NGO sector.

Recommendation 6: Delete the word ‘equal’ from the first object of the Act [section 7(a)]. An alternative approach could be to use the word ‘equitably’.

There is a lack of consistency in the usage of the word ‘conservation’ in Objects, and ‘management’ of biodiversity – critical to conservation – is omitted completely. It should be noted that protection, restoration, enhancement and management are *subsets* of conservation – it does not make sense to refer to ‘conservation and restoration’ any more than it makes sense to say ‘fruit and apples’.

Recommendation 7: Amend the Objects to refer to conservation by referencing its constituent elements rather than the current inconsistent mix of approaches [sections 7(a) to (d)]. Alternatively, the word ‘conservation’ could be defined in section 3 to include protection, restoration, enhancement and management.

Recommendation 8: Further to Recommendation 5, this terminology should be updated to be correct across the entirety of the Act, including the long title of the Act (which also currently reverses the order in which the words appear elsewhere in the Act).

Conservation Council of SA also supports the recommendations in the submission from the EDO to consider whether a specific Object from the Native Vegetation Act should be brought across, along the lines of ‘protect and restore biodiverse habitat’ (rather than ‘native vegetation’). Further, there

⁷ p43, *Australia’s Strategy for the National Reserve System 2009–2030*; <https://www.dcceew.gov.au/sites/default/files/documents/nrsstrat.pdf>; also see: <https://parksjournal.com/wp-content/uploads/2024/05/PARKS-301-GLFT9809-Fitzsimons-et-al.pdf>

should be an Object that specifically seeks to halt extinctions, in line with Australia's *Strategy for Nature*⁸ which has been collectively agreed upon by all States, Territories, and the Commonwealth.

Recommendation 9: That a new Object be added to the Act that seeks to halt new extinctions of native South Australian plants and animals ('native plants and protected animals') [new section 7(f)].

Principles [section 8]

The 'precautionary principle' – a widely and long-established accepted principle in environmental law, and as contained in Australia's 1992 *Intergovernmental Agreement on the Environment*⁹ – should be included in the list of principles under the Act. That Agreement provides a useful description of the precautionary principle, as follows:

*"Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation, and that decisions should be guided by careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and an assessment of the risk-weighted consequences of various options."*¹⁰

Recommendation 10: That the list of principles under the Act should be amended to include the precautionary principle.

General duty [section 11]

Conservation Council SA strongly supports the inclusion of a general duty not to harm biodiversity (see Key Recommendation 1, as above). However, we are concerned that the general duty in section 11(1) could be interpreted as being *subject* to section 11(2), even though the wording of 'regard is to be had' within section 11(2) gives the impression that this is not the intention.

Further, 'entity' in sections 11(1) and (4) is undefined; it is unclear whether it includes a person, and further unclear whether it includes a person or body engaged in the administration of the Act.

Lastly, the purpose of the general duty could be more clearly signposted in the legislation by amending the name of the section.

Recommendation 11: That the section be entitled 'general duty to not harm biodiversity' to more explicitly signpost the character of the duty to all users of the Act [section 11].

Recommendation 12: It should be explicitly clarified that subsection (2) does not limit the general duty expressed in subsection (1), rather than being considered equal in force, as could be currently interpreted [sections 11(1) and (2)].

Recommendation 13: That an 'entity' under the general duty be defined in the Act, including clarification as to whether it includes a person or body engaged in the administration of the Act [section 11(6)].

⁸ See: p16, "No new extinctions" target; <https://www.dcceew.gov.au/sites/default/files/documents/australias-strategy-for-nature-2024-2030.pdf>

⁹ See: <https://faolex.fao.org/docs/pdf/aus13006.pdf> (further context at: https://www.aph.gov.au/-/media/Estimates/rrat/bud2223/Tabled_Documents/Agriculture/TabledDoc2_Briefing_Note.pdf)

¹⁰ Ibid.

Statutory bodies [Division 2]

As per Key Recommendation 7, Conservation Council SA cannot support the legislation if the current model of community representation (as per the *Native Vegetation Act* that the draft *Biodiversity Act* seeks to replace) is removed from the appointment of the Council and the Clearance Assessment Committee. Recommended amendments have not been included in the enclosed track-changed copy of the Act, however the current *Native Vegetation Act* provides the template for reinstating the existing community representative model.

However, further to Key Recommendation 7, Conservation Council SA is concerned about the dilution of the role of community representatives on the Biodiversity Council by expanding membership from seven members to (up to) twelve members. Expanding membership on statutory bodies is a tried and tested tactic of rebalancing power away from the public and community interest.

Indeed, this is a tactic we have seen recently in amendments to the Environmental Protection Authority (EPA) of Western Australia that – apart from removing its power to regulate regarding the impacts of climate change – also saw the expansion of the EPA board from five to nine members to allow for people with a background in industry to have greater influence on environmental regulation¹¹.

Specifically, we note the addition of the Minister’s ability to appoint persons with skills, knowledge and experience in ‘energy and resources’. Whilst ‘energy and resources’ is clearly an area of land use that is of current interest to the Government, it is one of many land uses, and one that is not anywhere near as ubiquitous as agriculture and pastoralism that continue to dominate much of the South Australian landscape. If ‘energy and resources’ are to be platformed, then they should at least be limited in their balance of influence.

Further, as an area of skills, knowledge and experience, ‘scientific research’ is insufficiently connected to biodiversity, and the need for this connection should be made explicit.

Recommendation 14: That the Biodiversity Council should not contain more than nine members [section 15(1)].

Recommendation 15: Not more than one person deemed to possess skills, knowledge and experience in ‘energy and resources’ be allowed to be appointed to the Biodiversity Council [new section 15(3)].

Recommendation 16: That skills, knowledge and experience in ‘scientific research’ be explicitly focused upon biodiversity, i.e. ‘scientific research relevant to biodiversity’ [section 15(2)(b)(v)].

It is unclear why the Biodiversity Council’s advisory role regarding biodiversity policies should be limited to at the request of the Minister, rather than at their own initiative, especially given the newly elevated, statutory character of biodiversity policies under section 161. This would create a highly clunky process where the Council would need to, upon identifying an issue for investigation or remedy, then request the Minister to in turn request the Council to provide advice.

Recommendation 17: That the Council be able to provide advice on biodiversity policies to the Minister on their own initiative [section 16(d)].

¹¹ ‘Have WA’s new environmental protection laws left the state’s EPA a toothless tiger?’, Australian Broadcasting Corporation, 20 October 2024; <https://www.abc.net.au/news/2024-10-20/wa-new-environmental-protection-laws-/104479996>

Further to Key Recommendation 8 above and the concern about the concentration of power in the hands of the Minister and the potential for politicisation, it is the view of Conservation Council SA that the Native Vegetation Clearance Assessment Committee (or Native Vegetation Assessment Panel, as the current body is named) has worked effectively as a subcommittee of the Native Vegetation Council and should remain appointed by the Biodiversity Council, albeit with the chair being selected by the Minister. Conservation Council SA notes that members of the Council would, as per section 15(2)(b), collectively possess the requisite skills for membership of the Clearance Assessment Committee, and that there appears no reason for the requisite set of skills and expertise (but strangely, not knowledge) to be delegated to regulation.

Recommendation 18: That the Clearance Assessment Committee be retained as a subcommittee appointed by the Biodiversity Council [section 18].

Recommendation 19: That the Minister be empowered to appoint the Chair of the Clearance Assessment Committee [section 18].

Recommendation 20: That the number of members for the Committee be prescribed in the legislation, and be no more than five [section 18(1)]. There is no compelling reason that the number of members would be delegated to regulation [deletion of section 18(6)].

Recommendation 21: That the provision requiring that the chair of the NPCAC may not be a member of the Public Service be retained [section 18(5)].

Recommendation 22: That any requirements for skills and expertise – and knowledge – of the NPCAC be set out in the legislation rather than under regulation. There is no compelling reason that the skills required for the Committee would be delegated to regulation [deletion of section 18(6)].

Recommendation 23: That the Committee at least be able to provide advice to the Minister and Council on the Significant Environmental Benefit (SEB) scheme and mitigation hierarchy [section 19(c)], or, alternatively, be empowered to provide advice (or clarified that they are not prevented from providing advice) to the Minister on any matter relevant to the Committee.

As above for the Clearance Assessment Committee, there is no compelling reason that the number of members in the Scientific Committee would be delegated to regulation.

Recommendation 24: That the number of members for the Scientific Committee, or the range of number of members, be prescribed in the legislation. On balance, Conservation Council SA recommends at least 5 members and not more than 9 members [section 24(1)].

It should be clarified that nothing in the legislation prevents the Biodiversity Council from forming ad hoc working groups that help inform the ordinary business of the Council – i.e. not subcommittees that incur a Secretariat and/or significant additional cost to Government – and without the need to seek the permission of the Minister.

Recommendation 25: That the Biodiversity Council can form ad hoc working groups, and without the permission of the Minister, so long as they do not create any Secretariat requirements and/or significant additional costs upon Government [section 26(1)].

Conditions of membership [section 28]

The legislation does not appear to have explicitly contemplated the possibility of a member of a statutory body under the Act becoming incapable of discharging their duties, such as entering a coma, or similar; it is unclear whether section 28(2)(b) would cover such a situation or not due to the usage of the word 'failing'.

Further, Conservation Council SA views that the inclusion of the word 'satisfactorily' in section 28(2)(b) is too open to interpretation and potential Ministerial abuse, and otherwise sufficiently covered under 'neglect of duty' under section 28(2)(c).

Recommendation 26: That section 28(2)(b) [or otherwise section 28(3)] be amended to address the possibility of a member being permanently incapacitated.

Recommendation 27: That the inclusion of the word 'satisfactorily' in section 28(2)(b) is too open to interpretation and should be deleted.

Application for consent [section 48]

With the implicit or explicit consent of the Pastoral Board, leaseholders under the *Pastoral Land Management and Conservation Act 1989*, should be able to make an application to clear native plants rather than the Minister responsible for that Act.

Recommendation 28: That leaseholders under the *Pastoral Land Management and Conservation Act 1989* to allowed to make applications to clear native plants, subject to any additional requirements under that Act [section 48(2)].

Matters NPCAC must have regard to when determining application [section 49]

Recommendation 29: That, in addition to cumulative impacts that are reasonably likely to result from clearance, the Clearance Assessment Committee should be required to consider the cumulative impacts that would result from a clearance [section 49(1)(c)].

Recommendation 30: That the Clearance Assessment Committee should only be required to give regard to applicant's desire to facilitate the management of other native plants, and not all plants [section 49(2)].

Circumstances in which consent may be given etc [section 50]

There has been a transcription error from the Native Vegetation Regulations regarding vehicle tracks – it should read "not more than 5 metres" rather than "more than 5 metres" [see: section 13(1), *Native Vegetation Regulations 2017*].

Recommendation 31: That the special circumstances for the clearance of native plants for the purposes of establishing or widening a track should be not more than 5 metres in width, rather than more than 5 metres in width, as per the original policy intent under the *Native Vegetation Regulations 2017* [section 50(12(f))].

Further to Key Recommendation 9, this is likely the relevant section where it should be set out that the Clearance Assessment Committee can refuse an application, for example where it is clear that an entity is so scarce that a suitable 'offset' would not be available.

Conditions of consent [section 52]

Conservation Council SA is concerned that the current list of potential conditions does not contemplate all scenarios that are relevant to preserving native plants. On this basis, the principles of preservation of native plants is directly relevant, and should be utilised as a more general basis for creating conditions that are specific to a clearance application, but without providing an unrestricted power to create (otherwise potentially unrelated) conditions.

Recommendation 32: That the Clearance Assessment Committee be empowered to impose conditions of consent that are relevant to the ‘Principles of preservation of native plants’ under Schedule 3 [section 52(2)(g)].

Other matters relating to consents [section 53]

Clearance consents should be timebound and limited to no more than 5 years. We have seen the unintended policy impacts from clearance consents that have no end-date, especially where there have been subsequent changes in regulations and legislation. However, facts can also change over time, such as further shrinking of remnant native vegetation, or further shrinking of critical habitat, such that the original decision should need to be revisited in light of those changed facts. Conservation Council SA’s view is that 5 years is a more than reasonable time to balance commercial certainty/cost with the potential for the change of on-ground facts, noting that nothing prevents an entity seeking consent for clearance after the time limit expires.

Further, clearance consents granted under a (to be) repealed *Native Vegetation Act* should be grandfathered to 5 years from the date of the repeal.

Recommendation 33: Consent to undertake clearance of native plants should be timebound and limited to no more than 5 years [section 53(1)].

Recommendation 34: Any remaining valid consents to undertake clearance under the *Native Vegetation Act* should be revoked as at 5 years from the date of the repeal of that Act.

Avoidance of duplication of procedures etc [section 56]

To the extent that it is reasonable, this section should be future-proofed for changes in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Recommendation 35: That the meaning of an assessment report under the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth be prescribable under regulation to allow for changes in that Act without the need to amend the Biodiversity Act [section 56(7)].

Guidelines [section 61]

It is unclear whether amendments to guidelines – as opposed to the initial preparation and adoption of guidelines – is intended to be captured within the ambit of this section.

Recommendation 36: That the Government consider whether all amendments to guidelines require a detailed consultation process, and, at minimum, that minor amendments be excluded from extensive requirements to consult, etc. [sections 61(3) and 61(12)].

Protected animals [Part 5]

Conservation Council SA is concerned that the operations of Zoos, Aquariums, and fenced wildlife sanctuaries may suffer unintended consequences from the proposed permitting regime, and that it could unnecessarily constrain legitimate conservation efforts.

Recommendation 37: That the Government work with Zoos SA, the Zoo and Aquarium Association Australasia, and relevant member organisations of the Australian Land Conservation Alliance (ALCA), to ensure that routine operations of these organisations with regards to protected animals (such as wildlife translocations) are streamlined and fit-for-purpose.

Threatened species, threatened ecological communities and listed ecological entities [Part 6]

The Biodiversity Act should adopt the approach utilised in the NSW Biodiversity Conservation Act, namely, that an independent Scientific Committee be responsible for determining the listing of species and ecological communities, rather than it being a political decision of the Minister. However, as a pragmatic compromise, the Minister could still determine the eligibility criteria [section 71], and the process for establishing and revoking designated lists still prescribable in the regulations [section 72].

Under this proposal, the Minister would still be responsible under Part 6 for:

- action plans [section 77];
- the declaration of key threatening processes [section 78];
- threat abatement plans [section 79];
- whether threatened species of fish are prescribed within the definition of ‘protected animal’ in section 3 [section 81];
- critical habitat [Division 5, Part 6]

Recommendation 38: That the Scientific Committee should be the responsible decision-maker for listing decisions under Part 6 of the Act [sections 68 – 70; 72 – 76; would require consequential amendments to section 25].

Recommendation 39: That the inclusion of a public nomination process be considered for key threatening processes [section 78].

Subsequent to the triggers listed in the Act [section 82(2)], the Minister should be required to make a decision on whether they make a declaration of critical habitat or not, rather than merely to consider whether to make a declaration or not.

Any decision to amend or repeal a previous declaration of critical habitat should be accompanied by a statement of reasons via public notice (i.e. by a website determined by the Minister). Further, consequential amendments to provide information on critical habitat within the Planning Code must be made, not ‘may’ be made.

Recommendation 40: That the Minister must decide to declare critical habit or not within 6 months following a listing decision or on the recommendation of the Scientific Committee, not merely ‘consider whether’ to decide [section 82(2)].

Recommendation 41: That decisions to amend or repeal declarations of critical habitat be accompanied by a statement of reasons via public notice [new section 82(8)]. The proposed

requirement for a statement of reasons via public notice could also be extended to the declaration of critical habitat.

Recommendation 42: That the relevant consequential amendment to the *Planning, Development and Infrastructure Act 2016* [new section 76(3a)] should also be amended such the Minister responsible for that Act must (rather than ‘may’) make amendments to the Planning Code to provide information relating to critical habitat [see: 84—Amendment of section 76—Minor or operational amendments].

Financial and other assistance [section 101]

As outlined earlier, Conservation Council of SA is concerned that the ‘offsetting’ process has not been reformed in any substantive way. A component of this concern relates to how payments made in lieu of ‘offsets’ are subsequently disbursed and how the gain they are purported to deliver will be monitored and achieved.

We are therefore concerned that the provisions related to the expenditure of the Biodiversity Restoration Fund at section 36(4) are very broad and make no specific reference to the purpose for which those vast majority of those funds – i.e. payments made in lieu of ‘offsets’ likely to be in the order of millions of dollars – will have been collected.

If the policy intent is to be able link ‘payments in’ with ‘expenditure out’ for payments made in lieu of ‘offsets’, as Conservation Council SA has been advised, then provisions for this need to be incorporated into the Act.

Recommendation 43: That payments made in lieu of ‘offsets’ require tracking on incomings and outgoings to ensure absolute net gain is achieved.

On a practical level, Conservation Council SA supports the use of these funds to subsidise the activities of eNGOs in relation to purchasing land for conservation in-perpetuity, and therefore the reinstatement of the potential for the Biodiversity Restoration Fund to purchase property, noting that this mirrors the amendments to the *Native Vegetation Act 1991* currently before the Parliament¹².

Recommendation 44: That the power to purchase (or contribute to the purchase) of land from the Biodiversity Restoration Fund be retained [101(5)(b)] where a specific link from ‘payment(s) in’ can be drawn to the absolute net gain from any given purchase.

Recommendation 45: That, given payments into the Biodiversity Restoration Fund are derived from in-perpetuity clearance of native plants, that any land that is purchased in whole or in part by the Fund be subject to in-perpetuity arrangements (i.e. not a termed agreement of less than 99 years, as per long-term protection, noting that conservation agreements would not ordinarily be sufficient [section 101(5)]).

Recommendation 46: That it be clarified that land purchased using the Biodiversity Restoration Fund can be made into a public protected area in lieu of a biodiversity agreement [section 101(5)], provided it is acknowledged that the State Government is then *subsidising its own*

¹² *Native Vegetation (Miscellaneous) Amendment Bill 2024*;
[https://www.legislation.sa.gov.au/lz/path=/b/current/native%20vegetation%20\(miscellaneous\)%20amendment%20bill%202024](https://www.legislation.sa.gov.au/lz/path=/b/current/native%20vegetation%20(miscellaneous)%20amendment%20bill%202024)

responsibilities in relation to expanding and managing the public protected area estate from payments made in lieu of ‘offsets’, i.e. biodiversity destruction.

State biodiversity plan [section 160 and section 9]

Conservation Council SA concurs with the EDO that the State Biodiversity Plan, conservation plans and biodiversity policies will be instrumental in setting relevant targets and outlining required actions and that, overall, the Act would be strengthened by requiring decisions made under the Act to be *consistent with or give effect to* these key plans and policies, rather than simply having decision makers *have regard* to those plans and policies.

Recommendation 47: That decisions made under the Act should be ‘consistent with’ the State Biodiversity Plan, rather than merely ‘have regard to’ [section 9].

The preparation and review of the State Biodiversity Plan should require public consultation, not merely consultation as determined by the Minister of the day.

Recommendation 48: That the process of preparing and reviewing the State Biodiversity Plan be required to include public consultation [section 160(5)(c)].

Biodiversity policies [section 161]

As per Key Recommendation 8 above, the Minister should not have the power to determine the SEB policy – this should be wholly the remit of an independent Biodiversity Council.

A minor amendment should not, in any case, be taken to include a change to the SEB policy excepting where it accords with the definition of minor amendment used elsewhere in the Act (i.e. “**minor amendment** means an amendment to reflect a change in nomenclature, minor taxonomic revisions or typographical errors, or an amendment in prescribed circumstances”) [section 161(11)].

Recommendation 49: That any change to the SEB Policy not be excludable from the process outlined in section 161(8), excepting where it is genuinely a minor amendment (in accordance with the definition for ‘minor amendment’ as provided elsewhere in the Act, for example, in section 75(2)) [section 161(11)].

Biodiversity register [section 162]

The publication of Clearance Assessment Committee decisions on the Register should at least include the conditions of consent, and ideally, the entire decision notification document.

Recommendation 50: That the information on the Biodiversity Register for applications for consent to clear should include the conditions of consent (and ideally, in practice at least, the entire decision notification document) [section 162(a)(iv)].

Conserved areas should be included in the Register, and their inclusion not left subject to the regulations.

Recommendation 51: That conserved areas be included in the Biodiversity Register, ideally including whether they are sanctuaries or not [new section 162(9)(c)].

There should be a timeframe by which all relevant decisions are published on the Biodiversity Register to avoid undue delay, particularly in publishing controversial decisions.

Recommendation 52: That information (including decisions) included on the Biodiversity Register be added to the register as soon as practicable after it is received, or within a specific timeframe after that information is received [section 162(2)].

Native plants—regulated acts or activities exclusions [Schedule 2]

Noting the ongoing concern regarding the inclusion of biodiverse carbon plantings within the definition of commercial forest¹³ – and the need to resolve that matter within the *Landscape South Australia Act 2019* – that to at least avoid legislative complexity, the Biodiversity Act reference the definition of commercial forest in the *Landscape South Australia Act 2019*, rather than reproduce that definition (as currently is the case under Schedule 2). This is the approach being proposed in the *Assessment Improvements Code Amendment* currently under consultation on YourSAy¹⁴.

Recommendation 53: That the Biodiversity Act define commercial forestry with reference to the definition in the *Landscape South Australia Act 2019*, rather than reproduce it without reference [1—Interpretation, Schedule 2].

The limitations on tracks that were not carried across from the Native Vegetation Regulations 2017 should be carried over, albeit in a more limited form.

Recommendation 54: That the requirement in the *Native Vegetation Regulations 2017* – that clearance regarding pedestrian tracks should only be where there is no practicable alternative that would involve clearance that is less significant – be retained in the *Biodiversity Act* [10—Pedestrian tracks on private land, Schedule 2].

The blanket exemption provided to private mines regarding native vegetation clearance requirements should, at long last, be grandfathered, albeit with a long lead-in time.

Recommendation 55: That private mines from 1 January 2040 onwards no longer be afforded the exemption to native vegetation clearance requirements [13(1)(c), Division 5, Schedule 2].

The usage of ‘industry standards’ in relation to mining explorations is undefined and unclear, and should not in any case be determined by the mining industry.

Recommendation 56: That the use of ‘applicable industry standards’ for mining explorations be amended to ‘applicable guidelines’, as specified in section 14(2) [section 14(2) and section 14(3)].

¹³ See: Recommendation 3, Australian Land Conservation Alliance submission to the Independent Review of the *Landscape SA Act*; https://alca.org.au/wp-content/uploads/2023/10/20231027-ALCA-submission-Landscape-SA-Act-2019_web.pdf

¹⁴ See: <https://yoursay.sa.gov.au/assessment-improvements>; specifically, 4.4.3 in Attachment A: https://ehq-production-australia.s3.ap-southeast-2.amazonaws.com/01eea7dcf46b9939c512f61dfe1fef5997149fc8/original/1733451594/8d85fee5e569f3c97cb29877ceceb52d_Assessment_Improvements_Code_Amendment_-_attachment_A.pdf

The allowance for firewood to be taken from plants that have trunks does not appear in the existing *Native Vegetation Act* or Regulations; there is no apparent and compelling public policy reason for allowing large trees to be utilised for up to 6m³ of firewood every two years.

Recommendation 57: That native plants with trunks (between 300mm and 600mm) being used for firewood should not be excluded from regulated clearance [delete section 23(b)(i), Schedule 2].

It should be clarified that grazing will be taken to be a human activity or the result of a human activity for the purposes of the definition of ‘degradation’ being adopted from the *Pastoral Land Management and Conservation Act 1989*, otherwise grazing would not cause degradation under that Act’s definition.

Recommendation 58: That it be explicitly clarified that grazing is considered a human activity (or result of human activity) for the purposes of the Biodiversity Act [section 26, Schedule 2].

Related amendments and repeals [Schedule 5]

In addition to Recommendation 43 above:

Recommendation 59: The power to destroy (feral) cats by authorised officers should be extended to not only include sanctuaries, but also to include private protected areas (i.e. Biodiversity Agreements and legacy Heritage Agreements), land under conservation agreements, and conserved areas [12—Amendment of section 63—Power to destroy cats; under: Part 8—Amendment of Dog and Cat Management Act 1995].

Recommendation 60: That the Minister responsible for the *Mining Act 1971* must, in acting in the administration of that Act, take into account the objects and principles of the Biodiversity Act insofar as they may be relevant [47—Amendment of section 10B—Interaction with other legislation; Part 21—Amendment of Mining Act 1971].

Recommendation 61: That the Minister responsible for the *Pastoral Land Management and Conservation Act 1989* must, in acting in the administration of that Act, take into account the objects and principles of the Biodiversity Act insofar as they may be relevant [79—Amendment of section 5—Duty of the Minister and the Board; Part 24—Amendment of Pastoral Land Management and Conservation Act 1989].

General recommendations

Recommendation 62: That the shameful individual exclusions, such as of SA Motorsport Park land, from ordinary native vegetation clearance application requirements [refer: Schedule 2, *Native Vegetation Regulations 2017*], and any other such land, not be reproduced in the Act or subsequent regulations to the Act.

Recommendation 63: That the Government should modernise the legislation to allow for the setting of expiation fees and penalties via ‘penalty units’ (as is the norm in many other Australian jurisdictions), such that penalty units can be adjusted via gazette for inflation without the need to amend the Act.

Recommendation 64: That any eventual passage of the legislation be accompanied by sufficient appropriations to deliver the Act and deliver it well.

Missed opportunities

Whilst supportive of at least a provision to establish trusts has been included in the Act, Conservation Council SA notes that it would be highly unusual legislative practice to allow for the regulation of an ordinary independent statutory trust, as canvassed and sought after in earlier submissions from the environment sector. This is because the regulation of a statutory trust would make it much more susceptible to change via Ministerial fiat rather than by Parliament, which would be highly irregular for an institution of any notable standing.

Recommendation 65: That legislation be developed to design a *real* independent statutory conservation trust – i.e. a South Australian Trust for Nature that mirrors similar trusts interstate – rather than relying on section 27, as regulation is unfit for the creation of a permanent statutory organisation.

Beyond a statutory trust with sufficient starting appropriations, enhanced conservation covenants are one of the few legislative mechanisms that can bring new, additional money into the conservation sector, as detailed in the relevant Policy Note by the Australian Land Conservation Alliance¹⁵. As with a Trust, this mechanism needs to be relied upon – i.e., too important – to be delegated to regulation.

Recommendation 66: That the Government seek to add provisions to the Act or subsequent Act to give legislative effect to enhanced conservation covenants.

The Act also misses the opportunity to address the ‘joint proclamation’ issue for National Parks and other parks and reserves in South Australia, a mechanism which allows for mining leases to persist in areas that have been set aside for biodiversity conservation. It is unacceptable that 86.4% of our National Parks, and 99% of Regional Reserves, are open to mining¹⁶ and deeply disappointing that this Act does not address this issue.

Recommendation 67: That the Government legislate to prevent mining leases persisting in National Parks and other parks and reserves, and to prevent any new ‘joint proclamations’.

Thank you again for the opportunity to provide a submission on the South Australian Government’s exposure draft of the *Biodiversity Act*.

Conservation Council SA looks forward to discussing this submission further with the Government; however, if you require further information at any time, do not hesitate to contact me at

[REDACTED]

Yours sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ https://alca.org.au/wp-content/uploads/2023/12/ALCA-Policy-Note-Enhanced-protection-conservation-covenants_November-2023-2.pdf

¹⁶ <https://www.energymining.sa.gov.au/industry/energy-resources/licensing-and-land-access/land-access/conservation-areas>