

Reference: [REDACTED]

Hills and Fleurieu Landscape Board

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Biodiversity Conservation Unit
Department for Environment and Water
By email to: biodiversityact@sa.gov.au

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Re: Hills and Fleurieu Landscape Board Feedback on the draft Biodiversity Bill

Thank you for the opportunity to provide feedback on the draft SA Biodiversity Bill.

This is an important piece of legislation that is desperately needed to provide greater protections for biodiversity in our state. We commend DEW on its work preparing the draft Bill.

We strongly support the creation of a Biodiversity Act for South Australia. We also strongly support the Act's intent to protect, restore and enhance biodiversity, identify and prioritise biodiversity assets for conservation and restoration, and to inform land use planning and decision-making frameworks. We commend the increase in protection of native plantings over 20 years old.

We support the objects, principles and general duties of the Act, however we question whether the Act has the teeth required to reverse biodiversity declines in our state. This requires more than 'offsetting' losses, or even halting losses; it requires a commitment to nature positive actions that deliver net gains. There are several important principles missing which are key to the Act's success. These are:

- That biodiversity protections under the Act take primary over other legislation.
- That the decisions take a landscape-scale, ecosystem approach to biodiversity conservation, and consider the cumulative effects of loss, rather than only localised or species impacts.
- That decisions are made using the precautionary principle where there is uncertainty over impact.
- That administration of the Act is resourced adequately for it to be effective.
- Further to *Principle 2: That the community has a right to know about and participate in environmental decision making*; that monitoring and evaluation of the effectiveness of the Act (and of the state and condition of biodiversity) is transparent and publicly accessible.

[REDACTED] Bill focuses primarily on protection and minimisation of

ecosystems protected and restored by 2030) do not appear in the Biodiversity Bill or the PDI Act, and - assuming these are included in the State Biodiversity Plan - it is not clear from this legislation how they will be implemented in the planning system.

We support the identification of priorities for biodiversity restoration and conservation in the State Biodiversity Plan. Clear targets and metrics, and regular monitoring are of fundamental importance to evaluating the effectiveness of the Act in protecting, restoration and enhancing biodiversity.

We are concerned that the Biodiversity Act does not have primacy over other related legislation, including the Planning Development and Infrastructure Act, and biodiversity protections will continue to be overridden by other political priorities. At a minimum, other Acts should be required to show due diligence and consider the Biodiversity Act objects and requirements.

Key recommendations of the board are:

- Strengthen protections for critical habitat to prevent loss of TECs and prevent species extinctions. Critical habitats need to be no-go zones, where no development is allowed.
- Strengthen the legislative commitment to protecting and restoring a minimum of 30% of each ecological community to sustain native plants and animals, biodiversity and ecological processes.
- Establish clear targets and metrics, and regular monitoring and evaluation to track progress against objects of the Act. This should include a commitment to developing regional environmental accounts with accredited natural capital accounting methods that will align to national environmental accounts and allow for consistent narratives and understanding of community about the condition of environments in SA.
- Strengthen the SEB scheme and ensure payments into the scheme are reflective of true costs of repair.
- Strengthen primacy of the Biodiversity Act so that other Acts must show due diligence and consider legislated requirements of this Act.

The board's level of support, concerns and queries in relation to the bill are further detailed in the following pages.

If you would like to discuss any of the comments provided, please contact [REDACTED],
Team Leader Planning and MERI, [REDACTED]

Yours sincerely

Biodiversity Bill - Feedback from Hills and Fleurieu Landscape Board

Part of Bill	Comments
1- Preliminary	(Q1-2) We support the inclusion of fungi and algae under 'plants' to allow for their protection under the Act where appropriate. We support the adoption of the definition for 'native plant' from the National Parks and Wildlife Act 1972, meaning any plant indigenous to Australia can be protected. However, the Act needs to clear on the process for which exclusions are made (see also our response to Parts 4 and 5). There are numerous non-endemic Australian native plant species which currently or potentially pose a serious threat to our native ecosystems (including native vegetation communities). The proposed changes to the definition should provide sufficient detail to ensure there are no additional impediments for land managers to control invasive plant species. The Bill must ensure that a broader definition of native plants does not lead to a requirement for clearance applications to remove non-endemic invasive native plants, particularly those which threaten our endemic native ecosystems.
2 – Objects, principles and general duty	(Q3-7) We support the objects and guiding principles of the Act, and the recognition of biodiversity conservation and restoration as a responsibility shared by all of society across all sectors. We support the inclusion of a General Duty and the definition of 'harm' and 'reasonable measures' for the purposes of the general duty. We support the governance framework for the Act and identified committees being appointed based on their skills and expertise.
3 - Administration	For the Act to be effective, it is critical that the Biodiversity Council and Committees administering the Act are adequately resourced. Achieving the Objects of the Act – especially promoting biodiversity conservation and restoration as a responsibility equally shared by all - requires multi-pronged approaches, sustained effort, and resourcing to bring community on the journey. We would like to see a clear demarcation of roles and responsibilities between the Biodiversity Council and the Minister, particularly regarding the Biodiversity Council's role in setting the SEB policy such that there is independence from government in decisions needed to achieve the objects of the Act. (Q8) We support the establishment of a Biodiversity Administration Fund to provide transparency on which funds are used for the administration of the Act. We also have concerns over the list of eligible activities in the Biodiversity Restoration Fund. Given the Biodiversity Restoration Fund will receive payments made in lieu of a requirement to achieve a significant environmental benefit, the focus for the application of funds by the Council should be for the enhancement, re-establishment and management of native vegetation communities, ecosystems and habitats. <u>Research should be excluded from the list of eligible activities that can receive funding.</u> Particularly given this is provided for in the application of funds from the Biodiversity Conservation Fund.

The use of 'native plants' leaves ambiguity around which activities may receive funds. Including a list of exclusions which outlines activities that are ineligible to receive funding will help ensure funding is directed towards activities with desired biodiversity outcomes. For example, exclusions could include Agro-Forestry using native plants; establishment of native plant street trees by councils etc; or any activity that does not re-establish, enhance, preserve or manage native vegetation communities, ecosystems and priority habitats.

4 – Native plants

With regard to clause 52 – Conditions of consent, it is critical that decisions result in nature positive outcomes; that is, where clearance is unavoidable, that the SEB scheme will deliver a net gain to the environment in all cases with a generous margin, whether through a native plant management plan or payment into the Biodiversity Restoration Fund. The precautionary principle should be applied to ensure there is a high level of confidence in the gain achieved.

It is also critical that the SEB scheme recognises the true costs of environmental restoration. We believe the true costs are many times higher than what is currently provided through the SEB scheme.

We support the application of a mitigation hierarchy in the assessment of clearance applications. There needs to be rigour in the way this is applied, such that clearance is the last resort, and multiple alternatives are considered rather than accepting the cheapest design.

(Q9) We **support** the 'regulated activities' and 'unregulated activities' approach to native plants.

It is important that there are provisions for cultural burns to be undertaken for the benefit of First Nations and biodiversity values of an area. We support cultural burns being an unregulated activity that is not dependent on a biodiversity policy to be developed by the Minister.

With respect to **pest plant and animal control**, we note that the Act requires guidelines to be in place to control native species declared under the Landscape Act. This can be achieved with a shift from Plant Policy to Plant Guideline and a change in the responsible group. The issue for Landscape Boards will be one of timing, as the transfer to *guidelines* will require public consultation of at least two months. We will also need to request plant guidelines for problematic native plants that are not currently declared to allow us to undertake necessary control works (e.g. *Acacia saligna*).

Currently there are at least five native Australian plants not endemic to South Australia declared for control under the Landscape South Australia Act 2019. These are:

- *Pittosporum undulatum* - Sweet pittosporum
- *Billardiera fusiformis* - Climbing bluebell
- *Billardiera heterophylla* - Bluebell creeper
- *Leptospermum laevigatum* - Coastal tea tree
- *Eucalyptus globulus* subsp. *globulus* - Tasmanian blue gum

There are also a range of problematic native but non-endemic acacias which are not declared that are also controlled on roadsides, such as *Acacia saligna*.

Regarding Schedule 2 section 8 (Control on roadsides)

Each declared native plant must have an approved Biodiversity Council guideline before control is allowed. Control may also require an approved native plant management plan to be in place; and

Schedule 2 section 15 (Plant and animal control – control of declared native plants not on a roadside)

Each declared native plant must have an approved Biodiversity Council guideline before control is allowed. NPCAC must be notified of the proposed clearance in an approved form;

A potential issue is that a Landscape Board or Local Council could control a declared native plant on a roadside without notifying the NPCAC but an adjoining landholder must notify the NPCAC. This is

inconsistent and places an additional burden on landholders who landscape boards may be trying to encourage to control these plants.

Recommendation:

- *Be clear on the purpose for notifying the NPCAC.*
- *Remove requirement to notify NPCAC of proposed clearance where there is an obligation under the Landscape SA Act and an approved guideline in place.*

With respect to **whether landscape boards are included in the group of people with the control and management of roadsides land:**

Schedule 2 section 8 relates to work on roadsides undertaken by or on behalf of the person with the control and management of the land.

We aren't clear whether landscape boards are considered to have control and management of roadsides where we have an obligations under the Landscape SA Act under section 192(8) to manage declared weeds on road reserves.

Recommendation:

- *Clarify whether landscape board management responsibilities are covered in the terms "control and management of the land".*

With regard to **controlling pests not defined:**

Schedule 2 section 8 allows for clearance of native plants under a guideline and possibly under a native plant management plan for the purposes of controlling pests.

We note that the term 'pest' is not defined and the common usage of the term is very broad. We are comfortable with the term being applied to both declared plants and animals, and problematic non-declared native plants, for example *Acacia saligna*. We don't see this as a significant issue, since a guideline must be in place to clear the native plant.

(Q10) We **support** the development of a guideline which provides proponents with advice on how to apply the mitigation hierarchy. In addition to Step 1 Avoid – there should be provisions in the Act which facilitates the ability to designate a prohibition on clearance of threatened ecological communities, critical habitat and native plants at defined locations. The provision would interact with the Planning, Development and Infrastructure Act 2016.

(Q11) We support the protection of native plants more than 20 years old (excluding those in people's gardens or commercial forests), noting this must not detract from recognition of the importance of remnant native vegetation. Recognising the value of planted native plants and revegetated habitats will support collective efforts to restore and reconstruct native vegetation.

We would like clarification on whether a distinction will be made between the value of intact remnant vs. reconstructed habitat in clearance assessments and offsets required, which we feel is warranted.

5 – Native animals

(Q13) We support the 'regulated activities' and 'unregulated activities' approach to protecting and managing native wildlife, noting clarification sought for the management of impact-causing species.

(Q14) The introduction of targeted controls (instead of an 'unprotected list') allows more flexibility to address impact causing species not currently on the unprotected list. However, as this requires a declaration from the Minister, there is a risk that the declaration process could become subject to political pressure. We have concern that a Minister may be reluctant to implement (or could withdraw) controls for certain species due to political pressure and fail to allow impacts from those species to be

appropriately managed. Conversely, there is a similar risk that controls could be implemented for species in situations where it is not necessary. It is suggested that additional detail about the declaration process be provided so that it is clear how the nomination, declaration and review process is undertaken, and what factors are considered. This process should prioritise managing the impacts to industry, the community and threatened species.

Greater clarity on the process and model for how the Minister is advised of recommended changes to impact-causing native animal listings would be helpful (for regulated and un-regulated species).

(See also response to Q9).

(Q15) We support measures to prevent animal trafficking, but it is not clear how trafficable quantities of protected animals will be set for each species. Will this be determined by expert opinion, illegal market value of each species etc.? Are protected plants included? Only protected animals are listed with respect to trafficable quantities, on page 94 of the Biodiversity Bill, under section 127 – Evidentiary provisions.

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

(Q16) We **support** listing threatened ecological communities. A listing process that broadly aligns with national assessment and listing processes for threatened ecological communities would assist with their conservation.

(Q17) We **support** the ability of the Act to enable the recognition and protection other types of ecological entities if/when they are identified.

(Q18) We the application of existing offences to threatened ecological communities (but please note our response to Q20 - critical habitat).

(Q19) We **strongly support the inclusion of 'provisional listing'** of species and ecological communities where required. Given the usually protracted timeline for listings, due to the rigorous listing process, a mechanism for interim and/or short-term protection of species and ecological communities will be a valuable tool to assist with the long-term conservation of these entities.

(Q20) We **strongly support** the identification and declaration of **critical habitat** and hope that it will be used to provide protection to threatened ecological communities of highly restricted extent in South Australia (which, by definition, would be include all threatened ecological communities).

We feel protections for critical habitat could and should be strengthened beyond the current drafting of the bill.

The concept of "critical habitat" is included because an area significantly contributes to the conservation of the threatened species, ecological community, or entity. It therefore does not make sense that anyone can still apply to clear that habitat (destroy, damage or disturb a critical habitat feature).

The creation of the Biodiversity Act provides an opportunity to prevent further clearance of critical habitat, by recognising that any type of offset will never replace or adequately replicate the complexity and diversity of remnant native vegetation or habitat that is critical to the survival of a species or ecological community. Critical habitat should be considered off limits to development.

There appears to be inconsistency between Section 82 (3) - what is eligible to be declared critical habitat, and Section 148 (1) – permit to take native plant that is critical habitat. A habitat is only eligible to be critical habitat if it contributes to the conservation of a threatened species, threatened ecological community or listed ecological entity *such that its loss would increase the risk of extinction for, or negatively impact on the recovery of [that entity]*. However, the Act (Sect 148 (1)) allows for clearing of 'critical

habitat' in circumstances where the Minister deems that the taking of native plant *will not cause or contribute to an increase in the risk of extinction or collapse of the threatened species, threatened ecological community or listed ecological entity*. We take 'loss' in Section 82(3) to mean harm to any part of this critical habitat, which would (and should) by definition prevent the permitting of critical habitat clearance under Section 148(1).

(Q21) We **support the development of action plans** for the protection and recovery of threatened species, threatened ecological communities and listed ecological entities provided there are streamlined processes for endorsement and reporting, which don't redistribute limited resources (e.g. staff time and funding) away from critical recovery activities. The ability to fully or partially incorporate recovery or action plans from other jurisdictions is welcomed.

7 – Conservation areas

(Q22) We support the renaming of Heritage Agreements but feel the distinction between Conservation and Biodiversity agreements isn't well reflected in their names. (i.e. one might expect a 'Conservation Agreement' to offer stronger, more enduring protections than a 'Biodiversity Agreement'. Consider that Heritage Agreements could be renamed 'Conservation Agreements' and 'Biodiversity Agreements' could be used for shorter term agreements on private land.

(Q23) We support the introduction of a variety of conservation mechanisms which facilitate and maximise opportunities for emerging markets and encourage more land managers to protect more areas of private land. It is useful to be able to offer agreements that are more flexible (i.e. term of agreement).

8 – Enforcement

(Q24) We support provisions for enforceable undertakings.

(Q25) We support the introduction of civil enforcement for breaches of the Act.

(Q26) We strongly support the use of 'no development' orders to eliminate any incentive to try and bypass the law. No development should include agricultural activities such as sowing of pasture and crops, fertilising soils and grazing of stock. Presumably these types of activities are covered by part (a), "(a) a change in the use of the land", of the definition of 'development' in the Planning, Development and Infrastructure Act 2016. Is this correct?

(Q27) We support the option of civil penalties for breaches of the Act.

(Q28) We welcome the increase in maximum penalties. The penalties for illegally clearing native plants, remnant native vegetation and ecological communities etc. should be higher than proposed. Can these penalties be increased, particularly for repeat offenders?

9 – Permits

(Q29) *We would like clarification on why a hunting permit is required for control of declared pest species under the LSA Act where there is a legal requirement for the control to take place.*

10 – Miscellaneous

- (Q30) We support the requirements for the State Biodiversity Plan, including the requirements to
- identify state priorities for restoration, recovery, enhancement and conservation of biodiversity having regard for future climate scenarios;
 - define measurable targets
 - identify state-wide biodiversity indicators
 - regular reporting on implementation of the plan and progress towards targets set in the plan (Q31)

Clear targets and metrics are of fundamental importance to monitoring the effectiveness of the Act in protecting, restoration and enhancing biodiversity. Regular assessment is needed to enable adjustments if required. We would like to ensure there is transparency in reporting on biodiversity monitoring and evaluation of the Act's effectiveness against defined targets (yet to be determined).

(Q31) We **support** the recognition of culturally significant biodiversity entities.

As noted under Part 4 (Native plants), we would like to see cultural burning excluded from clearance regulations. While the Minister may develop a biodiversity policy on cultural burning, the Act should not seek to restrict cultural burning practices, and the policy should be led by First Nations.

(Q32) We **strongly support** the requirement for decision makers under the Act to take the State Biodiversity Plan into account. We have a keen interest in how conservation and restoration priorities are identified in the plan, and how they are considered (and enabled) through the planning design code.

(Q33) We **strongly support** the establishment of a biodiversity register.

(Q34) We **support** the framework proposed for regular review of the Act.

Schedule 2 – Regulated acts or activities exclusions

(Q35) We support moving clearance exclusions to one place in the Act.

(Q36) With respect to unregulated activities, we support the majority of the changes proposed.

Re Schedule 2, Part 2, Section 26, we have concern that the removal of the rules relating to historical management practices (i.e. grazing) to grazing not requiring clearance consent *if it will not cause **permanent degradation** of the land* (as per the *Pastoral Land Management and Conservation Act 1989*) is open to interpretation, and will weaken the ability to protect damage of remnant native vegetation from livestock grazing. In practice, loss of native understory due to trampling, grazing and increased nutrient loads, and corresponding increases in exotic species are not reversible by removal of grazing pressure. i.e. the change is permanent.

Schedule 3 – Principles of preservation of native plants

(Q37-39) We support the proposed updates to 'principles of preservation of native plants' and related amendments to existing legislation.

We support the requirement for a biodiversity State Planning Policy under the PDI Act and updating of this policy to reflect new requirements.