

NELA Submission on the Proposed *Biodiversity Bill 2025* (SA)

About NELA and its interest in this consultation

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, ecological restoration, environmental and carbon markets, environmental regulation and regulatory theory, and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. As a body with particular expertise and interest in environmental laws, NELA and its members recognise the importance of clear, strong, transparent and ambitious laws for safeguarding Australian environments, and we bring that recognition to bear in this submission.¹

Biodiversity in Australia is in a state of continued decline. Australia now has over 2200 threatened species and ecological communities currently listed under federal environmental law as threatened with extinction, and numerous assessments have shown that most of these are in a perilous state of decline.² Legislative measures at the state government level to address the biodiversity crisis is essential.

We thank the Department for the Environment and Water ('the Department') for the opportunity to comment on this proposed Bill, and we commend the Department for taking leadership on this critical issue. We refer to NELA's submission from March 2024 on the Discussion Paper relating to this Bill.³

1. Overarching comments relating to the Bill

As raised in our 2024 submission, successive legal reviews of biodiversity laws in Australia, across all levels of government, have repeatedly found that such laws have failed to protect biodiversity. We note that the Bill contains many of the components of existing biodiversity laws that has been found to be problematic in other jurisdictions in Australia with respect to the effectiveness of those laws to achieve their overarching goals. The major shortcomings of current biodiversity laws include reliance on offsetting as a tool for environmental management, broad discretion for decision makers that means far-weaker protections, and biodiversity laws typically being 'trumped' by planning, property mining, water, forestry laws

¹ The submission was led by Professor Justine Bell-James (University of Queensland), Sarah Brugler (University of Tasmania) and Dr. Paul Govind (University of Macquarie).

² Sarah Legge et al, 'Loss of terrestrial biodiversity in Australia: Magnitude, causation, and response' (2023) 381 *Science* 622-631. <https://www.science.org/doi/10.1126/science.adg7870>; Michelle Ward et al, 'A report card to effectively communicate threatened species recovery' (2024) 7(2) *One Earth* 186-198. [10.1016/j.oneear.2023.12.009](https://doi.org/10.1016/j.oneear.2023.12.009)

³ See here: https://www.nela.org.au/wp-content/uploads/NELA-Submission_SA-Biodiversity-Act_FINAL.pdf

etc. Despite their known failures, each of these components have been included within the new *Biodiversity Bill*.

However, NELA appreciates that this is an important first step for South Australia in establishing the State's first biodiversity legislation and there are some aspects that we understand to be nation leading. We support the following inclusions in the Bill, which are consistent with our suggestions in our 2024 submission:

- A modern objects clause that centres biodiversity conservation and restoration, rather than ecologically sustainable development;
- Some inclusion of climate change into the overarching objectives and principles,
- The creation of a First Nations Expert Biodiversity Committee;
- The machinery for critical habitat declarations and streamlining processes for listing nationally threatened species using the Common Assessment Method;
- The proposal to hold extinction inquiries;
- Including a legislated State Biodiversity Plan that maps priorities for conservation and restoration; and
- Expanding mechanisms for private land conservation and restoration including that such mechanisms are registered on the Biodiversity Register.

We would like to draw your attention to the following key matters raised in our 2024 submission that we recommend could be further improved in the Bill:

- Ensure that the Biodiversity Bill has primacy so that an activity that may otherwise be allowed under an existing framework, might need to be rejected or altered because of inconsistency with the Biodiversity Act.
- Explicitly link impacts of climate change to biodiversity in the operational provisions of the Bill
- Expand third party judicial review of decisions, similar to s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
- Ensure private land conservation agreements included under Part 7 are actively *monitored* for better environmental outcomes that are more likely to attract philanthropic and corporate investment.

NELA believes that if some of these governance improvements could be improved upon, then the Bill may be able to achieve more for biodiversity than which has been achieved by comparable laws in other jurisdictions. We further expand on NELA's top priorities for improvements in the Bill below.

2. Primacy of the Act/general duty

We suggest that the general duty under clause 11 have primacy over all provisions within the Biodiversity Bill and other South Australian legislation. Clause 11(4) currently describes a series of scenarios where an entity will not be in breach of the general duty including where it is acting in accordance with another Act. Clause 11(4) should be amended so that that the general duty under the Biodiversity Bill is afforded primacy in any regulatory decisions made under any South Australian legislation. This will ensure that the general duty, and the objects and principles of the Bill, are not trumped by decisions made under other laws that could negatively impact biodiversity protection for example land use planning.

We also have concerns regarding clause 6(5) which seems to give the Governor, and effectively the South Australian state government, very broad discretion to preclude the operation of the Bill. This outcome can undermine the efficacy of the objects of the Biodiversity Bill by diminishing the primacy of biodiversity protection.

3. Extinction inquiries

We commend the Department for including provision in the Bill for inquiries following the extinction of a species or collapse of an ecological community (cl 80). Inquiries of this kind have been called for in the scientific and legal literature,⁴ but we are not yet aware of any inclusion in Australian legislation. We note that extinction inquiries are mandatory for species endemic to the State, but only discretionary for species not endemic to the State.

As we noted in our 2024 Discussion Paper:

Broad discretion for decision makers typically results in far-weaker protections for biodiversity because ambitious action is less clearly supported by the legislation and thus more amendable to being overturned in litigation or political lobbying.

We would encourage the Department to, if feasible, mandate these inquiries in all instances.

4. Inclusion of climate change

We commend the Department for including some reference to climate change in the objects and principles of the Bill and note that this is consistent with calls to mainstream climate change into government decision-making.⁵ However, as we submitted in our submission on the 2024 Discussion Paper, there is a need to make the interaction between climate change and biodiversity more explicit. As we noted in our 2024 submission:

However, climate change will require new and more adaptive forms of decision making (see pp 7-8 in the Position Paper), as well as adjusting the necessary focus of biodiversity laws. For example, species distributions will shift as the climate changes, undermining the clarity of what is ‘native’ to a particular area; and native species may become invasive in ways that demand active management and perhaps eradication – complicating historically ‘bright line’ distinctions and definitions

We encourage the Department to consider further including the impacts of climate change in the operational provisions of the Bill (e.g. in relation to declaring critical habitat (cl 82) and for provisions referring to sensitivity and cumulative harm (eg. cl 49 and cl 114(9))).

5. Third party enforcement and judicial review

We commend the Department for including opportunities for third party enforcement of breaches of the Act, and especially commend the Department for extending standing to First Nations people with cultural or spiritual connections to the land affected. The remaining provisions for standing are like other State examples (e.g. under Queensland’s *Environmental Protection Act 1994* (Qld)), and we note that these provisions have not created an undue burden on the Court.

We note that there are no provisions in the Bill to provide for third party judicial review of decisions, similar to s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). We note that the inclusion of this provision in the federal Act has not led to an

⁴ Woinarski, John C. Z. et al, 'The contribution of policy, law, management, research, and advocacy failings to the recent extinctions of three Australian vertebrate species' (2017) 31(1) *Conservation Biology* 13-23; McCormack, Phillipa C., 'Implications of extinction in law: Preventing, declaring and learning from species extinctions' (2023) 1 *Cambridge Prisms: Extinction* e21.

⁵ Bleby, Alice and Anita Foerster, 'A Conceptual Model for Climate Change Mainstreaming in Government' Cambridge University Press (2023) 12(3) *Transnational Environmental Law* 623-648.

undue burden on the Court: a study conducted in 2017 found that only 35 judicial review claims had been commenced since the EPBC Act's inception.⁶ None of these cases were found to be frivolous or vexatious. We urge the Department to consider the inclusion of a similar provision in the Bill.

6. Restoration and conserved areas

We commend the Department for centring restoration in the objects of the Act, as we submitted in our 2024 Submission on the Discussion Paper. We also support the proposal for a legislated Biodiversity Plan that is intended to cover both conservation and restoration, as well as explicitly expanding the role of Heritage Agreements (now Biodiversity Agreements) to include restoration, and for conservation agreements, sanctuaries and other voluntary agreements to all include restoration objectives.

We also commend the Department for exempting clearing for restoration purposes from permitting requirements, as has been called for in the scientific literature.⁷ We note that this will be subject to guidelines prepared under the Act, and encourage the Department to consider an approach that balances the risks and benefits of restoration and applies a proportional approach.⁸ This is particularly important for restoration projects in Biodiversity Agreements also (noting clause 54 that requires Ministerial consent for clearing of vegetation in Biodiversity Agreements). If a proportionate approach is not taken in the proposed restoration guidelines, there is a risk that the rules for restoration within Biodiversity Agreements will be unduly onerous and expensive for landowners to pursue large restoration projects that have the long-term security and protections afforded by Biodiversity Agreements.

We believe that if enacted and subject to getting the details right in the guidelines, South Australia will be the leading Australian jurisdiction to establish fit for purpose legal mechanisms for restoration of degraded ecosystems within legislation (although noting work underway in other jurisdictions to exempt restoration practices under codes made under legislation).

We also welcome the proposed new and diverse types of statutory agreements that are proposed in Part 7, including that biodiversity and conservation agreements are to be noted on the Biodiversity Register (in addition to biodiversity agreements being registered against a property's title). However, there seems to be a missed opportunity to set up South Australia to attract investment in nature positive initiatives. For voluntary private land conservation measures investors often require re-assurance of persistent and strong legal governance, as well as re-assurance that activities like mining will not be undertaken in privately protected areas.

We believe that an independent private land conservation and restoration statutory body is best placed to oversee compliance with agreements consistently in the long term. In lieu of such arrangements, there should be legislative provisions that require the Minister or Biodiversity Council (as the case may be) to actively monitor agreements throughout the term

⁶ Nicola Silbert, 'Challenging Decisions: Environmental Non-government Organisations' Use of Judicial Review under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2018) 35(6) *Environmental and Planning Law Journal* 714-742.

⁷ Bell-James, Justine, Rose Foster and Nicole Shumway, 'The permitting process for marine and coastal restoration: A barrier to achieving global restoration targets?' (2023) 5(12) *Conservation Science and Practice* e13050; Shumway, Nicole et al, 'Policy solutions to facilitate restoration in coastal marine environments' (2021) 134 *Marine Policy* 104789.

⁸ Shumway, Nicole et al, 'Policy solutions to facilitate restoration in coastal marine environments' (2021) 134 *Marine Policy* 104789.

of the agreement. The lack of ongoing monitoring was a concern raised in the government's review of Heritage Agreement, with respect to the biodiversity outcomes from heritage agreements being unknown.⁹ A positive obligation such as this may help to ensure a private land conservation and restoration program of integrity over the long-term and so that landowners with such agreements cannot be forgotten about. We would be pleased to discuss this further with the Department.

7. Critical habitat declarations

We commend the Department for including clauses 82 (and following) on declaration of critical habitat, consistent with our recommendation in our submission on the Discussion Paper. Protection of critical habitat from development has been recognised as an important measure for conserving and assisting the recovery of threatened species. Critical habitat declaration features in laws in the United States and Canada but has not achieved widespread traction in Australia.¹⁰

We note that clause 82(2) should be updated to ensure the Minister must make a 'decision on' critical habitat following listing or recommendation by the Scientific Committee (rather than to simply 'consider'). Such an amendment will at least ensure transparency in decision making regarding critical habitat declarations.

⁹ Government of South Australia, 'A Review of Heritage Agreements: Structure and permissible activities', *Heritage Agreement Policy and Guidelines* (<https://yoursay.sa.gov.au/heritage_agreement_policy>).

¹⁰ Martin, Tara G. et al, 'Timing of Protection of Critical Habitat Matters' (2017) 10(3) *Conservation Letters* 308-316.