Environmental Defenders Office

Submission on proposed changes to SA *Native Vegetation Act 1991*

7 June 2024

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Submitted to:

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

Introduction

EDO welcomes the opportunity to provide feedback on the proposed key changes to the *Native Vegetation Act 1991,* as described in the *Amendments to the Native Vegetation Act 1991 - Discussion Paper*[1] (**Discussion Paper**) and proposed to be implemented by the *Native Vegetation (Miscellaneous) Amendment Bill 2024 – Draft for Comment* (**the Bill**).[2]

Our submission builds on earlier feedback provided following targeted consultation with key stakeholders in August and September 2023.

The changes have been described as 'policy neutral' - intended to improve and refine the administration of the Act with no intention to reduce or weaken any protections for native vegetation.[3] While that may be the intention, the proposed amendments do make a number of changes that alter protections and potentially undermine the conservation, protection and enhancement of native vegetation in South Australia. These include, for example, changes to the provisions regulating minor clearance of intact stratum, changes to requirements for substantial environmental benefit (**SEBs**) and expansion of the use of the Native Vegetation Fund. We do welcome proposed changes to improve compliance and enforcement of the Act, including new compliance tools such as reparation and emergency orders and increased penalties.

As already flagged with the Department for Environment and Water (**the Department**), the Discussion Paper and FAQs fail to provide a detailed explanation of some of the more complicated changes and this has made it difficult for stakeholders to understand the extent of the changes. We recommend that the Department should consider updating its FAQ document or providing a more detailed explanation of the changes to help stakeholders understand the changes before the Bill is introduced to the Parliament, and to help the Parliament in its consideration of the Bill.

We also acknowledge that changes to the *Native Vegetation Act 1991* (**NV Act**) are being progressed while the development of a new Biodiversity Act for South Australia is underway.[4] There is scope for significant interaction between the two Acts and even for components of the NV Act to be integrated with or replaced by new provisions in the Biodiversity Act. In our view, there may be benefit in delaying some of the more substantial changes to the NV Act (such as moving SEB provisions into the Act and aligning assessment pathways) until a Biodiversity Bill has been developed so that there is an opportunity to align policy thinking.

This submission provides feedback on the proposed key changes to the NV Act as set out in the Discussion Paper, namely:

- Meaning of substantially intact native vegetation
- Mitigation hierarchy
- Significant environmental benefit (SEB)
- Expert based Council
- Expanded use of the Native Vegetation Fund
- Conservation agreements
- Assistance to landowners

[1] https://yoursay.sa.gov.au/92969/widgets/433386/documents/283916
[2] https://yoursay.sa.gov.au/92969/widgets/433386/documents/283429
[3] Discussion Paper, p 3.
[4] https://www.environment.sa.gov.au/topics/biodiversity/biodiversity-act

- Increase in fees and penalty provisions
- Clearance of intact stratum
- Consistent application process for clearance applications
- Clearing when seriously at variance with the principles of clearance
- Consistent SEB Offset requirements
- Aligned assessment provisions for PDI Act referrals
- Expanded compliance actions and range of options

Response to key changes

EDO provides the following feedback on the proposed key changes to the NV Act, as described in the Discussion Paper and the Bill.

- **Meaning of substantially intact native vegetation**

In response to proposed changes to the meaning of substantially intact native vegetation set out in the Discussion Paper and proposed changes to section 3A of the *Native Vegetation Act 1991* (**NV Act**) we provide the following comments:

- ***Intentional degradation:*** We generally support the policy intention to exclude (from the remit of the definition of substantially intact native vegetation) any intentional degradation as a result of activities that would constitute a breach of the Act. Further clarification or guidance may be needed to support the proper application of this provision, including how the Council is able to satisfy itself that a breach would have occurred.

- ***Contiguous area:*** There has been no clear explanation given for the proposed addition that a stratum of native vegetation will be considered to be substantially intact if, *it constitutes, or forms part of, a contiguous area of native vegetation;* and no guidance as to what could be considered a *contiguous area.* It is unclear how this change would affect the scope of vegetation of that is 'substantially intact native vegetation' and whether, in practice, this proposed change would mean less vegetation is captured (and protected) by the definition. Small areas of vegetation can have significantly high biodiversity values, especially in otherwise cleared landscapes, so it is unclear why a stratum of native vegetation needs to form part of a contiguous area. Without any clear rationale for the proposed addition of section 3A(1)(a), we do *not* support this change.

- ***Degradation***: It is proposed to define degradation as follows:

  degradation in relation to a stratum of native vegetation includes—

  (a) a loss of native vegetation cover; and
  (b) a reduction in the diversity of native plant species; and
  (c) a reduction in the ability of the ecosystem of which it forms a part to be self-sustaining;

  The use of 'and' between the subsections of this definition suggests that all three are required to meet the definition. Is this the intention? The purpose/application of the definition should be clarified – for example, to assess vegetation value it should be "and" (ie assess structure, composition and function), but to identify a breach it should be 'or', as an impact on one element alone could degrade the self-sustaining ability of the ecosystem.

- Additionally, further guidance may be needed to apply the definition of degradation, including, for example, guidance on the term 'self-sustaining' which is currently undefined. For example, does self-sustaining include consideration of source sink dynamics (ie, connections between fragments of intact habitat) and functional linkages between species?

The Discussion Paper also indicates that the proposed changes will 'clarify how cumulative impacts are assessed when calculating a SEB',[5] however, it does not explain how this will be done. The Department has advised that the changes to the definition of the SEB will allow the Council to consider cumulative impacts in determining the SEB, whereas currently it can only consider the cumulative impacts when making a decision about consent to clear. How the SEB definition does this is unclear and it would assist if changes were made to the drafting of the Bill to make this more explicit.

- **Mitigation hierarchy**

We support the proposed changes that would see the mitigation hierarchy brought into the Act, so that it applies to relevant decisions made by the Council under the Act (and as we understand, also continue to apply to relevant decisions made by the Council under the *Native Vegetation Regulation 2017* (**Regulation**)).

We understand the provision will be moved across with no substantive changes to the definition. We **recommend** that the definition could clarify that offsets only apply to *residual* impacts that cannot be avoided or mitigated.

We note more broadly the proposal to incorporate the mitigation hierarchy into the proposed new Biodiversity Act for SA.[6] It is currently unclear how the proposed new Biodiversity Act will interact with the NV Act, including how any application of the mitigation hierarchy in the proposed new Biodiversity Act will affect the application of the mitigation hierarchy under the NV Act.

- **Significant environmental benefit (SEB)**

In theory, we would not oppose moving the definition of Significant Environmental Benefit (SEB) into the Act and consolidating current SEB provisions. However, the proposed changes are complicated to understand and disappointingly the Discussion Paper and FAQs fail to provide a detailed explanation of the changes and how current requirements have been consolidated.

In terms of the definition of 'significant environmental benefit' an existing definition will not simply be inserted into the Act, as suggested. Instead, a new definition has been created, drawing on existing elements of the Regulation and *Policy for a Significant Environmental Benefit Under the Native Vegetation Act 1991 and Native Vegetation Regulations 2017* (**SEB Policy**). Given this definition will underpin the entire framework it is important that there is scientific scrutiny of the definition (if there has not been already).

[5] Discussion Paper, p 9.
[6] *Developing a Biodiversity Act for South Australia, Discussion paper*, p 6. https://yoursay.sa.gov.au/89139/widgets/417965/documents/271589

We provide further comments on other changes under the heading 'Consistent SEB Offset requirements' below.

- **Expert based Council**

Regarding the proposed changes to the membership of the Native Vegetation Council (**NVC**) we provide the following comments:

- We generally support the proposed range of knowledge, skills and experience required for the NVC, including native vegetation management and preservation, primary production, planning and development, Aboriginal traditional land management, environmental law, biodiversity conservation, and civil or environmental engineering. We particularly support the inclusion, for the first time, of First Nations knowledge and experience in traditional Aboriginal land management.

- We note that the proposed changes reduce the role of peak bodies' nominees on the NVC and increase the Minister's discretion in appointment of members of the NVC. The draft Bill removes the requirements for peak bodies to nominate, and the Minister to appoint, a peak body nominee to the NVC. Instead, the draft Bill will require the Minister to give notice of any proposed NVC appointments to the Conservation Council of South Australia, the Local Government Association of South Australia, Primary Producers SA Incorporated and any other body prescribed by the regulations, and consider any submissions made by these bodies regarding the proposed appointments. While the amendments require the Minister to consider submissions of peak bodies, the Minister is not obliged to appoint peak body nominees. We understand that this change has been made to overcome difficulties in peak bodies identifying suitable nominees and vacancies in NVC membership. The proposed changes will overcome this problem and still provide a role for peak bodies to comment on appointments. An alternative would be to retain the existing process for peak body nominations and appointments in the first instance, but to allow the Minister to appoint an alternative person to the NVC, with consultation with the relevant peak body, if a peak body position cannot be filled in an appropriate timeframe. We suggest peak bodies are best placed to comment on the proposed changes, how they will be affected by them and whether they wish to retain the current ability to nominate persons to the NVC.

- **Expanded use of the Native Vegetation Fund**

Our key concern with proposed changes to expand the use of the Native Vegetation Fund is to ensure that payments made for the purpose of achieving a SEB are used strictly and solely for that purpose, consistent with the principle of like-for-like. Any deviation from this strict requirement risks undermining environmental outcomes. In our view, there is some ambiguity regarding the proposed changes to section 21 and whether they limit the use of funds in this way. In particular, we raise the following concerns:

- It is unclear what effect including 'as far as practicable' in subsection 21(6) will have on the use of the funds and the achievement of like-for-like SEBs. Would this allow a scenario where the NVC could make a case that use of certain funds received to satisfy a requirement under the Act to achieve a SEB is not practicable, and subsequently instead use those funds for 'for any other purpose to further the objects of this Act, or to support

the operation or administration of this Act (per proposed s 21(5)(d))? We would not support this, as it is a clear deviation from only using payments made for the purpose of achieving a SEB strictly for that purpose. We **recommend** removing the words 'as far as practicable' from subsection 21(6).

- Similarly, we **recommend** removing the words 'as far as practicable' from subsection 21(7) for similar reasons. Funds collected specifically for the purpose of 'supporting the administration, monitoring and enforcement of measures, actions or requirements that relate to the satisfaction of the requirement to achieve a significant environmental benefit' should be used solely for that purpose. We otherwise generally support the distinction (via subsections 21(3)(cf), 21(7) and 30(2)(eb)) for specific conditions and funds relating to supporting the administration, monitoring and enforcement of measures, actions or requirements that relate to the satisfaction of the requirement to achieve a SEB. Again, these requirements and payments must be additional (and not part of or in lieu of) the substantial requirements to achieve a SEB.

- It is unclear why subsection 21(3)(ce) is not captured by subsection 21(6). This may be a drafting oversight. We **recommend** reviewing whether subsection 21(6) should also apply to subsection 21(3)(ce) (being amounts paid into the Fund in accordance with a condition under section 30(2)(ea) (also being conditions requiring the applicant to pay into the Fund an amount determined by the Council to achieve a SEB)).

- **Conservation agreements**

Our key concern with the proposal to introduce new conservation agreements is that the primary purpose appears to be facilitating less strict SEB requirements (such as fixed-term rather than in-perpetuity agreements and a broader range of conservation activities (which may not be like-for-like).

We recognise that the strict parameters of heritage agreements may be limiting, particularly for landholders interested in voluntary private land conservation. We would support an alternative 'tier' of agreement being introduced to provide options for voluntary land conservation, however for agreements being used for the specific purpose of meeting SEB requirements, strict parameters must be retained.

Regarding the current inability for the Minister to be a party to a Heritage Agreement for land held by the Minister, specific amendments could be made to facilitate this. However, overcoming this barrier should not necessarily be tied to other proposed changes that distinguish conservation agreements from heritage agreements (i.e. fixed-term duration and a broader range of conservation activities). There should be alternative ways to facilitate the Minister entering into a Heritage Agreement in circumstances where the Minister sought to obtain credit for environmental benefits; rather than creating a new style of agreement for this purpose that is less robust (and as distinct from a lower tier style agreement for the purpose of voluntary private land conservation, as described above).

We make the following specific **recommendations**:

- Rather than allowing both Heritage Agreements and Conservation Agreements to be used to meet SEB requirements or gain credit for environmental benefits, the NV Act should establish a single type of agreement used for the specific purpose meeting SEB

requirements or establishing credit for environmental benefit. These types of agreements must be subject to strict requirements (such as in-perpetuity except in exceptional circumstances) consistent with best-practice offsetting. Changes could be made to allow the Minister to be party to these agreements.

- An alternative 'lower tier' agreement could be introduced to provide an option for landholders considering voluntary private land conservation. In these circumstances, a more flexible 'conservation agreement' style agreement may be appropriate, however these should not be used to meet SEB/credit requirements.

We also **recommend** that it would be appropriate to delay creating any new agreements under the NV Act until further work is done on a new Biodiversity Act for South Australia. The *Developing a Biodiversity Act for South Australia - Discussion Paper* contemplated broadening or creating schemes to further support the establishment and management of conservation areas on private and other land. Our suggestions above should be considered in this broader context.

- **Assistance to landowners**

In general, we support funding assistance to landholders to support important conservation work on private land. However, as noted above, our strong view is that payments made into the Native Vegetation Fund to satisfy a SEB obligation should only be used for the purpose of achieving a SEB, consistent with the principle of like-for-like. Assistance to landholders for other conservation activities should be funded through other components of the Fund.

- **Increase in fees and penalty provisions**

We generally support the proposed changes to section 26 of the NV Act to increase penalties for clearing offences.

- **Clearance of intact stratum**

We have concerns that the proposed changes to the rules around clearance of intact stratum to allow 'minor' clearing is a weakening of current protections and may, without strict parameters, lead to an increase in clearing and reduced environmental outcomes.

As noted in the Discussion Paper provisions restricting the clearing of intact stratum were introduced to clearly signal an end to broad scale clearance of native vegetation (p 4). While we understand that the current restriction has no regard to the purpose or scale of potential clearance, that is consistent with the broad intention of protecting intact stratum.

The decision to now allow council to permit minor clearing of intact stratum signals a shift away from strict restrictions on clearing of intact stratum. The proposed change has the potential to lead to an increase in clearing, particularly without strict parameters on what constitutes 'minor' or a mechanism to account for cumulative impacts of minor clearing.

We also note that a range of clearing is already permitted (without NVC approval) under the exemptions in Schedule 1, Part 1, Divisions 1 and 2 of the Regulation so it is unclear what other clearing is intended to be captured by this proposed change. We note the specific example given on the Discussion Paper (i.e. clearing branches for a track permitted to access land subject to a

heritage agreement) appears to be mostly captured by the exemptions in clauses 7 and 13 of the Schedule 1 of the NV Regulation.

That said, in earlier consultation it was suggested that the strict restriction on the clearing of intact stratum has led to a proliferation of exemptions which has tended to undermine the protections set out in the Act. It was also suggested that by allowing minor clearance, where appropriate, it should prevent the need for more exemptions and could potentially allow for a reduction of exemptions in the future, ensuring clearance of vegetation is subject to a proper and thorough assessment. While this may be the case, the Discussion Paper does not signal any intention to reduce exemptions.

If this change is to proceed, we **recommend** setting clear parameters on what constitutes minor clearing for the purpose of section 27(3)(b). This could include setting out types or scale of clearing activities that would be considered minor in either a schedule to the Act or the Regulations. This could potentially involve removing exemptions from the Regulation and describing previously exempt clearing as 'minor'. This would have the benefit of those clearing activities being subject to improved oversight by the NVC and a requirement that the vegetation to be cleared will remain substantially intact.

- **Consistent application process for clearance applications**

In general, we do not oppose moving clearance activities that require Council approval from the Regulation (NV Regulation, Schedule 1, Part 6) into the Act. However, we note that there have also been various content changes in moving the provisions across to the Act. Those changes have not been clearly explained in the Discussion Paper. Notably:

- There has been no explanation of why Schedule 1, Part 6, clause 37 - Commercial vehicle access track exceeding 5 metres and clause 38 - New dam and expansion of dam have not been transferred to the Regulation and whether the intention is to keep them in the Regulation. Our understanding from the Department is they will be retained in the Regulation.

- There have also been changes to Schedule 1, Part 6, clause 33(2) and cl 35(1)(b) and (2) of the Regulation with no clear explanation provided in the Discussion Paper. The Department has suggested that those provisions are either no longer needed or are being intentionally removed due to a change in policy.

As suggested above, it would be useful to provide more detail of these changes to stakeholders.

- **Clearing when seriously at variance with the principles of clearance**

The changes to subsections 29(4), (4A) and (4B) of the NV Act appear to be a general consolidation of the existing provisions. We support the removal of s29(4) which allowed variance with the principles of clearance for isolated plants. Isolated plants, such as hollow bearing paddock trees, can have significant biodiversity values and the clearance principles should apply. We question the inclusion of Schedule 1A activities into section 29(4). The purpose behind this change has not been explained, and it is unclear whether his will allow variance for a new suite of activities that were otherwise not previously captured by subsections 29(4), (4a) or (4b). In general, the scope of the provisions are quite broad, and undermine the intent of having principles in the first place. We

recommend that further restrictions should be put in place to ensure variance with the principles of clearance is only permitted in very limited circumstances.

- **Consistent SEB Offset requirements**

As noted above, in general we would not oppose moving the definition of Significant Environmental Benefit (SEB) into the Act and consolidating current SEB provisions. However, the proposed changes are complicated to understand and disappointingly the Discussion Paper and FAQs fail to provide a detailed explanation of the changes and how current requirements have been consolidated. We have not interrogated the proposed changes in detail, however we highlight two overarching concerns with the proposal to consolidate SEB offset requirements as proposed:

- **Substantial changes to the SEB provisions in the NV Act pre-empt work being done to develop a new Biodiversity Act for South Australia**.
  The *Developing a Biodiversity Act for South Australia - Discussion Paper* contemplates that offsets may be considered in the context of building the mitigation hierarchy into a new Biodiversity Act. We therefore **recommend** delaying any substantial changes to SEB provisions in the NV Act until the new Biodiversity Act has been developed and there is a better understanding of how the new Biodiversity Act will interact with the NV Act, particularly in relation to SEBs.

- **Missed opportunity to strengthen SEB requirements**
  The consolidation of SEB requirements provides an opportunity to strengthen the framework in line with best practice, however the proposed changes maintain, and in some case appear to weaken, current policy settings. Additionally, the Discussion Paper does not indicate whether the SEB policy will continue to apply, but our understanding, based on information provided by the Department is it will continue to apply but may need to be updated in light of the legislative changes. Those changes have not been explained so it is difficult to determine how the framework will operate as a whole.

  In particular, we are concerned that:

  - Proposed section 3C appears to pick up only some (but not all) of the Biodiversity Offsetting Principles currently set out in the SEB Policy (for example, 3C(4)(a) appears to align with Principle 7 – Long term outcomes, and 3C(4)(b) and (c) appear to align with Principle 5 – Additional Conservation Outcomes). It is unclear if or how other Principles have been picked up in 3C, or, if not, whether they will remain in the SEB Policy.

  - There seems to be inconsistency between Principle 4 – Like-for-like, or better of the SEB Policy and proposed 3C(4)(d). Currently, Principle 4 of the SEB Policy requires 'like-for-like offsets, in line with best practice. The SEB Policy explicitly says that "indirect offsets via the SEB program are not supported" (p 7). Proposed 3C(4)(d) on the other hand says "the measures, actions or requirements by which an environmental benefit has been, or is to be, achieved address, or will address, the impacts on the particular vegetation and animal habitat that constitutes, or forms part of, the vegetation that has been, or is proposed to be, cleared, unless the Council is satisfied that alternative measures, actions or requirements achieve, or would achieve, an environmental benefit that is of a higher conservation value,

in accordance with guidelines adopted under section 25 that relate to the achievement of such a benefit" (emphasis added). This suggests that it is proposed to move away from 'like-for-like' and allow alternative measures (indirect offsets). It is unclear if new Guidelines are intended to support proposed 3C(4)(d) or what alternative measures may be considered appropriate for the purpose of proposed 3C(4)(d). If this indeed a shift away from 'like-for-like' then that is a weakening of current protections.

- Protections for offsets will not be in perpetuity. While we welcome the requirement for SEBs to be secured through a Heritage Agreement or Conservation Agreement, we note that a Conservation Agreement and proposed 3C(4)(a) do not require the protection to be in perpetuity (protection in perpetuity is best practice).

- A number of other existing policy settings have been carried across into the legislation, without improvements to strengthen them. We highlight a number of policy settings, which we **recommend** should be strengthened to ensure biodiversity offsetting is able to deliver the outcomes intended:

    - *Payment into the Fund:* In general, EDO does not support payments as a way of discharging offset obligations, as it does not allow for offsets to be clearly identified and secured before impacts are approved. There can be a significant time lags in securing offsets and a risk that suitable offsets may not be found. If offsets are not secured before biodiversity is destroyed, a net loss of biodiversity occurs. If payment into the fund is to continue as an option, there should be stricter parameters around the payment of money in lieu of offsets, particularly where offsets are difficult or unlikely to be secured. Where like for like offsets do not exist, impacts should not be approved.

    - *In-perpetuity protection:* An offset area must be legally protected in perpetuity, as the impact of the development is permanent. Offset areas should not be available to be offset again in the future. There should also be clear requirements for the ongoing management of the land (at least for a minimum time frame) to ensure that biodiversity gain is achieved.

    - *Limits on the use of offsets:* Not all impacts are amenable to offsetting. The use of 'red flag' or 'no go' areas (with criteria set out in legislation) is essential to make it clear that there are certain matters in relation to which offsetting is not an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss.

  For further information, EDO report's report *Offsetting our way to extinction*[7] sets out twelve best practice science-based offsetting principles.

[7] Available at: https://www.edo.org.au/publication/discussion-paper-offsetting-our-way-to-extinction/

Aligned assessment provisions for PDI Act referrals

In general, we do not oppose changes that remove duplication between the various processes, so long as protections and oversight are not reduced. Again, it would be helpful if a more detailed explanation of the changes was provided to stakeholders.

Expanded compliance actions and range of options

In general, we welcome proposed sections 31E and 31EB that introduce new compliance tools, including, reparation and emergency orders. These are important step in improving compliance and enforcement of the regulatory framework. However, also we **recommend** extending the civil enforcement provisions of the NC Act so that any person can take action to remedy a breach of the Act. Third party civil enforcement is a standard component of environmental law in other jurisdictions, and enforcement increases accountability and transparency and community confidence in environmental laws.