Environmental Defenders Office

Submission on South Australia's Draft Biodiversity Bill 2025

18 February 2025

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Acknowledgement

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations peoples. We acknowledge that not all First Nations peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

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EXECUTIVE SUMMARY

The South Australian government is developing a new Biodiversity Act for South Australia. In January 2025 it released a draft Biodiversity Bill 2025 (**the Bill**) for public comment. This submission responds to that draft Bill.

The Bill sets out a streamlined and updated framework for biodiversity conservation in South Australia. The Bill:

- brings together and updates provisions of existing legislation, including the entirety of the *Native Vegetation Act 1991* (SA) (**NV Act**) and parts of the *National Parks and Wildlife Act 1972* (SA) (**NPW Act**);
- legislates existing policies and processes (e.g. listing processes); and
- introduces new concepts and legal mechanisms aimed at modernising and enacting stronger laws (e.g. a new general duty to not harm biodiversity, a new State Biodiversity Plan, recognition of Culturally Significant Biodiversity Entities, requirements to compile, maintain and update State biodiversity data, publish and maintain a Biodiversity Register, increased penalties for offences under the Bill, third-party civil enforcement provisions).

Our overarching view is that while the Bill is a modest step forward, it falls short of delivering the strong legal framework needed to conserve ecosystems, safeguard threatened species and ecological communities and prioritise biodiversity recovery. We are particularly concerned that the Bill, while introducing some useful new tools and safeguards, replicates mechanisms that have been criticised as being ineffective and out-dated and misses opportunities to make the improvements needed for ensuring those mechanisms are able to deliver improved outcomes for biodiversity. Concerningly the Bill also provides for significant overreach by the Minister on decision-making processes throughout the Bill, weakening the integrity of the legislation.

There are many elements of the Bill that we strongly **support**, including:

- The requirement for the Minister to prepare, publish and maintain a State Biodiversity Plan.
- New provisions clarify that the Minister is responsible for compiling, maintaining, and updating state biodiversity data, and for providing access to such data.
- Provisions for third-party civil enforcement of breaches of the Bill.
- The establishment of a Scientific Committee and First Nations Expert Biodiversity Committee to provide advice to the Minister and undertake functions relating to biodiversity conservation.

Other aspects of the Bill, while we support in principle, **require strengthening** to ensure the mechanisms established will be effectively implemented and deliver the outcomes needed to halt decline and support recovery. For example:

- The legislated process for listing species and ecological communities as threatened could be strengthened by removing Ministerial discretion and incorporating provisions for reviewing and maintain the lists.

- Provisions for the identification and protection of critical habitat replicate poorly implemented provisions from other jurisdictions without making improvements to ensure the provisions will be an effective tool that will deliver improved outcomes for biodiversity.
- There are further opportunities to strengthen interaction with the *Planning, Development and Infrastructure Act 2016* (SA)) (**PDI Act**), including, for example, by requiring decisions made under the PDI Act to be made consistent with State Plan, Action Plans and Threat Abatement Plans made under the Bill.
- While penalties have increased (relative to the NV Act) there is a strong case to be made for the penalties to be increased further to ensure that compliance is encouraged, particularly for commercial operators.

There are also several areas where we have **significant concerns** about the Bill proceeding in its current form. Specifically:

- There is no legal mechanism in the Bill that provides absolute protection for biodiversity when it is most needed – for example when impacts on biodiversity would be so serious that biodiversity decline, and extinction, would be inevitable.
- The Bill fails to overhaul and strengthen the Significant Environmental Benefit (**SEB**) scheme. We strongly recommend that further work is done ahead of the introduction of the Bill into the Parliament to set clear parameters in legislation that would bring the SEB scheme in line with best practice and the objects of the new Biodiversity Act and better embed the SEB scheme, including the key policy settings for the scheme, into the Bill itself, rather than a biodiversity policy.
- There are inconsistencies in the Bill on the use of native plant management plans, and no clear procedure on how a native plant management plan is to be considered and approved where one is required under the Bill. This needs to be remedied.
- As currently drafted, the Bill includes provisions that would allow it to be 'switched off' or overridden by other laws. For example, clause 6(5) allows the Governor to declare that the Bill, or a provision of the Bill. Other provisions provide the Minister with broad, unchecked powers (e.g. in relation to the appointment of statutory bodies, and the making of rules in biodiversity policies). These provisions must be tightened, with problematic provisions removed or substantially amended and powers curtailed, before the Bill is introduced to Parliament.

The Government's commitment to introduce a new legal framework for biodiversity conservation in South Australia is welcome, but it is important that it spends the time getting the framework and policy settings right from the outset. It is also important to ensure proper scrutiny is given to consolidated and streamlined provisions to ensure there are no inadvertent errors made in the drafting of new provisions, or perverse outcomes. Given the breadth and complexity of the Bill, it has been challenging for stakeholders to understand the changes and provide comprehensive feedback in the limited four-week consultation period, particularly given the limited explanatory material accompanying the draft Bill.

We make recommendations for improving both the architecture and drafting of the Bill and strengthening the substantive provisions to ensure the Bill delivers an effective legal framework that will deliver improved outcomes for biodiversity. **A consolidated list of our**

recommendations is provided at Appendix 1. We would be happy to provide further input or more detailed recommendations as the Bill continues to be developed.

It is important that the Bill introduced into the Parliament matches the Government's laudable ambition to halt biodiversity decline and put biodiversity on a pathway to recovery. In our view, there are substantial improvements that can be made to the Bill to ensure it provides South Australia with the best chance of achieving this outcome. We welcome the opportunity to continue to work with the South Australian Government to effectively implement these amendments.

INTRODUCTION

EDO welcomes the opportunity to make a submission on South Australia's Draft Biodiversity Bill 2025 (**the Bill**).

The Bill is a substantial document, over 150 pages in length, setting out a streamlined and updated framework for biodiversity conservation in South Australia. It brings across and streamlines existing provisions of the *Native Vegetation Act 1991* (SA) (**NV Act**) and parts of the *National Parks and Wildlife Act 1972* (SA) (**NPW Act**), legislates existing policies and processes (e.g. listing processes), and introduces new concepts and legal tools to support conservation (e.g. a new general duty to not harm biodiversity, State Biodiversity Plan).

Given the breadth and complexity of the Bill, it has been challenging for stakeholders to get across the intricacies of the Bill in the limited four-week consultation period. We have welcomed the Department's assistance in helping us understand the policy intention behind various aspects of the Bill and the legal drafting. At this stage, EDO's submission aims to address key elements of the Bill and provide suggestions for improving the architecture of the Bill, and importantly, strengthening key provisions to ensure the framework is able to deliver improved outcomes for biodiversity in South Australia. We recognise there are areas where ongoing discussion may be required, particularly where the intention of the Bill is not clear or where we can provide more detailed feedback as the Bill is revised.

Our submission is set out in two parts:

- Part 1 provides overarching comments on the Bill
- Part 2 provides feedback on key elements of the Bill, firstly by highlighting whole-of-Bill concerns, and secondly by stepping through key provisions of the Bill in alignment with its structure.

Throughout our submission we make recommendations for improving both the architecture and drafting of the Bill and strengthening the substantive provisions to ensure the Bill delivers an effective legal framework that will deliver improved outcomes for biodiversity. We would be happy to provide further input or more detailed recommendations as the Bill continues to be developed.

PART 1 - OVERARCHING COMMENTS ON THE BILL

The Biodiversity Bill provides a new, consolidated, first-of-its-kind legal framework for biodiversity conservation in South Australia. Notably, the Bill:

- brings together and updates (e.g. by increasing penalties) provisions of existing legislation, including the entirety of the NV Act and parts of the NPW Act;
- legislates existing policies and processes (e.g. listing processes); and
- introduces new concepts and legal mechanisms aimed at modernising and enacting stronger laws (e.g. a new general duty to not harm biodiversity, a new State Biodiversity Plan, recognition of Culturally Significant Biodiversity Entities, requirements to compile, maintain and update State biodiversity data, publish and maintain a Biodiversity Register, increased penalties for offences under the Bill, third-party civil enforcement provisions).

Our general view is that while the Bill is a modest step forward, it falls short of delivering the strong legal framework needed to conserve ecosystems, safeguard threatened species and ecological communities and prioritise biodiversity recovery. We are particularly concerned that the Bill, while introducing some useful new tools and safeguards, replicates mechanisms that have been criticised as being ineffective and out-dated and misses opportunities to make the improvements needed for ensuring those mechanisms are able to deliver improved outcomes for biodiversity.

The general structure and key elements of the Bill provide a sound basis for new laws, but there is substantial scope to enhance the provisions of the Bill to ensure the legal framework will deliver critical outcomes needed to halt biodiversity decline and support recovery.

There are many elements of the Bill that we strongly **support**, including:

- The requirement for the Minister to prepare, publish and maintain a State Biodiversity Plan. Importantly, the Plan will set out principles, policies and strategic directions for achieving the objects of the Bill.
- New provisions clarify that the minister is responsible for compiling, maintaining, and updating state biodiversity data, and for providing access to such data.
- Provisions for third-party civil enforcement of breaches of the Bill. Third-party civil enforcement is an important mechanism to improve the operation of the regulatory framework and to bolster community trust in that framework.
- The establishment of a Scientific Committee and First Nations Expert Biodiversity Committee to provide advice to the Minister and undertake functions relating to biodiversity conservation.

Other aspects of the Bill, while we support in principle, **require strengthening** to ensure the mechanisms established will be effectively implemented to deliver the outcomes needed to halt decline and support recovery. These include:

- A legislated process for listing species and ecological communities as threatened. A legislated process improves transparency and accountability, but the process could be strengthened by removing Ministerial discretion and incorporating provisions for reviewing and maintain the lists.
- Provisions for the identification and protection of critical habitat, although we are concerned that the Bill replicates poorly implemented provisions from other jurisdictions without making improvements to ensure the provisions will be an effective tool that will deliver improved outcomes for biodiversity.
- A new concurrence role for the Minister administering the Biodiversity Bill in relation to proposed amendments to the Planning and Design Code that relate to a zone or overlay of importance to biodiversity. However, there are other opportunities to strengthen interaction with the *Planning, Development and Infrastructure Act 2016* (SA)) (**PDI Act**), including by requiring decisions made under the PDI Act to be made consistent with State Plan, Action Plans and Threat Abatement Plans made under the Bill.
- Increased maximum penalties relative to the NV Act are an improvement, however we think there is a strong case to be made for maximum penalties to be increased further, particularly due to the application of sentencing principles by courts invariably resulting in penalties on conviction that are significantly less than the maximum.

There are also several areas where we have **significant concerns** about the Bill proceeding in its current form. Specifically:

- There is no legal mechanism in the Bill that provides absolute protection for biodiversity when it is most needed – for example when impacts on biodiversity would be so serious that biodiversity decline, and extinction, would be inevitable. In order to deliver real change in accordance with the Objects of the Bill and meet commitments to halt biodiversity decline and restore ecosystems, the Bill needs a mechanism that safeguards biodiversity when impacts are unacceptable.
- The Bill fails to overhaul and strengthen the SEB scheme. The repeal of the NV Act and introduction of a new Biodiversity Act provides a key opportunity to strengthen the SEB scheme in line with best practice and the objects of the new Biodiversity Act. We strongly recommend that further work is done ahead of the introduction of the Bill into the Parliament to set clear parameters in legislation that would bring the SEB scheme in line with best practice and with the objects of the new Biodiversity Act and better embed the SEB scheme, including the key policy settings for the scheme, into the Bill itself, rather than a biodiversity policy. There are inconsistencies in the Bill on the use of native plant management plans, and no clear procedure on how a native plant management plan is to be considered and approved where one is required under the Bill. This needs to be remedied. We suggest this could be done via a new sub-division in Part 4 that specifically regulates acts or activities that require a native plant management plan.
- As currently drafted, the Bill includes provisions that would allow it to be 'switched off' or overridden by other laws. For example, clause 6(5) allows the Governor to declare that the Bill, or a provision of the Bill will not apply to a part of the State, or for a particular period of time, or with respect to a specified species of plant or animal, or 'any other specified circumstance or thing'. Other provisions provide the Minister with broad, unchecked powers (e.g. in relation to the appointment of statutory bodies, and the making of rules in biodiversity policies and the creation of permits). These provisions must be tightened, with problematic provisions removed or substantially amended, before the Bill is introduced to Parliament.

We are also concerned with the pace at which the Bill is being progressed. As noted above, given the breadth and complexity of the Bill, it has been challenging for stakeholders to understand the changes and provide comprehensive feedback in the limited four-week consultation period, particularly given the limited explanatory material accompanying the draft Bill.

The Government's commitment to introduce a new legal framework for biodiversity conservation in South Australia is welcome, but it is important that it spends the time getting the framework and policy settings right from the outset. It is also important to ensure proper scrutiny is given to consolidated and streamlined provisions to ensure there are no inadvertent errors made in the drafting of new provisions, or perverse outcomes.

Most importantly, it is important that the Bill introduced into the Parliament matches the Government's ambition to halt biodiversity decline and put biodiversity on a pathway to recovery. In our view, there are substantial improvements that can be made to the Bill to ensure it provides South Australia with the best chance of achieving this outcome.

Part 2 - FEEDBACK ON KEY ELEMENTS OF THE BILL

Whole-of-Bill issues

Upfront, we highlight a number of whole-of-Bill issues, such as the distinction between regulated and unregulated activities, drafting approach, and Bill-wide definitions and concepts.

No mechanism to provide absolute protection for biodiversity

The Minister's message in the Explanatory Guide acknowledges the urgent need to halt biodiversity decline. It recognises that 'the current legislative framework does not fully reflect the scale and complexity of the biodiversity crisis' and that stronger, more modern laws are needed to conserve ecosystems, safeguard threatened species and ecological communities, and prioritise biodiversity recovery'.

As outlined in Part 1, the Bill brings together and updates provisions of existing legislation and legislates existing processes. It also introduces several new concepts aimed at modernising and enacting stronger laws. However, one key element that the Bill is lacking is a legal mechanism to provide absolute protection for biodiversity when it is most needed – for example when impacts on biodiversity would be so serious that biodiversity decline, and extinction, would be inevitable. While the Bill does introduce measures to strengthen protections (e.g. increased penalties, a new general duty against harming biodiversity, and critical habitat provisions), it ultimately retains discretion for decision makers, aided with the ability to accept SEB payments, to approve acts or activities that will impact on biodiversity.

In order to deliver real change and meet commitments to halt biodiversity decline and restore ecosystems, we need tools that will draw a line in the sand at critical moments. We highlight a number of examples of how this could be achieved:

- ***'No-go' zones:*** Biodiversity conservation and land management frameworks could work together to identify areas of high environmental value, where impacting acts or activities would be largely prohibited. This was proposed in the Federal Government's *Nature Positive Plan* which proposed that regional plans would identify areas of high environmental value, where development will largely be prohibited.[1] This would include areas with World Heritage or National Heritage values, Ramsar wetlands, critical habitat for threatened species and other areas of high conservation significance.
- ***Mandatory critical habitat provisions:*** As discussed further below, strong critical habitat provisions could provide a mandatory mechanism for identifying and protecting (e.g. as no go zones in a regional plan, appropriate land zoning, mandatory refusal triggers etc.) areas that are critical habitat. As drafted, the provisions in the Bill fall short of doing this.
- ***Mandatory refusals for unacceptable impacts:*** Legal frameworks could include a legislative trigger that mandates refusal of acts or activities where proposed impacts are, at the end of the day, unacceptable. The *Biodiversity Conservation Act 2016* (NSW) includes

[1] Australia Government, *Nature Positive Plan: better for the environment, better for business,* December 2022, https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf

a mechanism of this kind, where serious and irreversible impacts trigger a mandatory refusal for certain applications (see 7.16(2) of that Act).

Recommendation 1: Insert a legal mechanism into the Bill that will provide absolute protection for biodiversity when it is most needed (e.g. when impacts on biodiversity would be so serious that biodiversity decline, and extinction, would be inevitable). This could be identified areas that are off limits to activities (e.g. no-go zones, or stronger protections for critical habitat), or a mandatory refusal trigger (e.g. unacceptable impacts).

Ensuring decisions are consistent with the State Biodiversity Plan, conservation plans (e.g. Action Plans and Threat Abatement Plans), and biodiversity policies

The State Biodiversity Plan, conservation plans and biodiversity policies will be instrumental in setting the targets and actions required to achieve the objects of the Bill. Overall, the Bill would be strengthened by requiring decisions made under the act to be *consistent with* or *give effect to* (as is the case in cl 9) these key plans and policies, rather than simply having decision makers have regard to those plans and policies.

Further, in order to improve the interaction between the biodiversity conservation framework established under the Bill and frameworks that regulate acts or actions that may impact on biodiversity (such as the PDI Act), decision makers under those Acts must also be required to make decisions consistent with the State Biodiversity Plan, and any relevant conservation plan or biodiversity policy. This would ensure that decisions made about land use or the carrying out of acts or activities do not undermine targets and actions set under the Bill or the ability for the Bill to achieve its objectives.

Recommendation 2: Make amendments to the Bill to require that decisions are made consistent with the State Biodiversity Plan, conservation plans (e.g. Action Plans and Threat Abatement Plans), and biodiversity policies. This should include:

(a) Strengthening existing provisions in the Bill to require 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.
(b) Require decisions made under frameworks that regulate acts or actions that may impact on biodiversity (such as the PDI Act) to be consistent with the State Biodiversity Plan, and any relevant conservation plan or biodiversity policy.

See also Recommendations 19, 47(g) and 64(c).

Regulated acts or activities

We understand the rationale for proposing a simple framework that neatly distinguishes between 'regulated' and 'unregulated' activities. This concept is given effect within the framework as follows:

- **Regulated acts or activities** are described in the Act as:
    - in relation to native plants (in Part 4 (cl 42)):

i. clearance of native plants on any land (whether public land or otherwise) within the regulated clearance area specified in Schedule 1 or on any public land outside the regulated clearance area;
ii. taking a native plant from any public land;
iii. taking a native plant of a prescribed species from private land;
iv. dealing with a native plant of a prescribed species;
v. an act or activity prescribed by the regulations for the purposes of this subsection;
vi. attempting, or assisting in, an act or activity referred to in a preceding paragraph.

- in relation to protected animals (in Part 5, cl 62):
  i. taking a protected animal or a protected egg;
  ii. interfering with a protected animal;
  iii. releasing a protected animal from captivity;
  iv. keeping a protected animal or protected egg;
  v. dealing with a protected animal or a protected egg;
  vi. farming a protected animal;
  vii. harvesting a protected animal;
  viii. dealing with a protected animal product of a protected animal that has been harvested;
  ix. destroying, damaging or disturbing a protected habitat;
  x. an act or activity prescribed by the regulations for the purposes of this subsection;
  xi. attempting, or assisting in, an act or activity referred to in a preceding paragraph

- The term **'unregulated'** is not used in the Bill, however it is generally understood to refer to acts or activities that are not regulated acts or activities (see cl 42(2) and 62(2)). It includes activities that are expressly 'excluded' in Schedules 2 and 4 of the Bill.

Generally, we **support** this architecture of 'regulated activities' and 'exclusions'. However, we don't necessarily agree with the categorisation of certain acts or activities as 'exclusions'. As outlined below, we suggest that those acts or activities that require a native plant management plan approved by the Native Plants Clearance Assessment Committee (**NPCAC**) may be best thought of as 'regulated activities' and be brought into the remit of Part 4 (although potentially in a stand-alone division). We discuss this in further detail below.

See Recommendations 32 and 41 below.

Culturally Significant Biodiversity Entities

We generally **support** the policy intent of introducing provisions in the Bill to allow for the identification and protection of Culturally Significant Biodiversity Entities, however we suggest improvements to the architecture of the Bill to provide greater clarity around how this would operate.

For example:

- Currently, provisions relating to Culturally Significant Biodiversity Entities appear ad hoc in the Bill (e.g. the concept is introduced as a definition in cl 3, and the key process for identifying a Culturally Significant Biodiversity Entity is in accordance with a biodiversity policy made under 161(4)(b). There are also relevant provisions in Part 8 - Enforcement. It may be useful to have a standalone sub-division in the Bill that consolidates operative provisions relating to Culturally Significant Biodiversity Entity (but which could cross-reference other sections if needed). Further, we recommend that Culturally Significant Biodiversity Entities should be a required consideration under all relevant decision-making processes, including for permits and the development of management plans throughout the Bill.
- The process for First Nations persons to identify a Culturally Significant Biodiversity Entity and for the Minister to recognise a Culturally Significant Biodiversity Entity is somewhat unclear (see cl 3). Specifically, it is unclear if the making of a biodiversity policy under clause 161 is taken to be the act of identification and recognition, or if the biodiversity policy will outline a process for identification and recognition of a Culturally Significant Biodiversity Entity. If it is the former, given a biodiversity policy is ultimately made by the Minister, it is unclear how it is ultimately accepted that relevant First Nations persons have identified a Culturally Significant Biodiversity Entity. In any event, we submit that the identification of a Culturally Significant Biodiversity Entity should be by First Nations persons only, and the Minister's acceptance should not be required to meet the definition. If an ultimate decision-making function is required, this could instead lie with the First Nations Expert Biodiversity Committee. We also note there is a requirement for each Culturally Significant Biodiversity Entity to be included on the Biodiversity Register (which we **support**).

Recommendation 3: Make amendments to better protect and respect First Nations Culturally Significant Biodiversity Entities, by ensuring these entities are required to be considered in all decision-making processes under the Bill and clarifying the process for identifying a Culturally Significant Biodiversity Entity, including that this process should be led by First Nations peoples only and not be at the discretion of the Minister.

Subjective decision making

We note that many provisions of the Bill are drafted as subjective, for example 'in the opinion', 'is satisfied' etc.

Decision-making premised on a subjective standard (i.e. the decision maker being satisfied or of the opinion that certain elements are met), rather than being premised on an objective standard (i.e. the elements being met in fact) are not designed to ensure integrity and impartiality of decisions, provide insufficient guidance to decision-makers as to how to make a decision, are difficult to enforce, and erode public trust in the legal framework.

We recommend removing subjective decision-making elements from the Bill and adopting a premise of objective decision making.

Recommendation 4: Remove drafting that provides for subjective decision-making from the Bill to ensure that the Bill provides sufficiently clear guidance, transparency and accountability for decision-makers, stakeholders and the public.

Broad and unconstrained Ministerial and Governor power

Several provisions in the Bill give the Minister or Governor broad discretion and unrestrained power, including in relation to override protections in the Bill. For example:

- Clause 6 allows the Governor to declare that the whole Act or any part of the Act does not apply within a part of the State, for a particular time period, or to a specified species or 'any other specified circumstance or thing'.
- Clause 67 of the Bill allows the Minister to declare that protected animals or protected eggs of a specified species may be taken (if satisfied that the taking of the species at levels that could reasonably be expected as a result of the declaration would not reasonably cause the species to be considered for assessment as a threatened species in accordance with Part 6). We suggest there could be more specific criteria guiding and limiting when the Minister can utilise the power to allow protected animals or eggs to be taken.
- As further outlined below, several provisions in the Bill allow the Minister to undertake such consultation as the Minister considers necessary or appropriate. We recommend the Bill should be more prescriptive as to how consultation should occur, including by setting out, or allowing the regulation to prescribe, minimum requirements.
- Members of the NPCAC, First Nations Expert Biodiversity Committee (**FNEBC**) and Scientific Committee are to be appointed by the Minister on the basis of the skills and expertise considered necessary to achieve its functions. While the Regulations can set out requirements as to the requisite skills and expertise of the members and prescribe requirements in respect of the appointment of members of the NPCAC, there is otherwise little oversight to the Minister's appointments. The role of peak bodies in nominating members has been removed (see further comments below).

Recommendation 5: Constrain Ministerial and Governor discretion and the risk of government overreach by ensuring there are clear criteria directing the exercise of power throughout the Bill, and that these are included in the Bill, and not left to be prescribed by the Regulation.

See also Recommendations 7, 8, 21(e), 23, 46(b) and 65(b).

Definition of 'entity'

The term 'entity' is used throughout the Bill in its general sense (as well as for specifically defined concepts such as ecological entity, and Culturally Significant Biodiversity Entity). For example, it is used generally in the following provisions:

- The proposed new General Duty in clause 11 provides that "(a)n entity must not undertake an activity that harms or has the potential to harm biodiversity unless the entity takes all reasonable and practicable measures to prevent or minimise any resulting harm".
- The proposed listing process (clause 74) provides that "(a)ny entity (including the Department or Scientific Committee) may, in the manner and form determined by the Minister, nominate a native species, ecological community or other ecological entity to the Minister for a listing decision".

When used generally, the term 'entity' is undefined in the Bill. The term 'entity' is however defined in section 4 of the *Legislation Interpretation Act 2021* (SA) as follows:

entity includes a person, a partnership and an unincorporated body;

Notably, the term person is defined in the *Legislation Interpretation Act 2021* (SA) to include a body corporate as well as an individual.

We therefore assume that general use of the term entity in the Bill is intended to have this meaning. It may be useful to clarify this in the Bill itself.

Recommendation 6: To avoid ambiguity, define the general term 'entity' in the Bill.

Status of biodiversity policies

Many provisions in the Bill provide for matters to be prescribed in either the regulation or a biodiversity policy. Our understanding is that biodiversity policies will not be statutory instruments, meaning there is less oversight in the making of a biodiversity policy than there would be for making regulations (because regulations can be disallowed by the Parliament).

Unless biodiversity policies are given the status of statutory instrument (which would be analogous to State Planning Policies, which are statutory instruments made under the statutory instrument under the PDI Act), provisions that provide the option to use either the regulation or biodiversity policies to set subordinate rules should be amended to remove the option to use a biodiversity policy, and require matters to be prescribed in regulations only. Biodiversity policies could be retained in circumstances where it would be appropriate for them to be used to provide additional guidance, as opposed to setting rules.

Recommendation 7: Make biodiversity policies statutory instruments or clarify subordinate rules are to be provided in regulations only.

Consultation requirements

The Bill requires public consultation in a number of instances, however some provisions relating to consultation are more prescriptive than others. For example:

- Part 4, Division 3 includes requirements for the NPCAC to consult with specified bodies (cl 51), as well as any other person (in a manner prescribed by the regulations) (cl 53 (5) and (6).
- The Biodiversity Council (**the Council**) must consult on draft guidelines made under clause 61. This clause includes a specific requirement for public advertisement and a minimum timeframe for consultation.
- Clause 74 requires the Minister must consult during the listing process, by publishing a notice on a website and carrying out any other prescribed consultation requirements. It also empowers the Minister to reject a nomination under the Minister's discretion without a requirement to seek scientific advice on this decision.
- Clause 77 requires the Minister to undertake such consultation on the proposed Action Plans as the Minister considers appropriate. Similar provisions exist for Threat Abatement Plans (cl 79).
- Clause 82 provides that before making a critical habitat determination, the Minister must undertake public consultation, and any other engagement the Minister considers appropriate.

- Clause 160(5) provides that in preparing or reviewing the State Biodiversity Plan the Minister must undertake such consultation as the Minister considers necessary or appropriate. Yet, perhaps inconsistently, clause 160(9) provides that the regulations may prescribe requirements for consultation in respect of preparing or reviewing the State Biodiversity Plan.
- Clause 161 provides that the Minister must undertake consultation on any proposed biodiversity policy with the public and any prescribed entities for a period of at least 30 days.

To improve transparency and accountability across the Bill generally, we recommend that, where consultation is required, the Bill is prescriptive as to how this is to occur, including minimum time periods and requirements for notification, and not leave consultation obligations to the discretion of the Minister. This should be in the Bill, but at the least, could be prescribed in the Regulation. This issue is also flagged at relevant spots earlier in our submission.

Recommendation 8: Where lacking, the Bill should be more prescriptive as to how consultation should occur, including by setting out, or allowing the regulation to prescribe, minimum requirements. This will provide more certainty to all stakeholders, reduce regulatory burden of creating consultation processes afresh for each decision, and ensure consistency in the quality of consultation undertaken.

Implementation and funding

Any law is only as good as the resourcing provided by government to implement and administer the law. This is particularly true of environmental laws, where the financial benefit of non-compliance can often be significant and active regulation by the government demonstrates to proponents and the public that the laws are being upheld. This naturally leads to increased compliance, public trust and greater social licence of operators. This also provides more certainty to operators as to the standard they are required to meet in South Australia and generates greater respect for the regulator by all stakeholders.

Adequate resourcing must be provided for appropriately experienced and knowledgeable assessment, compliance and enforcement staff, and staff to ensure adequate education, consultation and access to information for the public. Additionally, because the Bill introduces new legal mechanisms (e.g. Action Plans, State Biodiversity Plan, Biodiversity Register etc.) new money must be committed to begin the upfront task of implementing these mechanisms and maintaining them in the long-term. For example, there is little point in providing the ability to make Action Plans, if there is no commitment to make sure these become an effective part of the framework through adequate resourcing.

Sufficient First Nations and culturally competent staff should be employed and supported also to ensure that the Bill's aspiration to respect and include First Nations in decision making under the Bill can be meaningfully implemented.

Recommendation 9: Ensure that adequate resourcing is provided upfront to deliver the key elements of the Bill and maintained annually to support good administration of this Bill, to build public and industry confidence in the regulators and to ensure good quality, informed, decision-making.

Part 1 - Preliminary

Operation of Act

We raise the following concerns with the preliminary matters set out in Part 1 of the Bill:

- **Clause 6(5)** provides that the Governor may, in essence, turn off parts of the Bill. Our understanding is that this provision has been carried over from the NPW Act, where its application was limited to the specific framework set up by Part 4 of that Act relating to the taking and disposal of plants and permits authorising such activities. However, replicating it here in the Bill, has the inadvertent outcome that it will apply to the whole of the Bill (other than the clearance of plants, which is explicitly excluded under cl 6(6)). This is an overreach of the provision, and as we understand not the policy intent. We understand that it is intended to amend this part of the Bill accordingly.
  Ideally this power should be removed to reduce the risk of ill-considered use of this power at the detriment of biodiversity. However, if it is to remain, criteria must be provided as to when this power can be implemented, to reduce the risks of misuse and to ensure public confidence remains in the legislation. We support the exclusion of clearance of native plants from this power. Legislative provisions, such as cl 6(5), allowing legislative instruments or other subordinate instruments to override the primary Act, are known as Henry VIII clauses and are generally considered an inappropriate incursion of the power of the executive over that of the legislature that undermine the rule of law.
- Further with respect to **clause 6(3**) we suggest inclusion of 'failures to act' where that failure affected the biodiversity of the State, to ensure omissions that cause environmental damage can still be enforced.

Recommendation 10: Address concerns about the operation of the Bill by:

(a) Omitting clause 6(5) (and consequentially clause 6(6) from the Bill). Alternatively, explicitly limit the scope of 6(5) to its equivalent current operation in the NPW Act (i.e. the taking and disposal of plants and permits authorising such activities), and explicitly exclude (in clause 6(6)) its application to the remainder of the Bill.
(b) Extending clause 6(3) to include 'failures to act', to ensure omissions that cause environmental damage can still be enforced.

- **Clause 4(1)** provides: 'Except where the contrary intention is expressed in this or any other Act, this Act is in addition to and does not limit or derogate from the provisions of any other Act'. While this may be a common element in other Acts, we are concerned that this overarching provision would allow for the Bill to either inadvertently or deliberately be overridden by other legislation, undermining the broad objectives of the Bill.

Recommendation 11: To avoid the Bill being either inadvertently or deliberately overridden by other legislation, exclude clause 4(1) from the Bill.

- In the time available, we have not had the opportunity to interrogate each of the **definitions in clause 3**, however we note the following concerns:

- We recommend throughout the Bill that clarification is introduced as to the Bills application to both aquatic and terrestrial species, including in the definition of ***biodiversity***.
- We acknowledge concerns raised by various stakeholders to adopt the definition of ***native plant*** currently in the NPW Act, which includes any plant indigenous to Australia, rather than a plant indigenous to South Australia. This is different to the definition in the NV Act (which limits the definition of native plant to those indigenous to South Australia). Concerns have been raised about the ability to manage native plants that may be invasive in South Australia. To address these concerns, the definition of native plant could:
    - retain the narrow definition and allowing prescribed plants outside of South Australia to be captured by the definition – therefore allowing for those plants to be protected under the framework; or
    - adopt the expanded definition and allow prescribed plants to be excluded from the definition, allowing native plants that have become pest species in South Australia to be properly managed.
- We further recommend clarification that 'native plant' includes both aquatic and terrestrial plants, assuming from the broad frame of the Bill that this is the policy intent.
- We **support** the expansion of the definition of plants to include algae and fungi. We recommend that clause 3 provide a definition of both algae (micro and macroalgae,) and fungi for the purposes of this Act.
- Regarding **clause 3(2)** and consideration of whether a ***stratum*** of native plants will be considered to be substantially intact, we note the provision includes the term 'contiguous area' as proposed in the Native Vegetation (Miscellaneous) Amendment Bill 2024. As flagged in our feedback on that Bill,[2] there has been no clear explanation given for the proposed addition and 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, we do not support this change. We recommend that non-contiguous stratum of native vegetation should be protected, to ensure protection of fragmented vegetation areas with high value/ vulnerable vegetation. Also, we recommend a cross-reference to (2) be inserted in the definition of 'stratum' to ensure this qualification of the definition is picked up by readers.
- For the definition of *protected animal*, we support the exclusion of the 'unprotected species' list, however we do not support that animals can be excluded from the definition. We also do not support the exclusion of fish, amphibians or invertebrates that are not threatened. All animals should be protected, even where not currently threatened, to ensure they don't become threatened at all. Further, reference should

[2] EDO, *Submission on proposed changes to SA Native Vegetation Act 1991*, June 2024, https://www.edo.org.au/publication/submission-on-proposed-changes-to-sa-native-vegetation-act-1991/

be included that native animal includes both aquatic and terrestrial animals, for certainty.

Recommendation 12: Clarify the Bills application to both aquatic and terrestrial species, including in the definitions of *biodiversity, animal, protected animal* and *native plant.*

Recommendation 13: Amend the definition of native plant to address concerns about the ability to manage pest native species in South Australia.

Recommendation 14: To guarantee protection for fragmented or small patches of vegetation, amend clause 3(2) of the Bill as follows and provide a clearer definition of stratum:

(a) Omit clause 3(2)(a), which refers to a contiguous area of native plants.
(b) Cross-reference clause 3(2) in the definition of ***stratum*** in clause 3(1).

Recommendation 15: Amend the definition of ***protected animal*** to:

(a) Expand the definition of protected animal to include fish, amphibians or invertebrates that are not threatened (i.e. these should not be excluded from the definition).
(b) Remove the ability for the regulation to exclude classes of animal from the definition.

Part 2 - Objects, principles and general duty

Objects

We generally **support** the objects of the Bill, but suggest they could be expanded to include:

- Objects that more specifically reflect the goals of the Kunming-Montreal Global Biodiversity Framework,[3] such as to stop and reverse biodiversity loss by 2030, and to fully restore biodiversity by 2050. 'Halting and reversing biodiversity loss' is referenced as a principle in clause 8(a), but is not reflected in the Objects and we recommend its inclusion. This would assist in giving meaningful effect to this Global Biodiversity Framework in South Australia.

Specific objects relevant to each of the relevant parts of the Bill. As noted below, the NV Act has specific objects relating to the conservation, protection and enhancement, and management, of native vegetation. This signals a clear and specific policy intent for the protection and restoration of native vegetation. Because the proposed objects of the Bill relate more broadly to protecting, restoring and enhancing biodiversity, there is a risk that this specific policy intent to protect and restore native vegetation is lost. Similarly, there is no object specifically relating to threatened species (e.g. halting extinctions).

Recommendation 16: Amend the objects of the Bill to better reflect the goals of the Kunming-Montreal Global Biodiversity Framework, including with specific inclusion of objects to stop and reverse biodiversity loss by 2030, and to fully restore biodiversity by 2050.

Recommendation 17: Include specific objects in the Bill relating to the conservation, protection and enhancement, and management, of native vegetation and protection and recovery of threatened species (e.g. halt extinctions, recover species).

[3] https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf

Principles

We generally **support** the inclusion of principles in the Bill and the requirement that a person or body engaged in the administration of this Act must seek to give effect to the principles. We strongly suggest that both the precautionary principle and principle of intergenerational equity should also be included in **clause 8**, as key nationally agreed principles of environmental law in Australia

We further recommend that **clause 8(b)** be amended to add recognition that transparency and community participation in decision-making leads to better quality decisions, and that open access to information should be provided for as much as possible.

Clause 8(c) acknowledges that First Nations people, as traditional owners with a strong connection to Country, will be engaged in a way that is respectful and mindful of cultural sensitivities and the historical and persisting impacts of colonisation. We support this principle, but consider it should go further and reflect Articles 14 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples to which Australia is a signatory. In particular, and as submitted by First Nations consulted as part of development of the Bill, the principle of Free, Prior and Informed Consent of First Nations in management of biodiversity resources should be embedded as a principle in the new Act.

Clause 8(c) should also be amended to recognise Indigenous Data Sovereignty and Indigenous Cultural & Intellectual Property rights.

Recommendation 18: Expand the principles in clause 8 of the Bill by:

(a) including the precautionary principle and principle of intergenerational equity;
(b) expanding clause 8(b) to add recognition that transparency and community participation in decision-making leads to better quality decisions, and that open access to information should be provided for as much as possible; and
(c) expanding clause 8(c) to reflect Articles 14 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples to which Australia is a signatory. This should include embedding the principle of Free, Prior and Informed Consent of First Nations in management of biodiversity resources as a principle in the new Act and recognising Indigenous Data Sovereignty and Indigenous Cultural & Intellectual Property rights.

State Biodiversity Plan

We **support** inclusion of **clause 9**, which will assist in providing for meaningful implementation and consideration of the State Biodiversity Plan. As outlined elsewhere in our submission, we suggest the requirement be that administration of the Bill be consistent with (and also, as required in clause 9, give effect to) the plan.

Recommendation 19: Amend clause 9 of the Bill (as emphasised) to provide that a person or body engaged in the administration of this Act *must act consistently with*, and where appropriate give effect to, the State Biodiversity Plan in making decisions under this Act.

First Nations' knowledge

We **support** the inclusion of **clause 10** which requires consideration and application of First Nations knowledge in many functions of the Bill. We suggest that an additional sub-provision (f) could be added to extend this to any function of the Bill.

Recommendation 20: Extend the application of clause 10 of the Bill (e.g. by adding a new sub-clause (f)) that provides that a person or body engaged in the administration of this Act must, as far as is practicable, seek, consider and apply First Nations' knowledge (where it is available and endorsed by the knowledge holders), in exercising any other function in the Act.

General Duty

In general, EDO **supports** the proposal to introduce a general duty against harming biodiversity in the Bill. As flagged in our submission on the Discussion Paper, to the best of our knowledge, there is no general duty to not harm biodiversity in any biodiversity conservation laws in Australian jurisdictions. However, general environmental duties to not cause harm exist across Australian jurisdictions in pollution and waste laws,[4] and biosecurity laws.[5]

The general duty in **clause 11** of the Bill appears to be modelled off similar duties in other South Australian legislation, including the *Environment Protection Act 1993*, *Marine Parks Act 2007* and *Landscape South Australia Act 2019*. Specifically:

- Section 25 of the *Environment Protection Act* 1993 provides that person must not undertake an activity that pollutes, or might pollute, the environment unless the person takes all reasonable and practicable measures to prevent or minimise any resulting environmental harm.
- Section 37(1) of the *Marine Parks Act 2007* provides "(a) person must take all reasonable measures to prevent or minimise harm to a marine park through his or her actions or activities.
- Section 8 of the *Landscape South Australia Act 2019* provides "(a) person must act reasonably in relation to the management of natural resources within the State.

Common, key elements of these provisions include:

- The element of reasonableness – e.g. a person must take reasonable measures, or act reasonably.
- Matters to which regard must be had when determining whether the duty has been met.
- Circumstances, or the ability to prescribe circumstances in which a person will not be in breach of the duty.
- Express indication that the breach of the duty is not an offence, but that a person in breach of the duty may be subject to compliance action, such as a reparation order or order made by the Environment, Resources and Development Court (**ERD Court**).

[4] *Environment Protection Act 1997* (ACT) s 22; *Environmental Protection Act 1994* (Qld) s 319; *Environment Protection Act 2017* (Vic) s 25; *Environmental Protection Act 1993* (SA) s 25; *Environment Management and Pollution Control Act 1994* (Tas) s 23A; *Waste Management and Pollution Control Act 1998* (NT) s 12.

[5] *Biosecurity Act 2023* (ACT) s 22; *Biosecurity Act 2015* (NSW) s 22; *Biosecurity Act 2014* (Qld) s 23; *Biosecurity Act 2019* (Tas) s 70, Biosecurity Bill 2024 (SA),

These elements provide the foundation for the proposed new duty in clause 11 of the Bill. Notably:

- The general duty itself is as follows: "An entity must not undertake an activity that harms or has the potential to harm biodiversity unless the entity takes all reasonable and practicable measures to prevent or minimise any resulting harm".
- It includes the element of reasonableness – worded in the Bill as 'all reasonable and practicable measures'.
- Clause 11(2) lists the matters that must be had regard to in determining whether the duty has been met.
- Clause 11(4) sets out circumstances in which a person will not be in breach of the duty, including prescribed circumstances.
- Clause 11(5) provides that a breach of the duty is not an offence, but that a person in breach of the duty may be subject to compliance action.

Additionally, the terms 'activity' and 'harm' are defined for the purpose of the section and clause 11(3) allows for regulations or a biodiversity policy to prescribe activities that will, or will not, be taken to harm biodiversity, as well as matters to be taken into account in determining what measures are required to be taken under and what measures will, or will not, be taken to constitute reasonable measures for the purposes of compliance with the duty. See our more detailed comments in response to Consultation Question 5 below.

Given this is one of (if not the first) biodiversity duty of care to be introduced, it is useful to model it off existing provisions. Unfortunately, while the Explanatory Material helpfully explains the proposed duty, it does not provide any detailed background information on the development of the duty for the purpose of the Bill, and why this model was adopted for the purpose of introducing a general duty to prevent harm to biodiversity. For example:

- It would be useful to understand how effective the general duties in other South Australia legislation have been in preventing harm and whether this model could be strengthened. We have not been able to find any useful, existing analysis on this. For example, the recent review of the *Landscape South Australia Act 2019* did not look at this in detail.
- It would also be useful to understand how similar provisions have been enforced, including how often compliance action is taken to enforce the duty, and what barriers there may be to the effective enforcement of those provisions. Again, we have not been able to find much information in this regard. We are aware that in other jurisdictions there have been challenges enforcing environmental duties, particularly where they are broadly framed or not prescriptive, rendering the duties somewhat meaningless.
- It is unclear why the proposed duties (and the general duties found in other South Australian legislation) are drafted so as to not be offences. This is in clear contrast to other duties found in pollution and waste, and biosecurity laws, which are designed as offences. In this instance, we note that the Bill does allow for compliance action to be taken for a breach (despite it not being an offence), and that the Bill does establish other offences (such as offences for contravening provisions aimed at protecting native vegetation (clause 44), protected animals (clause 64) and critical habitat (clause 84)), so the disadvantages of the duty being drafted in this way may be limited in any case.

In any case, we generally **support** the concept of introducing a general duty to ensure the protection of biodiversity and provide these specific comments on the proposed provision:

- **Clause 11** refers to entity (rather than person as per *Marine Parks Act 2007* and *Landscape South Australia Act 2019*). While we don't disagree with this approach, as noted below we suggest it may be useful to define entity within the Bill (see our comments on Whole-of-Bill).
- We agree that it will be important for statutorily made guidance material to support the implementation of the new duty, including on how individuals and organisations can comply with the general duty; and what type of action may or may not constitute a breach of the duty.
- We agree with specified compliance action being available for a breach of the duty, despite it not being an offence. The duty could be strengthened by making a breach of the duty an offence similar to duties under pollution and waste, and biosecurity laws, but in any case will provide an alternative pathway for regulators to take action where there has been harm to biodiversity.
- **Clause 11(2)** lists matters that must be regarded in determining what measures are required to be taken to comply with this duty. This includes, amongst other things, the availability, suitability and practicability (including cost) of measures to prevent or minimise harm or the risk of harm. In our view the practicability, and in particular cost, should not be a factor. This implies that significant costs could be an excuse for preventing harm.
- **Clauses 11(2)(g), 11(4)(d) and 11(6)** allow for matters to be either prescribed in the regulation or a biodiversity policy. It does not appear that a biodiversity policy is intended to be a statutory instrument, meaning that there would be more transparency and accountability in making a regulation prescribing matters for the purpose of clause 11 (because regulations can be disallowed by the Parliament) as opposed to a biodiversity policy. Given the key role biodiversity policies will play on this new framework, consideration should be given to making biodiversity policies statutory instruments. This would be analogous to State Planning Policies, which are statutory instruments made under the PDI Act (see also our comments on Whole-of-Bill).
- 'Harm' is defined in the Bill, for the purpose of the general duty in **clause 11,** as:

  > ***harm*** to biodiversity is taken to be a direct or indirect adverse impact on biodiversity that is not trivial, having regard to matters including—
  >
  > i. the extent and scale of the impact; and
  > ii. the sensitivity of the affected environment; and
  > iii. any matter that may be prescribed by regulations or a biodiversity policy

  This definition has similarities to the definition of 'substantial harm and material harm' in the Biosecurity Bill 2024 (SA), in that it sets out matters to be considered in determining harm, and excludes harm that is trivial.[6]

[6] Clause 250 of the Biosecurity Bill 2024 (SA) provides:

- Our key concern with this definition is its subjectiveness. We contrast the framing of the general duty and definition of harm in clause 11 with the framing of the offence provisions in clauses 44, 64 and 84 of the Bill, which provide a more descriptive explanation of the types of actions that are being regulated e.g. 'taking a protected animal' (clause 62(1)(a)), with 'take' being defined in clause 3 as 'with reference to an animal, includes any act of catching, restraining, killing or injuring'.
- We acknowledge however that the more general application of the general duty in clause 11, and the broader 'biodiversity' rather than 'protected animal' may make it harder to define harm in this instance. Therefore, further guidance (e.g. prescriptions in the Regulation) will be important for providing further assistance in applying and enforcing the definition.
- We note that the Bill itself does not set out what are reasonable measures, but leaves this to be prescribed in the regulations or a biodiversity policy (see clause 11(3)). We note again our concerns with biodiversity policies not being statutory instruments.
- **Clause 114(1)(g)** of the Bill provides that any (other) person, with the permission of the Court, can apply to the ERD Court to restrain or remedy a breach of the Act, except in respect of an application to restrain or remedy a breach of the general duty in section 11. There is no clear explanation of why the duty of care has been specifically excluded, however we understand the duty is intended to operate alongside the range of offences that exist in the Bill (and for which open standing civil enforcement will be available). As a tool for increasing protection for biodiversity, the general duty will provide an alternative pathway for regulators to take action where there has been harm to biodiversity and will complement existing offence provisions. We recommend removal of the exemption of breaches of the general duty from third party actions allowed under clause 114(1)(g).

Recommendation 21: To strengthen the general duty in clause 11 of the Bill:

(a) make a breach of the duty an offence, similar to duties under pollution and waste, and biosecurity laws;
(b) allow the duty to be enforced by third parties (i.e. remove the exemption of enforcing breaches of the general duty by third parties under clause 114(1)(g));
(c) define the term entity within the Bill (see Recommendation 6);
(d) remove the words "and practicability (including cost)" from clause 11(2)(e), as practicability, and in particular cost, implies that significant costs could be an excuse for preventing harm; and

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250—Substantial harm and material harm
(1) For the purposes of this Part, in determining whether harm is (or would be) substantial, the following matters are relevant (but not exclusive):
a) the nature, scale and effects of the harm that may arise;
b) the immediacy and seriousness of any threat caused by a relevant act;
c) the number of animals or plants (as the case may be) affected, or at risk of being affected;
d) the availability and effectiveness of any treatment or measures that may be available to be used to eliminate or reduce the harm.
(2) For the purposes of this Part, in determining whether any harm is (or would be) material, it is relevant to consider any impact or potential impact, and the risk of any impact, other than an impact that is or would be trivial or negligible.

(e) amend clauses 11(2)(g), 11(3), 11(4)(d) and 11(6) so that matter can be prescribed in the regulation only.

Part 3 – Administration

Delegation and administration of Act

EDO generally **supports clause 12** and **clause 13** of the Bill. Given the inherent potential for conflicting interests between the planning and mining portfolios, and the environment portfolio, it is useful for clause 13 to prevent the same Minister from administering Acts relevant to those portfolios. EDO particularly **supports** that non-disclosure of a conflict of interest is an offence under **clause 12(4),** which improves likely compliance with the disclosure requirement. We suggest strengthening this to also provide that the person must not undertake a duty under this act where they hold a material conflict of interest, with an offence provision also applicable in this instance.

Recommendation 22: Strengthen the conflict-of-interest provisions in the Bill by providing that a person must not undertake a duty under this Act where they hold a material conflict of interest and create this as an additional offence in the Bill.

Statutory bodies

We provide the following feedback on **Part 3, Division 2**—Statutory bodies:

- ***Legislative requirements for the establishment of statutory bodies:*** The legislative requirements for the establishment of the Biodiversity Council are more prescriptive than the other bodies (as are the current legislative requirements for establishing the Native Vegetation Council under the NV Act). For example, in the case of the NPCAC, Scientific Committee and FNEBC proposed in the Bill, requirements as to the requisite skills and expertise of the members of the NPCAC and appointment of members of the NPCAC will be prescribed in the regulations. We are unclear on the rationale for this and suggest that the requirements for those bodies should be in the legislation itself. This is particularly the case in relation to the NPCAC, whose functions are intended to replicate functions that are already performed by the Native Vegetation Council (**NVC**) and importantly include undertaking enforcement action for vegetation clearing.

Recommendation 23: Insert specific, appropriate criteria in the legislation for the membership of all statutory bodies created under the Bill, given the importance of these roles.

- ***First Nations Expert Biodiversity Committee:*** We **support** the establishment of the FNEBC and First Nations representation on the Biodiversity Council, and recommend the Minister seek input from First Nations on the establishment and functions of this Committee.

Recommendation 24: Seek meaningful input from First Nations on the establishment and functions of the First Nations Expert Biodiversity Committee.

- ***Scientific Committee:*** We generally **support** the establishment of the Scientific Committee. As flagged in more detail later in our submission, we think the role of the Scientific Committee can be strengthened in relation to some of the processes (e.g. in

relation to listing of threatened species, and identification of key threatening processes etc.) – see Recommendations 46(c), 48(a) and 51.

- ***Split functions between Biodiversity Council and Native Plants Clearance Assessment Committee* (NPCAC):** As outlined in the Explanatory Guide, the NVC, which currently operates under the NV Act, will no longer exist and will have its functions split between the Biodiversity Council and NPCAC. We generally agree with this splitting of roles which would see:

  - The NPCAC take on the primary function of assessing and determine applications for clearing consent, consider referrals made under the PDI Act, and assess and approve native plant management plans.
  - The Biodiversity Council to take on advisory and administrative functions, including providing advice to the Minister on the administration of the Act, the State Biodiversity Plan and biodiversity policies, and administering the managing the Biodiversity Restoration Fund and entering into conservation agreements and advising the Minister in relation to biodiversity agreements.

  However, we would suggest the following improvements to the Bill:

  - As outlined above, the Bill should include clear legislative requirements for the establishment of the NPCAC and not leave this detail to the regulations (see Recommendation 23);
  - The Biodiversity Council should be able to provide advice to the Minster on biodiversity policies on its own initiative, and not at the request of the Minister (this would align with other advisory functions of the Biodiversity Council); and
  - The Bill should be clearer about the NPCAC function 'to administer the SEB scheme', particularly as the Biodiversity Council also has a role in administering the Scheme, and as the Council will manage the Biodiversity Restoration Fund. The NPCAC's role may be better described as applying the Scheme (as part of its role in considering applications and imposing conditions of consent).

Recommendation 25: In order to empower the Biodiversity Council with the ability to provide advice to the Minster on biodiversity policies on its own initiative, remove the words "at the request of the Minister" from clause 16(d), or provide for a separate power to provide advice without external request.

Recommendation 26: To clarify the function of the NPCAC as it relates to the SEB scheme, amend clause 19(c) of the Bill, (e.g. "*apply* the SEB scheme" (rather than administer)).

- ***Enforcement role of NPCAC:*** We are concerned that one of the functions of the NPCAC is to undertake enforcement action relating to the unlawful clearance of native plants in accordance with Part 8. In our view, such a committee should not be tasked with or primarily responsible for enforcement. While we recognise that the NPCAC can delegate its powers (including to the Department), enforcement of the clearance provisions of the Bill requires and should fall to a specialised, well-resourced agency. The potential delegation

of this important role may create more confusion for all stakeholders and weakens the accountability of this role. To that end, our view is that the enforcement of the clearance provisions of the Bill should be the direct responsibility of the Department, not the NPCAC. However, the NPCAC could retain an advisory role in relation to enforcement, which could include referring matters for investigation or making recommendations to the Department. The Bill should be amended accordingly.

Recommendation 27: Amend clause 19(e) of the Bill (as it relates to the NPCAC's function to undertake enforcement action relating to the unlawful clearance of native plants), and place responsibility for enforcement of the clearance provisions of the Bill directly with the Department, with the NPCAC retaining an advisory role in relation to this function.

- ***Membership of the NPCAC and Biodiversity Council*:** Regarding the membership of the Biodiversity Council and NPCAC, the Bill proposes changes that will remove the role of peak body nominees and appointments (currently, section 8 of the NV Act provides that in establishing the NVC, one member must be a person selected by the Minister from a panel of three persons nominated by Primary Producers SA Incorporate, and one must be a person selected by the Minister from a panel of three persons nominated by the Conservation Council of South Australia). The Bill simply provides that members of the Biodiversity Council and NPCAC will be appointed by the Minister on the basis of the skills and expertise considered necessary to achieve its functions (clause 18). This is even more of a step back from a position proposed (but not progressed) as part of 2024 amendments to the NV Act, which while removing direct appointments of peak body nominees would have required 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.

  We understand one reason for this change has been made to overcome difficulties in peak bodies identifying suitable nominees, and vacancies in NVC membership. An alternative to removing the role of peak bodies all together 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.

Recommendation 28: Retain a role for peak bodies in appointing members to the NPCAC and Biodiversity Council.

- ***Other committees:*** We generally **support** the provisions that allow the Council (with the approval of the Minister), or Minister, to establish additional committees and advisory bodies for the purposes of the Act (**clause 26**). This generally aligns with existing provisions in the NV Act.

Funds

The Explanatory Guide explains that the Bill establishes three funds:

- the Biodiversity Restoration Fund;
- the Biodiversity Conservation Fund; and
- the Biodiversity Administration Fund.

The Biodiversity Conservation Fund essentially replaces the Wildlife Conservation Fund under the NPW Act.

Money that currently sits in the Native Vegetation Fund will be carried over and split between the Biodiversity Restoration Fund and the Biodiversity Administration Fund. The money transferred into the Biodiversity Administration Fund will comprise money paid into the Native Vegetation Fund for administrative and operational purposes (e.g., application fees, state appropriation), and moving forward, will receive application/permit fees and other administrative monies and can be used to support the administration of the Act. We generally support this distinction and the creation of a new a Biodiversity Administration Fund.

However, we remain concerned that the Biodiversity Restoration Fund continues to have a wide range of functions, including both receiving and expending money associate with the SEB scheme; as well as receiving expiation fees and penalties from native plant-related offences and expending money on research and restoration. In our view, there should be a stand-alone fund used solely for the purpose of receiving and expending money under the SEB scheme. This is needed to ensure that the Scheme delivers genuine like for like offsets and that payments received in order to satisfy a SEB obligation are used solely to acquit that obligation and not for other purposes – see further our comments on the SEB scheme below.

Money otherwise received from expiation fees and penalties from native plant-related offences and payments by order of the ERD Court should be managed separately. The Biodiversity Conservation Fund could be expanded for this purpose.

Recommendation 29: Establish a stand-alone fund used solely for the purpose of receiving and expending money under the SEB scheme.

Part 4 – Native plants

Overarching comments on Part 4

Up until now it has been unclear how the new Biodiversity Bill would interact with the NV Act, which regulates the clearing of native vegetation.

The decision to repeal the NV Act in its entirety and regulate the clearing of vegetation under the proposed new Biodiversity Act is a significant change. The proposal does not simply replicate existing provisions of the NV Act in the Bill but makes a number of significant changes to both the drafting of the provisions and the policy settings for regulating vegetation clearance. The Bill also incorporates changes on foot in the Native Vegetation (Miscellaneous) Amendment Bill 2024. While many elements of the framework continue (e.g. the requirement for approval to clear vegetation, Significant Environmental Benefits etc.), new drafting, tweaks, enhancements and more

substantial policy changes means that scrutiny of this Part of the Bill is warranted. To the extent that it remains relevant, EDO's feedback on the proposed changes to the NV Act[7] (originally intended to be implemented via the Native Vegetation (Miscellaneous) Amendment Bill 2024), should be considered, in addition to our specific comments on the Biodiversity Bill below. This significant change provides a key opportunity to overhaul and strengthen the regulatory framework for native plants.

As flagged above, and further discussed below, we don't necessarily agree with the categorisation of certain acts or activities as 'exclusions'. As further outlined below, we suggest that those acts or activities that require a native plant management plan approved by the NPCAC may be best thought of as 'regulated activities' and be brought into the remit of Part 4 (although potentially in a stand-alone division).

Feedback on key elements of Part 4

Objects

The NV Act has specific objects relating to the conservation, protection and enhancement, and management, of native vegetation. This signals a clear and specific policy intent for the protection and restoration of native vegetation. Because the proposed objects of the Bill relate more broadly to protecting, restoring and enhancing biodiversity, there is a risk that this specific policy intent to protect and restore native vegetation is lost. In addition to the broad objects for protecting, restoring and enhancing biodiversity, we suggest the objects could include a specific object relating to the protection and restoration of native vegetation. This would better reflect the specific purpose of Part 4 of the Bill.

Recommendation 30: Include a specific object in the Bill relating to the conservation, protection and enhancement of native vegetation.

Distinction between clearance of native plants; and taking or dealing with native plants; and discrepancies in the Bill arising from this distinction

Clause 42 of the Bill sets out various regulated acts or activities as they relate to native plants (for completeness, we note that the term 'regulated acts or activities' is also used in the context of the protection of animals in Part 5).

Notably, there is a distinction in Part 4 between clearance of native plants, and taking or dealing with native plants. We understand the distinction is as follows:

- 'Clearance', in relation to a native plant, means causing or permitting the killing or destruction of, or substantial damage to, a native plant (per clause 3 of the Bill). Notably, authorisation to clear requires consent by the NPCAC (per clause 47(a) of the Bill) granted under Part 4 of the Bill.
- 'Dealing with' native plants, means selling, giving away or otherwise disposing of a native plant, importing a native plant, exporting a native plant and 'taking' with reference to a plant means any interference with a plant that does not result in substantial damage to, or death of, the plant and includes (but is not limited to) removing roots, limbs, stems,

[7] EDO, *Submission on proposed changes to SA Native Vegetation Act 1991*, June 2024, https://www.edo.org.au/publication/submission-on-proposed-changes-to-sa-native-vegetation-act-1991/

flowers, seeds or any other part of the plant (per clause 3 of the Bill). Notably, dealing with or taking native plants requires a permit from the Minister granted under Part 9 of the Act (per clause 47(b) of the Bill).

This distinction is a reflection of the current regulatory framework. Our understanding of the current regulatory framework is as follows:

- Dealing with and taking of native plants on public land is currently regulated under the NPW Act. 'Take' is defined in the NPW Act slightly differently to the proposed definition in the Bill,[8] and the term 'dealing with' is not used in the NPW Act, although actions within the proposed definition of 'dealing with' in the Bill (such as exporting and importing native plants and illegal possession of native plants) are regulated by the NPW Act. Under the NPW Act, the Minister may grant permits to take native plants or undertake other activities relating to native plants.
- Dealing with and taking of native plants on private land is regulated under the NV Act. The terms 'dealing with' and 'take' are not used, but the definition of clearance includes clearance the removal of native vegetation, the severing of branches, limbs, stems or trunks of native vegetation and any other substantial damage to native vegetation. Clearing (unless otherwise a permitted activity) requires approval from the NVC.

The Bill is trying to consolidate multiple existing frameworks into a single regulatory framework using new terms and concepts. As drafted, we find the interaction between Part 4, Part 5 and Part 9 confusing at times, and we suggest revision of the framework to clarify the regulation of native vegetation under the Bill. For example:

- it is particularly confusing that dealing with and taking of native plants is regulated under both Part 4 and Part 9 of the Bill;
- because the term 'regulated acts or activities' is used in both Part 4 and Part 5, the Bill could better clarify that references to regulated acts or activities in Part 4 refer specifically to those relating to native plants as described in **clause 42** (in Part 4), and similarly references to regulated acts or activities in Part 5 refer specifically to those relating to protected animals as described in **clause 62** (in Part 5);
- The offence in **clause 44** could be amended to make it clear that 'unless authorised to do so in accordance with Division 3' refers to an authorisation described in clause 47 (which includes a permit granted under Part 9).

Further, we note the following additional implications arising from the framing of Part 4:

- if our understanding of the Bill is correct, then certain clearing on private land that previously required approval by the NVC will now, to the extent that it falls within the definition of dealing with or take in the Bill,[9] instead require a permit by the Minister. The

[8] 'Take" is defined in the NPW Act as follows:

(b) with reference to a plant means—

(i) to remove the plant or part of the plant, from the place in which it is growing; or

(ii) to damage the plant;

[9] Notably, not all native plants fall within the definition. It is only the taking of a prescribed species of native plant on private land or dealing with a prescribed species of native plant that is captured.

extent of this change and practical implications have not been clearly outlined in the explanatory material.

- The extent to which both taking a native plant from private land or dealing with a native plant is regulated under Part 4 is limited, as per **clauses 42(1)(c) and (d),** regulation in either scenario is limited to plants that are 'prescribed species' only. At this stage, the scope of plants to be prescribed in unknown. We understand clause 42(1)(c) mirrors the NPW Act, and that few, if any plants, have been prescribed under those provisions to date.

Recommendation 31: Amend the Bill to provide more clarity on the distinction between the regulation of native vegetation and the regulation of protected animals; and also the distinction between clearance of native plants, and dealing with and taking native plants. For example:

(a) clarify that references to regulated acts or activities in Part 4 refer specifically to those relating to native plants as described in clause 42 (in Part 4), and similarly references to regulated acts or activities in Part 5 refer specifically to those relating to protected animals as described in clause 62 (in Part 5); and
(b) amend the offence in clause 44 to make it clear that 'unless authorised to do so in accordance with Division 3' refers to an authorisation described in clause 47 (which includes a permit granted under Part 9).

Exclusions

Clause 42(2) of the Bill provides:

> …the activities specified in Schedule 2 as amended from time to time by regulation are not regulated acts or activities if carried out or undertaken in accordance with any requirements, and subject to any restrictions, set out in that Schedule unless the act or activity is carried out or undertaken in respect of a native plant that comprises or constitutes critical habitat.

As outlined in the Explanatory Guide, 'exemptions' that sit in the NV Regulations will be moved across into Schedule 2. There are some proposed changes to the content of the provisions but also a key structural change that will see the activities consolidated and simplified into a single list of 'exclusions'.

While we understand the desire to simplify things, we don't necessarily agree with the categorisation of certain acts or activities outlined in Schedule 2 of the Bill (in particular those that require a native plant management plan approved by the NPCAC) as 'exclusions'.

There is a notable difference between acts or activities that are 'true exemptions' in that they can be carried out without any oversight or permit (e.g. clearance of native plants within 3 m of an existing prescribed building), and activities that, while not requiring 'consent' by the NPCAC, do in fact require some form of oversight and assessment, including referral to the NPCAC, and approval of a native plant management plan (e.g. mining and petroleum activities, and impact assessed development). Treating these all as Schedule 2 exclusions is not appropriate, particularly as a number of the activities do require the NPCAC to approve a plan of management in accordance with clause 60 in Part 4. Similarly, the Bill now clearly requires the application of the mitigation hierarchy to these activities (which we welcome) but to ensure these provisions are effective, appropriate oversight within the framework of the Bill itself is required to make sure the mitigation hierarchy is properly applied, particularly for those activities that are not 'true exemptions'.

In our view, there is no reason to be constrained by the way the NV Act and NV Regulation were structured, and it would be appropriate for certain acts or activities that require a native plant plan of management to be brought within the structure of the Bill and regulated under Part 4.

To that end, we suggest that:

- Schedule 2 of the Bill should be limited to true exclusions – essentially categories of acts and activities that equate to the NV Regulations Schedule 1, Part 1, Division 1—Permitted clearance where notification not required and Schedule 1, Part 1, Division 2—Permitted clearance where notification required; and
- Acts or activities that require a referral to the NPCAC under another Act and/or a native plant management plan should be moved out of Schedule 2 of the Bill and become regulated acts or activities under Part 4 of the Bill. This does not necessarily mean that they become activities for which NPCAC 'consent' is required. Instead, Part 4 could be expanded to include a new sub-division dealing specifically with those acts or activities that require referral to the NPCAC and a native plant management plan. Some ideas as to how this would work are outlined below.

  See our further comments below regarding a proposed new sub-division for native plant management plans.

Recommendation 32: To better reflect the scale of clearing activities, and to provide greater consistency and clarity around activities that require oversight by the NPCAC (e.g. native plant management plan or referral), amend the Bill to:

(a) restrict exclusions in Schedule 2 to true exemptions, namely categories of acts and activities that equate to the NV Regulations Schedule 1, Part 1, Division 1—Permitted clearance where notification not required and Schedule 1, Part 1, Division 2—Permitted clearance where notification required; and
(b) move acts or activities that require a referral to the NPCAC under another Act and/or a native plant management plan out of Schedule 2 and regulate those activities under the Bill (e.g. in a stand-alone sub-division in Part 4).

Regarding the remainder of the Schedule 2 exclusions, we provide the following comments:

- We suggest that all clearing undertaken in reliance on exclusions should be notified (e.g. to the NPCAC) or tracked in some way that is publicly accessible. This would improve transparency and assist with compliance and enforcement, as keeping a record of clearing undertaken relying on exceptions would reduce the scope of clearing that might otherwise be unexplained or require investigation. This will also help the public, who may become concerned about clearing, to understand whether the clearing was undertaken legally and under which notified exemption, if one applies. If this is implemented, this information should be published on the Biodiversity Register (noting this is already somewhat facilitated by clause 162(2)(b)).
- Acknowledging that the Explanatory Guide otherwise says 'exemptions' that sit in the NV Regulations will be moved across into Schedule 2, we have not, in the limited time available, reviewed the provisions in detail to ensure there have been no unintended

consequences in moving the provisions across and consolidating some of the provisions (e.g. consolidating exemptions relating to 'ongoing grazing practices', the 'maintenance of existing agriculture, forestry or farming' and the 'grazing of domestic stock' are removed and into a single exemption).

Recommendation 33: To improve transparency and accountability, require all clearing undertaken in reliance on exclusions to be notified (e.g. to the NPCAC) or tracked in some way that is publicly accessible.

Principles of preservation of native plants

In general, we **support** retaining the principles of native vegetation clearance, renamed as principles of preservation of native plants. We make the following suggestions for strengthening the principles and their application:

- The wording of **clause 49(1)(b**) could be strengthened by requiring the NPCAC to give effect to (rather than have regard to) the principles of preservation of native plants. This would mirror the wording in clause 8 of the Bill (which requires a person or body engaged in the administration of the Act to give effect to the principles in clause 8).
- We **support clause 50(4),** which provides that the NPCAC must not make a decision that is seriously at variance with the principles of preservation of native plants. We note the Bill identifies circumstances where the NPCAC may contravene this requirement. It appears these circumstances generally mirror the current NV Act, however we note a change in the wording from 'which outweighs the value of retaining the vegetation' to 'outweighs any adverse impacts that are reasonably likely to result from the proposed clearance'. It is unclear what effect this change may have in practice.
- The NPCAC should be required to give effect to the principles of preservation of plants when approving a native plant management plan (see our additional comments on native plant management plans below).

Recommendation 34: Strengthen the application of the principles of preservation of native plants by:

(a) amending clause 49(1)(b) to require the NPCAC to give effect to (rather than have regard to) the principles of preservation of native plants; and
(b) require the NPCAC to give effect to the principles of preservation of plants when approving a native plant management plan.

Clearing and taking of plants by First Nations persons

We generally **support clause 43** of the Bill which relates to clearing and taking of plants by First Nations persons. This builds on the existing provisions in the NPW Act and is consistent with laws in other jurisdictions (e.g. ss 2.8(1)(j) and (k) of the *Biodiversity Conservation Act 2016* (NSW); Part 10, Division 3 of the *Biodiversity Conservation Act 2016* (WA)).

Offences

We generally support the offence provisions in Part 4, Division 2, however consider that maximum penalties, particularly for corporations, should be increased, including for expiation fees. See our further comments and recommendations on enforcement below.

Authorisation for clearing native vegetation

Overarching comments on Part 4, Division 3

Part 4, Division 3 of the Bill outlines the process for dealing with applications for consent to clear native vegetation. Notably (as mentioned above) even though dealing with and taking native plants are described as regulated acts or activities under Part 4, the authorisation process for those acts or activities is in Part 9.

The Bill does not simply replicate the existing provisions of the NV Act. Instead, it generally streamlines the assessment process and makes a number of key changes to the assessment process and policy settings. Our submission responds to key changes and flags areas of ongoing concern.

Ensuring comprehensive application material for quality assessment

Clause 48 provides for the information an application for consent to clear native plants must be accompanied by. We suggest that clause 48(4) be extended to include information that supports the assessment of the criteria referred to in clause 49(1) as well as the matter in clause 50, for example to require evidence of consideration of the cumulative impact, directly and indirectly, that is reasonably likely to result from the proposed clearance, how the principles of preservation of native plants are met by the application, whether the plants contain, or are constituted of, a stratum of native plants that is substantially intact etc. We note the mitigation hierarchy is already helpfully referenced in clause 48(4)(b) to this end.

Recommendation 35: Amend clause 48(4) to require an application for consent to include information that supports the assessment of the criteria referred to in clause 49(1) as well as the matters in clause 50.

Matters NPCAC must have regard to when determining application

In general, we **support** clause 49 which clearly sets out matters the NPCAC must have regard to when determining an application, including the addition of the mitigation hierarchy and cumulative impacts as explicit matters for consideration, as follows:

a) be satisfied that the mitigation hierarchy has been applied in respect of the proposed clearance in accordance with guidelines adopted by the Council under section 61; and
b) have regard to the principles of preservation of native plants in so far as they are relevant to that decision; and
c) consider the potential cumulative impact, both direct and indirect, that is reasonably likely to result from the proposed clearance.

We also **support** the development of guidelines to help guide the application of the mitigation hierarchy. It could be useful to similarly have guidelines on considering cumulative impacts, including what kinds of impacts are considered to be relevant. This could be done via biodiversity policies made under clause 161. We note that there does not seem to be any mechanism within the framework for monitoring and responding to cumulative impacts from 'unregulated' activities. Again, this supports our suggestion (see Recommendation 32) that some of the 'unregulated activities' be brought within the framework of Part 4 (e.g. those that require a native plant

management plan). This would provide an opportunity to make cumulative impacts a consideration in the development and approval of those plans.

With respect to clause 49(2) we raise concern that the requirement to 'have regard to the applicant's desire to facilitate the management of other plants' is relatively vague and could perhaps be made more prescriptive as to what actions would help demonstrate this by the applicant.

Recommendation 36: Provide additional guidance (e.g. in a biodiversity policy) on matters to be considered by the NPCAC under clause 49, including in relation to:

(a) the application of the mitigation hierarchy;
(b) consideration of cumulative impacts; and
(c) actions that would demonstrate applicant's desire to facilitate the management of other plant.

Circumstances in which consent may be given

Our understanding is that clause 50 generally reflects current arrangements in the NV Act. We recommend more guidance is given as to specified circumstances for consent, including maximum areas that are allowable as specified circumstances under clause 50(12), for example the area of native plants that may be cleared for construction or expansion of a dam at (g). This will assist the decision-maker in applying the provisions to an application and ensure consistency in decisions.

Recommendation 37: Provide more specific parameters on when the scope of clearing constitutes 'specified circumstances' in clause 50(12) (e.g. maximum distance or area of native plants that can be cleared in each circumstance).

Consultation

The Bill maintains the provisions for consultation currently in the NV Act. It is unclear why the provisions allowing public feedback on an application are to be found in clause 53(5) and (6), separate to the other provisions for consultation found under the heading 'Consultation' in clause 51. This is a change to the current structure of the provisions and may lead to confusion by having consultation requirements under single provision. It would be useful and clearer for readers of the legislation to have all the consultation requirements in two sub-sections of a single provision.

We **support** that, under **clause 53(1),** clearance consents are only valid for 2 years, to ensure that the circumstances with respect to the assessment of the clearing have not substantially changed by the time clearing is undertaken. Where the NPCAC may provide for a longer period for this timeframe, we recommend guidance is specified as to when this may be allowable.

We **support** the requirement that reasons be required to be provided and the decision published under clause 53(4) to demonstrate how the decision-maker considered each relevant matter for a clearing application, to support accountability and transparency in the decision-making process.

Recommendation 38: In relation to consultation requirements for consents under Part 4, consolidate all the consultation requirements in two sub-sections of a single provision (rather than in both clause 51 and clause 53), to make it clearer for readers.

Recommendation 39: Tighten provisions related to lapsing of consent for clearance of native plants, including by providing stricter parameters and more specific guidance as to when the NPCAC may provide for longer periods for which a consent can remain in force.

Credit for environmental benefits

We recommend more guidance be provided to ensure certainty and remove subjectivity in the consideration of credits under **Division 4.** Many of the provisions in **clause 57** are vague and provide limited guidance to ensure consistency and certainty as to how they will be applied. For example, the references to the NPCAC being 'satisfied' a benefit is of 'significant value' with no criteria to assist them in making this determination. If this guidance is to be provided separately from the Act, we encourage that it be provided through a statutory instrument which could be referenced in clause 57.

We **support** the power of the NPCAC to vary conditions of the grant of a credit under **clause 57(6),** to allow for any changes in relevant circumstances to be accounted for. As above, more guidance could be provided to guide when this power should be used, e.g.to ensure environmental benefits are achieved only and not to weaken the operation of the provision.

Recommendation 40: Provide additional guidance or prescription to guide decision making under clause 57 to ensure consistency and certainty in how decisions are made as to the application of credits for environmental benefits in Division 4.

Suggested new sub-division – native plant management plans

As noted above (in the discussion on exclusions), we suggest that Part 4 could be expanded to include a new sub-division dealing specifically with those acts or activities that require a native plant management plan.

In addition to our concerns above about the mischaracterisation of certain acts or activities as exclusions, we also note that there is inconsistency in the Bill on the use of native plant management plans, and no clear procedure on how a native plant management plan is to be considered and approved where one is required under the Bill. For example:

- **Clause 60** of the Bill provides a native plant management must be prepared in the manner and form determined by the Council and may contain such provisions as the Council thinks fit including those listed in clause 60. However, it does not specify any process for the 'approval' of a native plant management plan (or clarify exactly which provisions of the Bill this applies to).
- **Clause 52** provides that in granting consent under Part 4, Division 3, the NPCAC can impose condition that any measures, actions or requirements undertaken to achieve the significant environmental benefit are undertaken in accordance with a native plant management plan in accordance with section 60. It is not explicit that the native plant management plant is to be provided as part of the application process (and therefore considered and accepted by the NPCAC as forming part of the application), but presumably a native vegetation management plan could be provided to satisfy clause 48(4)(c)(i). A similar situation arises under clause 59 in relation to the achievement of a significant environmental benefit by accredited third party provider.

- **Clause 93** and **94** each allow a native plant management plan to be agreed from time to time between the Minister and the owner of land when negotiating a biodiversity agreement or conservation agreement. It is not explicit that clause 60 applies to the native plant management plan referred to in these provisions (although presumably it does based on the definition of native plant management plan in clause 3, or what role the NPCAC may have in relation to a native plant management plan that is developed for the purpose of clause 93 or clause 94).
- **Schedule 2, Part 2, Division 2, clause 8** provides that in the case roadside or rail corridor plant management, clearing is an excluded (unregulated activity) if carried out in accordance with a native plant management plan that is approved by the NPCAC. There appears to be no clear process for such an approval set out in the Bill, other than matters for consideration by the NPCAC outlined in Schedule 2, Part 2, Division 2, clause 8 (2) and (3).
- Similarly, **Schedule 2, Part 2, Division 2, clause 9** requires impact assessed development to be carried out in accordance with a native plant management plan that is approved by the NPCAC, and Schedule 2, Part 2, Division 2, clause 13 and clause 14 require mining operations and mining explorations to be carried out in accordance with a native plant management plan that is approved by the NPCAC.

While this may reflect the provisions in the current framework, it is confusing and the uncertainty should be rectified in the new framework. This supports our reasoning for suggesting that a new sub-division could be added to Part 4 that more clearly sets out a process for assessing and approving native plant management plans.

Here we set out possible options for achieving this:

- Schedule 2 of the Bill be amended to remove any acts or activities that require a native plant management plan to be approved by the NPCAC (e.g. Schedule 2, clauses 8, 9, 13, 14, and 25). This would have the effect that these activities become 'regulated acts or activities' under the Bill.
- Subsequently, clause 47 of the Bill should be amended to recognise a new authorisation, namely the person has an approved native plant management plan (under the relevant new subdivision).
- Part 4, Division 3 of the Bill should then include two distinct sub-divisions, as follows:
    - Subdivision 3A – NPCAC consent. This sub-divisions retains proposed clauses 48 – 56 as they relate to the process for obtaining NPCAC consent for clearance.
    - Subdivision 3B – Native Plant Management Plan. This sub-division should include proposed clause 60, which relates to native plant management plans, and any additional clauses needed to support such a new division. This subdivision may need to specify which acts or activities are eligible for/require a native vegetation plan (e.g. by specifically identifying those activities that have been lifted from Schedule 2).
- This new sub-division could also better regulate the process for referrals to the NPCAC (e.g. by also incorporating proposed clauses 55 of the Bill). We suggest it could be done in this new subdivision as our understanding is that a native plant management plan is required for impact assessment development referred to the NPCAC under the PDI Act (per Schedule 2, clause 9 of the Bill).

- The new sub-division should include key matters for consideration that reflect those pertaining to the granting of consent by the NPCAC, including:
    - be satisfied that the mitigation hierarchy has been applied;
    - giving effect to the principles of preservation of native plants; and
    - consideration of cumulative impacts.
- Failing to comply with a native plant management plant would be a breach of the Act. This may already be the case under clause 45 to the extent a native plant management plan forms part of a condition of consent, but it may also be necessary to create an offence in its own right (as there are circumstances where a native plant management plan may not be tied to a consent).
- Native plant management plans should be required to be kept on the biodiversity register.

This proposal would need further, more detailed consideration and we are happy to discuss it further with the Department in due course.

Recommendation 41: Provide greater clarity on the role of and process for preparing and approving native plant management plans, including by:

(a) inserting a new sub-division in Part 4 that regulates all acts or activities that require a native plant management plan, and clearly sets out a process for assessing and approving such plans;

(b) including key matters for consideration that reflect those pertaining to the granting of consent by the NPCAC, including that the NPCAC, in approving a native plant management plan must:

- be satisfied that the mitigation hierarchy has been applied;
- give effect to the principles of preservation of native plants; and
- consider cumulative impacts.

(c) amending Schedule 2 of the Bill to remove any acts or activities that require a native plant management plan to be approved by the NPCAC (e.g. Schedule 2, clauses 8, 9, 13, 14, and 25). This would have the effect that these activities become 'regulated acts or activities' under the Bill;

(d) creating a new offence for failure to comply with a native plant management plant; and

(e) requiring native plant management plans to be kept on the biodiversity register.

Significant Environmental Benefits

The Explanatory Guide indicates that 'the Significant Environmental Benefit (**SEB**) scheme outlined in the NV Act remains largely unchanged' (and we understand that changes to the scheme proposed by the NV Amendment Bill are not being implemented at this time), however the Bill does make a number of notable changes, such as:

- inserting a definition of SEB (although we note the proposed definition is different to what was proposed in the Native Vegetation (Miscellaneous) Amendment Bill 2024); and
- requiring that a person enter into a biodiversity agreement or conservation agreement to secure a SEB.

The Explanatory Guide also indicates that the requirement in the Bill to develop a new biodiversity policy in relation to SEBs (clause 161(4)(c)) will provide an opportunity to review how the scheme should operate into the future.

It is disappointing that the draft Bill does not seek to overhaul and strengthen the SEB scheme at the outset. The repeal of the NV Act and introduction of a new Biodiversity Act provides a key opportunity to strengthen the SEB scheme in line with best practice and the objects of the new Biodiversity Act. While we acknowledge that a new biodiversity policy for the SEB scheme will be developed, this is a missed opportunity to embed key parameters for the scheme in legislation, and, particularly if biodiversity policies are not statutory instruments, circumvents important oversight and scrutiny of the Parliament.

We strongly recommend that further work is done ahead of the introduction of the Bill into the Parliament to set clear parameters in legislation that would bring the SEB scheme in line with best practice and the objects of the new Biodiversity Act and better embed the SEB scheme, including the key policy settings for the scheme, into the Bill itself, rather than a biodiversity policy. A biodiversity policy could be used for establishing the method underpinning the calculation of SEBs (e.g. similar to the current guide for calculating a significant environmental benefit).

As a starting point, we provide the following specific feedback on the Bill and the SEB scheme generally:

- The framing of the Scheme as a 'substantial environmental benefit' scheme is misleading and confusing. Amongst stakeholders and users, it is understood and often referred to as an offsets scheme. While the Scheme does aim to deliver overall environmental gain, it is at its core, an offsets scheme and should be clearly described as such.
- The requirement for a SEB to achieve net environmental gain (as currently required in the *Policy for a Significant Environmental Benefit*[10]*)* should be embedded in the legislation. Similarly, other Biodiversity Offsetting Principles, including those found in the *Policy for a Significant Environmental Benefit,* should be embedded in the legislation (we note that the amendments proposed by the Native Vegetation (Miscellaneous) Amendment Bill 2024 went some way to doing this). This would set clear policy parameters for the Scheme in legislation, guide the development of the anticipated SEB biodiversity policy, and protect against the risk of the principles or biodiversity policy being watered down in the future.
- Elements of the Scheme deviate from strict, best practice like for like offsetting. For example:
    - A SEB can be achieved through restoration and plantings. Planting seedlings in place of mature trees, or restoring degraded vegetation, does not create immediate compensation for high value land, because it takes decades, sometimes centuries, of growth before seedlings will achieve the same biodiversity values, for example providing suitable feed or nesting hollows for animals. While some

[10] Government of South Australia, *Policy for a Significant Environmental Benefit Under the Native Vegetation Act 1991 and Native Vegetation Regulations 2017*, July 2020 https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2019.pdf

element of restoration of offsets sites may be needed in order to achieve environmental gain, overreliance on restoration and planting as a means of delivering offsets is problematic and contrary to like for like.
- Similarly, the option to make a payment in the Fund to satisfy offsets obligations provides no guarantee that offset obligations will be met with genuine like for like offsets.

The Scheme's policy settings should be tightened to bring the Scheme more in line with best practice, including through direct legislative reform.

- 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 lag 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. While the Bill clarifies that the NPCAC must be satisfied that an on-ground SEB is not possible before accepting payment in lieu of an SEB, we suggest that the NPCAC should be able to refuse an application in circumstances where it is clear that a species or ecological community is so scarce that a suitable offset would not be available. As outlined above, payments made to acquit an offset obligation should be managed separate to other funds and should be expended only on genuine like for like offsets.
- We welcome new requirements that a person enter into an agreement to secure a SEB, however this should be limited to agreements that are in perpetuity (or in limited circumstances, fixed long-term periods), with restrictions on varying or terminating the agreements. This could be given effect by strengthening the provisions for biodiversity agreements and require exclusively biodiversity agreements to be entered into for the purpose of securing SEBs. A conservation agreement can be retained as an alternative, less strict option for landholders voluntarily wanting to enter into an agreement for conservation agreement for purposes other than securing a SEB.
- We acknowledge that the Bill proposes to insert definition of SEB into the Bill as follows:
    - ***significant environmental benefit*** means an environmental benefit that has been, or will be, achieved and which the NPCAC has determined to be of significant value in accordance with the SEB scheme, but does not include a payment into a fund in lieu of achieving an environmental benefit.

  In general, this definition describes what is meant by SEB under the proposed framework and addressed concerns that SEB is not actually defined under the current NV Act.

  However, the definition may need to be reviewed if the substantial legislative provisions are amended or following a more comprehensive review and overhaul of the Scheme.

- We generally **support** matters relating to environmental benefits under Part 4 Division 4 being included on the Biodiversity Register that is to be established under cl 162 of the Bill. We suggest the following also be required to be included on the Register:

- SEB annual progress reports (as currently required under the *Policy for a Significant Environmental Benefit* or as otherwise required); and
- Other information on how SEB requirements are being met, including progress on establishing, protecting and managing vegetation, and biodiversity outcomes delivered. See, for example, clause 58 of the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (NSW),[11] which requires the register established under that Act to track progress against meeting offset requirements.

- We note there is a possible mismatch between clause 58(5) of the Bill, which requires the NPCAC to have regard to the State Biodiversity Plan when giving approval to a person to assign the whole or part of the credit to another person or body, and clause 9 of the Bill which would require the NPCAC to also give effect the State Biodiversity Plan, where appropriate. This issue also arises with respect to clause 59(4).

Recommendation 42: Use the Biodiversity Bill to overhaul and strengthen the SEB scheme to ensure that it truly provides for effective offsets, and in particular:

(a) clearly frame the Scheme as an offsets scheme;
(b) set clear parameters in legislation that would bring the Scheme in line with best practice and the objects of the new Biodiversity Act;
(c) embed the requirement to achieve net environmental gain, and other Biodiversity Offsetting Principles, in the legislation;
(d) better embed the Scheme, including the key policy settings for the Scheme, into the Bill itself, rather than a biodiversity policy;
(e) remove the option to pay money in lieu of offsets (or otherwise introduce strict parameters around the payment of money in lieu of offsets, particularly where offsets are difficult or unlikely to be secured);
(f) only allow biodiversity agreements (and not conservation agreements) to be used to satisfy SEB (offset) obligations; and
(g) require the following information to be included on the Biodiversity Register:
    i. SEB annual progress reports; and
    ii. other information on how SEB (offset) requirements are being met, including progress on establishing, protecting and managing vegetation, and biodiversity outcomes delivered.

Part 5—Protected animals

Part 5 of Bill also adopts the concept of 'regulated activities' requiring a permit, as currently provided for under the NPW Act, and 'unregulated activities' which do not require a permit. Permits will now be required to keep any animal, except exempt animals, rather than the exemption that has to date been provided for keeping one animal. In effect, this would replicate the current situation under the NPW Act (whereby 'unprotected animals' (all of which are 'impact causing species') can be taken without a permit).

All native animals will now be protected under the Bill, as opposed to the current list in the NPW Act defining some 'unprotected' native animals. This is supported as it creates certainty for all

[11] https://www.parliament.nsw.gov.au/bill/files/18631/Passed%20by%20both%20Houses.pdf

stakeholders, making compliance and enforcement more straight-forward, and appropriately values the lives and wellbeing of all native animals.

Clause 62 provides for regulated activities, and stipulates that Schedule 4 can provide for acts or activities that are not regulated being undertaken to protected animals.

Amendments to unregulated impacts to protected animals

In **Schedule 4**:

- We oppose the inclusion of (b) allowing the taking of dingoes, where there is substantial science now supporting the benefit dingoes provide to environmental balance.[12] If lethal management of dingoes is to continue, then a permit (i.e. application, assessment, reporting) must be required.
- We raise concern that oversight and enforcement of unregulated activities could be lacking and clear regulation is necessary to improve the likelihood of compliance and enforcement of unregulated activities. For example, the following should be addressed:
    - the vague test of 'likely to cause' in (b) should be removed. Proof of actual damage must be required;
    - the test of whether a protected habitat is causing damage or 'may constitute a safety risk or hazard to people' where this is a subjective determination made by the actor; and
    - clause (c) should be removed as it is a dangerously broad exemption from the Bill's criteria designed to protect species and habitat.

- It's also unclear what circumstances are being foreshadowed by inclusion of (e), this should be removed also due to being unclear and open to misuse or misinterpretation.

Reducing Ministerial overreach to increase accountability and integrity

Clause 67 of the Bill empowers the Minister to Gazette protected animals or eggs as able to be taken, however there is no criteria to guide what the Minister must consider when making this decision, and when this decision may be made. Clause 67 should be amended to include:

- specific criteria guiding and limiting when the Minister can utilise the power to allow protected animals or eggs to be taken, to provide certainty and accountability around how this broad power may be used; and
- a requirement to undertake an impact assessment to determine whether the impact proposed to be allowed is needed, with consideration of non-lethal alternatives, and to provide evidence that the action will not affect the conservation status of the species;

[12] Smith, B., & Appleby, R. (2018). Promoting human-dingo co-existence in Australia: Moving towards more innovative methods of protecting livestock rather than killing dingoes (Canis dingo). *Wildlife Research*. 45 (1), 1-15. doi: 10.1071/WR1616; Greenville, A. C., Wardle, G. M., Tamayo, B. and Dickman, C. R. (2014). Bottom-up and top-down processes interact to modify intraguild interactions in resource-pulse environments. Oecologia 175, 1349–1358 15 See for example: Letnic, M., Koch, F., Gordon, C., Crowther, M.S. and Dickman, C.R. (2009). Keystone effects of an alien top-predator stem extinctions of native mammals. Proceedings of the Royal Society of London. Series B-Biological Sciences. Vol. 276, 3249-3256; Johnson, C. and Van Der Wal, J., (2009). Evidence that dingoes limit abundance of a mesopredator in eastern Australian forests, Journal of Applied Ecology, 46 , 641–646.

- a requirement to consult with the public prior to making this declaration, and to consider the submissions received;
- a requirement to seek advice from scientists and First Nations prior to making any declaration, and to consider this advice.

Providing adequate protection for protected animals and First Nations interests

The Bill requires the Minister to prepare a draft management plan with respect to harvesting for each relevant protected animal.

Our overarching feedback on Part 5 is as follows:

- We raise concern that there are no requirements in Part 5 to consider animal welfare/health and wellbeing specifically. Further, considerations such as in clause **66(2)(c)** reduce animals to 'resources'. We suggest this Part is revised to insert clearer requirements of consideration of:
    - whether any other management options are available for the species other than killing the animal; and
    - the scientific and First Nations understandings of the best management of the species.
- Given the focus of the Objects of the Bill on supporting First Nations knowledge, there should be specific consideration of how consultation on draft management plans will be developed with the relevant First Nations for the species. We suggest that proactive notification of First Nations should be required to allow for feedback, with a period of longer than 30 days provided for First Nations where we are aware that often First Nations decision making processes can require time. Further, Culturally Significant Biodiversity Entities must be considered in the development of these management plans.
- We do not support the continued allowance of commercial or non-commercial shooting of kangaroos, except in so far as it is by First Nations peoples for cultural or spiritual reasons. We support the calls for an inquiry into both commercial and non-commercial shooting of kangaroos, and any inclusion of kangaroos should only occur once the South Australian inquiry into the practice is finished, on the proviso that the inquiry recommends that the practices can continue. We are aware of consistent issues of lack of compliance and lack of enforcement with codes of practice in kangaroo culling around Australia, leading to welfare implications which can no longer be ignored and growing understanding that the science underpinning kangaroo culling programs is questionable.
- We strongly **support** the increased penalties provided for in the Bill. However, we recommend that increased penalties should be provided for taking an animal that is a threatened species, to strengthen deterrence and increase protection of these species already at risk.

Recommendation 43: Amend clauses 64 and 65 to provide higher penalties for the take of an animal that is a threatened species and amend clause 67 to include:

(a) specific criteria guiding and limiting when the Minister can utilise the power to allow protected animals or eggs to be taken, to provide certainty and accountability around how this broad power may be used; and
(b) a requirement that impact assessment is needed to provide evidence of the need for the take, whether non-lethal solutions may be available, and to ensure the conservation status of the species will not be impacted;
(c) a requirement to consult with the public prior to making this declaration, and to consider the submissions received;
(d) a requirement to seek advice from scientists and First Nations prior to making any declaration, and to consider this advice.

Recommendation 44: Include greater consideration of animal welfare and consideration of scientific and First Nations knowledge throughout decision-making in Part 5, including for permits and for the development of management plans. Further, we recommend introduction of a power to restrict or prohibit the use of harmful devices such as 1080 poison, strychnine, and leg-hold traps. The use of these devices can cause suffering to many different species of animals that are not the target of the legislation and should be prohibited.

Recommendation 45: Remove reference to kangaroos in the Bill as a relevant protected animal until an inquiry is undertaken into kangaroo culling practices, and pending the outcomes of that inquiry.

Part 6 - Threatened species, threatened ecological communities and listed ecological entities

Listing process (Part 6, Divisions 1 – 3)

EDO **supports** legislating a listing process for threatened species and threatened ecological communities as proposed in the Bill, and adoption of the Common Method Assessment by South Australia. We provide the following comments and recommendations on the provisions in the Bill:

- On the face of the Bill, there is no explanation for the distinction between the categories for nationally threatened species or ecological communities and SA threatened species or ecological communities (we note eligibility criteria, which may provide further context for the distinction, will be prescribed in regulation). We understand that this is intended to reflect the fact a species may be eligible to be listed as either at risk of extinction in Australia or at risk of extinction in South Australia. Our understanding is that all listed species, irrespective of category, would be added to a single list and be subject to the provisions in the Bill relating to threatened species. We note that while other jurisdictions also recognise this distinction, they adopt a single range of categories to cover both scenarios.[13]

[13] For example:
- Section 13 of the *Flora and Fauna Guarantee Act 1988* (Vic) provides:
  A taxon of flora or fauna is eligible to be listed in the Threatened List—
  a) if at the time of listing it is at risk of extinction in Australia, in one of the following categories of threat—

- We generally **support** the proposed power in **clause 70** of the Bill for ecological entities to be identified and listed, and commensurate protections for such entities in the Bill. We understand this power is intended to 'future-proof' the Bill by enacting the power now, but recognising that this concept will require further development, in consultation with experts and stakeholder.
- The process for establishing or revoking designated lists must be prescribed in the legislation and not be left to be determined by the Minister (**clause 72).**
- The listing decision should not be at the discretion of the Minister (**clause 72**), but instead be made by the Scientific Committee, based on objective, scientifically robust eligibility criteria. This is the model used in NSW (see Part 4 Division 3 of the *Biodiversity Conservation Act 2016* (NSW)).
- The Bill should also require:
    - Threatened species lists to be reviewed at regular intervals with criteria for what should be considered in this review. This is a requirement in other jurisdictions and ensures that lists remain timely in reflecting any species that have become threatened over time. For example:
        - In NSW, s4.18 of the BC Act provides that the Scientific Committee must keep the lists of species and ecological communities under review and must, at least every 5 years,[14] determine whether any changes to the lists are necessary. The purpose of this provision is, presumably, to ensure that

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i. extinct;
ii. extinct in the wild;
iii. critically endangered;
iv. endangered;
v. vulnerable;
vi. in the case of a taxon of fish, conservation dependent; or

b) if at the time of listing it is at risk of extinction in Victoria, in a category of threat referred to in paragraph (a)(i) to (v).

The threatened species list subsequently identifies whether the species' extinction risk is in Australia or Victoria:
https://www.environment.vic.gov.au/__data/assets/pdf_file/0025/707416/FFG_Threatened_List_June_2024.pdf

- Section 4.4 of the *Biodiversity Conservation Act 2016* (NSW) provides:
    1) A species is eligible to be listed as a ***critically endangered species*** if, in the opinion of the Scientific Committee, it is facing an extremely high risk of extinction in Australia in the immediate future, as determined in accordance with criteria prescribed by the regulations.
    2) A species is eligible to be listed as an ***endangered species*** if, in the opinion of the Scientific Committee—
        a) it is facing a very high risk of extinction in Australia in the near future, as determined in accordance with criteria prescribed by the regulations, and
        b) it is not eligible to be listed as a critically endangered species.
    3) A species is eligible to be listed as a ***vulnerable species*** if, in the opinion of the Scientific Committee—
        a) it is facing a high risk of extinction in Australia in the medium-term future, as determined in accordance with criteria prescribed by the regulations, and
        b) it is not eligible to be listed as an endangered or critically endangered species.
    4) If a species is not eligible to be listed in any category in accordance with this section on the basis of the risk of extinction in Australia, then it is eligible to be listed in accordance with this section on the basis of the risk of extinction in New South Wales.

    Species are simply listed as threatened in the Schedules of the Act without distinguishing whether the extinction risk is within Australia or NSW.

[14] This differs from earlier provisions in the repealed *Threatened Species Conservation Act 1995* (NSW), which required a review of the schedules of threatened species every two years (section 25A).

lists are kept up-to-date and reflect the current understanding of the conservation status of species.
        - In Victoria, s16K of the FFG Act requires the Minister to ensure that the Threatened Species List is reviewed for the purposes of identifying any necessary changes at intervals of no more than 5 years.
    - Threatened species lists to be reviewed following a major event to determine whether any changes are required (see further comments on updating threatened species protections following a major event below).
- We generally **support** the provisions in the Bill for 'provisional listing' of species and ecological communities and the inclusion of expedited processes (clauses 75 and 76).
- While **clause 166(3)(c)** does allow for the regulation to make saving and transitional provisions, the Bill itself should include provisions that provide that on commencement of the Act the lists in relevant schedules of the NPW Act are taken to be the threatened species list for the purpose of the Bill (noting that the Bill provides for future amendments to the list).

Recommendation 46: Amend Part 6 of the Bill to:

(a) remove the distinction between Commonwealth and South Australian species listing, where this is considered unnecessary;
(b) provide for the process for establishing or revoking designated lists to be in the legislation and not to be determined by the Minister;
(c) require that the listing decision is made by the Scientific Committee and based on objective, scientifically robust eligibility criteria;
(d) inserting a prescribed period into the Act with respect to undertaking a listing assessment and making a preliminary and final listing decision, to ensure the listings occur in a timely way;
(e) require review of the lists at least every 5 years, to ensure it remains up to date, with clear criteria for undertaking the review;
(f) require threatened species lists to be reviewed following a major event; and
(g) include transitional provisions in the Bill that provide that on commencement of the Act the lists in relevant schedules of the NPW Act are taken to be the threatened species list for the purpose of the Bill.

Action Plans

We **support** the inclusion of provisions in the Bill providing for action plans. Action plans are one of the key mechanisms in the Bill for delivering protections for threatened species, threatened ecological community, listed ecological entity or critical habitat. For this reason, the framework for making and implementing action plans must be robust and effective in delivering real outcomes. There are key lessons to be learnt from other jurisdictions where weak implementation of action plans has led to failure in reversing declines and achieving recovery. For this reason, we make the following recommendations.

Recommendation 47: Ensure Action Plans are an effective tool for delivering improved outcomes for biodiversity, by strengthening the Bill as follows:

(a) The Bill must require action plans to be made for listed threatened species and threatened ecological communities. As it stands, the Bill provides that the Minister *may* make an action plan. There must be a clear process, that includes provision for community engagement and statutory timeframes for finalising plans (e.g. within 12 months from listing date). The Bill could allow for the Minister, on advice from the scientific committee, to determine that an action plan is not required in exceptional circumstances only, based on clear matters for consideration set out in the legislation.
(b) In the case of critical habitat, the Bill could specifically require action plans to be made for critical habitat, or similar to the *Environment Protection and Biodiversity Conservation Act* (Cth) (**EPBC Act**), could require actions plans for threatened species to identify critical habitat. In the latter case, identification of critical habitat in an action plan could become part of the process for identifying and declaring critical habitat (which as we outline below, should also be mandatory for listed threatened species).
(c) The requirement to make an action plan should be an enforceable duty under the Act, which can be enforced by members of the community.
(d) The Act should retain the ability for action plans to be made for listed ecological entities, and as this concept is developed, further consideration should be given to making this requirement mandatory as well.
(e) The Bill could be strengthened by setting a timeframe for reporting on implementation rather than leave this to the regulation (e.g. every 3-5 years). However, we **support** clause 77(6) which provides that the Minister must— (a) take reasonable steps to implement an action plan; and (b) report on the implementation and effectiveness of the plan in accordance with the requirements prescribed by the regulations for the purposes of this paragraph. Our understanding is that this duty would be enforceable under clause 114 of the Act.
(f) The Minister should also have a duty to review and update action plans, at least once every 10 years or after 'major events' (see further comments on updating threatened species protections following a major event below).
(g) In order to ensure conservation action and action plans are not undermined by decisions made by land use planning decisions and action approvals, decisions made under the PDI Act or Part 4 or Part 9 of the Bill should be required to be consistent with action plans.

Key threatening processes and Threat Abatement Plans

In general, we **support** the inclusion of provisions providing for the identification of key threatening processes and making of Threat Abatement Plans, and make the following recommendations for strengthening the provisions in the Bill.

Recommendation 48: Ensure the identification of key threatening process and implementation of Threat Abatement Plans are effective tools for delivering improved outcomes for biodiversity, by strengthening the Bill as follows:

(a) The Bill must provide a clearer role for the Scientific Committee in identifying key threatening processes, and for the Minister to act on the advice of the committee in declaring such threats.

(b) Where a key threatening process has been declared, the Bill must require that a Threat Abatement Plan be prepared, and set requirements for reporting on implementation and effectiveness of Threat Abatement Plans, and requirements to review Threat Abatement Plans at regular intervals and following major events (see below).
(c) The broader regulatory framework could be strengthened to ensure key threatening process are more comprehensively taken into consideration in decision making. For example:
    i. require environmental assessments to state whether approving the development will contribute to or exacerbate key threatening processes, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider; and
    ii. require decision makers to consider and not make decisions that would increase the impact of key threatening processes when making strategic plans or granting approval under the PDI Act or Part 4 or Part 9 of the Bill.

Updating threatened species protections following a major event

New provisions should be introduced into the Bill that trigger a review of relevant rules, including listings, relating to threatened species protection following a major event. This is something that Professor Graeme Samuel envisaged in national environment laws; that is, in recommending new National Environmental Standards under the EPBC Act, Professor Samuel recommended that *"(s)tandards should be subject to both regular reviews and reviews in response to changing, unforeseen or emergency situations, such as the 2019-20 Black Summer bushfires*".[15]

Such triggers are starting to be introduced into environmental laws and policies. For example:

- Clause 32A of the Victorian East Gippsland Regional Forest Agreement[16] allows for a review of the agreement after a major event.
- Clause 4.3(5) of the Private Native Forestry Code of Practice for Northern NSW provides that the Minister administering the *Local Land Services Act 2013* (NSW) can request harvest operations are reviewed where an unforeseen event (such as wildfire, mass dieback or a forest biosecurity event) has caused, or has the potential risk of causing serious or irreversible environmental damage on private land at a bioregional scale.

EDO has provided more detailed analysis and recommendations for strengthening legal framework so that they are able to respond quickly to support species conservation and recovery after a major event, in our report *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity.*[17]

Recommendation 49: Introduce new provisions into the Bill that trigger a review of relevant rules relating to threatened species protection following a major event.

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[15] Samuel, G. *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, October 2020, https://www.dcceew.gov.au/environment/epbc/our-role/reviews/epbc-review-2020
[16] https://www.agriculture.gov.au/agriculture-land/forestry/policies/rfa/regions/victoria/eastgippsland
[17] EDO, *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity,* November 2022, https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf

Extinction Inquiry

We generally **support** provision in the Bill requiring the Scientific Committee to undertake an inquiry into the potential extinction of the native species or ecological community. As the Explanatory Guide explains, 'this will facilitate learning from species extinctions, helping to improve efforts to conserve nature'.

We suggest that the Bill should also require the Scientific Committee to conduct an inquiry in circumstances where a native species, ecological community or ecological entity has moved to a category within a designated list with a higher extinction risk (e.g. a species is uplisted from endangered to critically endangered), ahead of a species becoming extinct. Based on the same logic, this will facilitate learning, help to improve recovery efforts with a view to preventing the species from ultimately becoming extinct.

Recommendation 50: Amend the Bill to require the Scientific Committee to conduct an inquiry in circumstances where a native species, ecological community or ecological entity has moved to a category within a designated list with a higher extinction risk (e.g. a species is uplisted from endangered to critically endangered), to prevent a species becoming extinct.

Critical Habitat

EDO generally **supports** the inclusion of provisions aimed at protecting critical habitat in the Bill. Loss of habitat and habitat fragmentation and degradation are among the primary drivers of biodiversity decline. Protecting, restoring and managing habitat is essential for abating the biodiversity crisis. Critical habitat, by definition, refers to an area that is critical for the survival and recovery of a species or ecological community. If these areas are degraded or lost, then species or ecological communities are likely to go extinct or be rendered unable to recover.

Most Australian jurisdictions have introduced critical habitat provisions into law. While this suggests an intention to protect the habitat of species at risk of extinction, the effective implementation and use of the provisions has been problematic. As acknowledged in the FAQ document,[18] critical habitat provisions are rarely used, and often protections are limited.

In our 2024 report *Bushfires, Bureaucracy and Barriers - How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities*,[19] we examined critical habitat provisions in a number of Australian jurisdictions, analysed why they were being underutilised and made recommendations for reform. In particular, we found that:

- identification of critical habitat is not mandatory, and mechanisms for identifying and/or declaring critical habitat are rarely used;
- critical habitat is not clearly defined;
- procedural requirements and processes create barriers;
- protections for critical habitat are limited;
- there is no consistent application of critical habitat provisions across Australian jurisdictions; and

[18] FAQ document, p 4 https://yoursay.sa.gov.au/96921/widgets/455031/documents/301878
[19] EDO and WWF Australia, *Bushfires, Bureaucracy and Barriers - How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities,* March 2024, https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf

- failure to incentivise or resource protection of critical habitat on private land has contributed to underuse of the mechanisms

We recommended that to overcome these challenges, it was important to:

- clearly define critical habitat;
- make critical habitat identification mandatory;
- protect and manage critical habitat; and
- support landholders.

With this lens, we provide the following feedback on the critical habitat provisions in the Bill:

- ***Declaration of critical habitat***

  The declaration of critical habitat is discretionary (clause 82(1)), but the Bill does require the Minister to consider whether to make a declaration within 6 months following a listing decision (a decision to list a species, ecological community or ecological entity as threatened) or on the recommendation of the Scientific Committee. One of the key barriers we found to the effective implementation of critical habitat provisions was the discretion in identifying or declaring critical habitat. Consistent with EDO's previous recommendations, we recommend that the identification and declaration of critical habitat should be mandatory. There is also potential to link the identification of critical habitat to the development of Action Plans (e.g. Action Plans could be required to identify critical habitat). Additionally, to remove discretion, the identification of critical habitat should be based on the objective advice or decision of the Scientific Committee rather than at the discretion of the Minister. Although not recommended, if mandatory identification and declaration of critical habitat is introduced, the Minister could retain a limited power to allow exceptions. As drafted, there is a real risk that the critical habitat provisions in the Bill will suffer the same fate as other jurisdictions and be an underutilised and ineffective tool.

Recommendation 51: Make the identification and declaration of critical habitat mandatory. Further, consider linking the identification of critical habitat to the development of Action Plans (e.g. Action Plans be required to identify critical habitat). Additionally, to remove discretion, the identification of critical habitat should be based on the objective advice or decision of the Scientific Committee rather than at the discretion of the Minister.

- ***Definition and criteria***

  There is no clear, standalone definition of critical habitat in the Bill. Instead, critical habitat is 'defined' (in clause 3) with reference to its declaration as critical habitat under clause 82(1). To be eligible to be declared critical habitat, an area must meet the criteria are set out in clause 82(3) (these are also described as *critical habitat features* in the Bill – see further comments below). We suggest the definition should be better linked to the eligibility criteria rather than the act of declaring something as critical habitat. We also note that compared to other jurisdictions, the criteria in clause 82(3) are quite broad, but the provision anticipates that a biodiversity policy may be used to provide further guidance.

Recommendation 52: Amend the definition of critical habitat to link it to the eligibility criteria rather than the act of declaring something as critical habitat. Ensure that more prescriptive criteria are provided to assist with declaring critical habitat.

- ***Critical habitat features***

The Bill introduces the concept of *critical habitat features.* The term is explained (in clause 82(4)(a)) as: the features that make it (habitat) eligible to be critical habitat in accordance with subsection (3). Subsection 82(3) provides:

> A habitat is eligible to be critical habitat if, in the opinion of the Minister after consideration of any relevant biodiversity policy, the area in which the habitat is located significantly 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, the threatened species, threatened ecological community or listed ecological entity (as the case may be).

This concept is not used in other jurisdictions with critical habitat provisions, and on the face of the Bill it is unclear why this concept has been introduced. Following discussions with the Department, we understand that the concept is designed to further narrow in on the specific elements of a landscape that is critical to the ongoing survival of a species (e.g. hollow bearing trees, rocky outcrops etc.). As envisaged, a biodiversity policy may provide further guidance on eligibility and specifically what might constitute *critical habitat features.* The critical habitat provisions are subsequently designed around this concept of critical habitat features.

At this stage, we are unsure if the distinction between critical habitat and critical habitat features is needed. In a framework with clear, robust criteria for identifying critical habitat, it could be expected that what is identified as critical habitat is essentially 'critical habitat features' rather than a larger patch of area (i.e. only hollow bearing trees and not a larger geographic area containing hollow bearing trees would be declared as critical habitat).

That said, we are not opposed to the framework adopting this concept and terminology if it leads to identification and protection of habitat that is critical to the survival of species. What is important, is that the Bill provides an effective framework that allows for critical habitat/critical habitat features to be identified and adequately protected, and that the provisions are properly implemented and actually used as a tool to deliver improved outcomes for biodiversity.

- ***Authorisation to destroy, damage or disturb critical habitat features***

We premise our comments in this section with our overarching position that critical habitat should not be destroyed, damaged or disturbed. As noted above, critical habitat, by definition, refers to an area that is critical for the survival and recovery of a species or ecological community. If these areas are degraded or lost, then species or ecological communities are likely to go extinct or be rendered unable to recover. It therefore seems non-sensical to create a framework that identifies critical habitat and then allows it to be destroyed.

Laws must provide real protection for areas of critical habitat. There are a number of ways this could be achieved. For example: critical habitat could be identified as 'no-go areas' that are off-

limits to development, or the framework could require mandatory refusal of projects that significantly/unacceptably impact critical habitat. The Bill does not provide any such mechanism.

Notwithstanding this position, in the event that no mechanism for absolute protection of critical habitat is supported, we provide the following comments on the Bill.

- We note that authorisations given under the PDI Act or *Mining Act 1971* (**Mining Act**) are not recognised as relevant authorisations that would allow critical habitat to be destroyed. This suggests that the policy intent is not to allow those Acts to authorise, on their own, the destruction of critical habitat. This likely explains the new authorisation process set out in clauses 87 – 89. It appears authorisation under these provisions would be required in addition to any approval under the PDI Act or Mining Act. If that is the case, then the new authorisation process acts as an important safeguard.
- We note that the new authorisation process does not apply where consent has been provided under Part 4 or a permit granted under Part 9 of the Bill (i.e. the authorisations described in cl 85) in relation to the clearance of native plants). It appears however that specific considerations for critical habitat have been included in Part 4 (e.g. clauses 50(8) and (10)) and Part 9 (e.g. clause 148). These appear to equate to provisions in clause 87.
- We also question whether the NPCAC is the best entity to be determining applications under this Division, given its skills and functions relate specifically to clearance of native plants. Critical habitat considerations are likely broader than just the clearance of plants (e.g. examples of critical habitat features include rocky outcrops or caves). The Minister, on advice of the Scientific Committee or Biodiversity Council, may be the more suitable authority for determining applications made under this Division. It would then follow that consideration also be given to requiring approval for clearance of critical habitat features that comprise or constitute native plants under Part 6, Division 5, so it is assessed and determined by the same authority (in addition to consent by the NPCAC under Part 4).

If the new authorisation process in this Division is indeed intended to act as a safeguard by providing additional oversight for acts or activities that may destroy, damage or disturb critical habitat, then absent our preference of making critical habitat off limits to impacts all together, the inclusion of this safeguard in the Bill is generally supported.

Recommendation 53: Amend the Bill to provide real protection for areas of critical habitat (e.g. critical habitat could be identified as 'no-go areas' that are off-limits to development, or the framework could require mandatory refusal of projects that significantly/unacceptably impact critical habitat).

- ***Consultation***

Clause 82 provides that before making a critical habitat determination, the Minister must undertake public consultation, and any other engagement the Minister considers appropriate.

Recommendation 54: Amend the Bill to be more prescriptive at clause 82 as to how consultation must be carried out.

- ***Transparency***

We **support** the requirements in clause 89 that NPCAC must provide the applicant with a written statement of the reasons for its decision and must publish its decision and reasons under this Division on the Biodiversity Register.

- ***Support for landholders***

We **support** clause 83, which provides that the Minister or Council may take steps to engage with the owner or occupier of land on which critical habitat is located to enter into an agreement (such as a biodiversity agreement or biodiversity under Part 7 Division 2) to protect the habitat or arrange for the preparation of an action plan under section 77. Dedicated funding could be made available to support landholders to enter into agreements and maintain areas of critical habitat.[20]

EDO would welcome the opportunity to further discuss how the critical habitat provisions in the draft Bill could be strengthened.

Part 7 – Conserved areas

We generally **support** the inclusion of provisions in the Bill relating to conserved areas, but provide the following comments and recommendations:

- It appears the scope of sanctuaries is possibly narrowed in the Bill as sanctuaries can be declared for the conservation of protected animals[21] rather than just animals (which is the current position on the NPW Act). It is unclear what this change might have in practice.

- We support the introduction of new provisions providing for conservation agreements to be entered into between the Biodiversity Council and an owner of land. This provides an alternative option for landholders to undertake conservation action without the stricter requirements of a biodiversity agreement. As noted in the explanatory guide, conservation agreements can be more flexible and can be time limited (in contrast to biodiversity agreements). For this reason, we do not support conservation agreements being used to satisfy SEB requirements. This should be limited to biodiversity agreements only.
- To that end, because biodiversity agreements will be used to meet SEB obligations, the provisions must be tightened to provide guaranteed protection for the biodiversity values intended to be protected to offset loss from approved actions and approvals. This should include:

[20] For example, in NSW, landholders of land on which an area of outstanding biodiversity value has been identified are prioritised for funding under the NSW *Biodiversity Conservation Investment Strategy.*

[21] Under cl 3 of the Bill, protected animal means— (a) a native animal, excluding a fish, amphibian and invertebrate; or (b) a fish that is a threatened species and is of a class that is prescribed for the purposes of this definition; or (c) an amphibian or invertebrate that is a threatened species; or (d) any animal of a species declared by regulation to be a species of protected animal.

- explicit provisions in the Bill providing for biodiversity agreements to have effect in perpetuity, unless otherwise specified (and limiting circumstances in which they may otherwise than in perpetuity); and
- restricting circumstances in which biodiversity agreements can be varied or terminated (e.g. a biodiversity agreement cannot be varied or terminated unless measures are taken to offset any negative impact of the termination on the biodiversity values protected by the agreement).[22]

- We **support** the inclusion of a new head of power (clause 91) that provides that the regulations may establish for establishing conservation areas on private land, allowing new forms of conservation agreements to be established in the future. This should include consideration of a new type of agreement that excludes all incompatible activities (including mining) – see, for example, Special Wildlife Reserves in Queensland.[23]
- We note clause 166(3)(c) allows for the regulation to saving and transitional provisions, but it would be useful for the Bill to explicitly provide that heritage agreements made under the NV Act will continue in force under the new Act as if they are biodiversity agreements.
- We understand Part 7, Division 3 of the Bill generally replicates existing provisions in Part 4, Division 2 of the NV Act.

Recommendation 55: Remove provisions that allow a conservation agreement to be used to satisfy SEB requirements. Only biodiversity agreements should be allowed to satisfy SEB requirements.

Recommendation 56: To the extent that biodiversity agreements will be used to meet SEB obligations, the provisions must be tightened to provide guaranteed protection for the biodiversity values intended to be protected to offset loss from approved actions and approvals. This should include:

(a) explicit provisions in the Bill providing for biodiversity agreements to have effect in perpetuity, unless otherwise specified (and limiting circumstances in which they may otherwise than in perpetuity); and
(b) restricting circumstances in which biodiversity agreements can be varied or terminated (e.g. a biodiversity agreement cannot be varied or terminated unless measures are taken to offset any negative impact of the termination on the biodiversity values protected by the agreement).

Recommendation 57: Amend clause 166(3)(c) to explicitly provide that heritage agreements made under the NV Act will continue in force under the new Act as if they are biodiversity agreements.

Part 8 – Enforcement

Civil enforcement

EDO **strongly supports** the proposed addition of broader standing for persons to apply to the ERD Court for civil enforcement of contraventions of the Act. Third-party civil enforcement is an important mechanism to improve the operation of the regulatory framework and to bolster

[22] For examples of similar provisions, see Part 5, Division 2 of the *Biodiversity Conservation Act* (NSW).
[23] https://www.qld.gov.au/environment/parks/protected-areas/private/special-wildlife-reserves

community trust in that framework. It is a crucial accountability mechanism for all modern regulatory frameworks seeking to protect the public interest and is an essential inclusion in a modern and future focused biodiversity protection regime.

Notably:

- Clause 114(1) provides that civil enforcement to remedy or restrain a breach of the Act is available to the Minister and, with respect to particular matters, other persons or organisations.
- Clause 114(1)(f) provides that First Nations persons with cultural or spiritual connection to the land that has or will be affected by the breach may, with the permission of the Court, apply to the Court to remedy or restrain a breach of the Act.
- Clause 114(1)(g) provides that any person, with the permission of the Court, may apply to the Court to remedy or restrain a breach of the Act, except a breach of the general duty (see above).
- Clause 114(2) sets out matters the Court must be satisfied of in order to grant permission.

In our view, the requirement at subsections (f) and (g) for First Nations persons and members of the general public respectively to obtain the leave of the court to make an application for civil enforcement imposes an unnecessary procedural hurdle that will burden the Court and is unlikely to perform a material gatekeeping function. There are already substantial barriers for members of the community to commence court proceedings that answer each of the factors set out at s 114(2). In particular, the Court already has the power to dispose of proceedings it deems frivolous, vexatious, or otherwise.

There is a significant amount of evidence in Australia that broad third-party standing to enforce environmental laws does not "open the floodgates" to litigants.[24] For example, the NSW environment, planning, and biodiversity protection laws have contained open standing for civil enforcement for many decades.[25]

To that end, in our view it would be preferable, procedurally simpler, and make little material difference to the number of applications, if the Bill were amended to provide open standing to any person to apply to the ERD Court to remedy or restrain a breach of the Act or regulations, without the need to seek permission from the Court.

Recommendation 58: Civil enforcement of the Bill be simplified to provide open standing to any person to apply to the ERD Court to remedy or restrain a breach of the Act or regulations.

Recommendation 59: Consistent with Recommendation 21, the general duty in clause 11 should be constructed as an offence, and there should be no limitation preventing third party civil enforcement of breaches of that offence. A transitional arrangement could be added to phase in the introduction of the general duty offence if that is seen as helpful.

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[24] See, for example, A Reynolds, A Ray and S O'Connor, *Green Lawfare: Does the Evidence Match the Allegations? – An Empirical Evaluation of Public Interest Litigation under the EPBC Act from 2009 to 2019*, Environmental and Planning Law Journal (2020) 37 EPLJ 497; R Pepper and R Chick, *Ms Onus and Mr Neal: Agitators in an Age of Green Lawfare*, Environmental and Planning Law Journal(2018) 35 EPLJ 177

[25] For example, since its inception in 1997, the *Protection of the Environment Operations Act 1997* (NSW) has contained, at ss 252 and 253, the ability for any person to apply to the Court for an order to remedy or restrain a breach of that Act or a breach any other Act if that breach is likely to harm the environment.

Civil penalties

EDO **strongly supports** civil penalties being available to regulators as an alternative to prosecution. However, the civil penalty framework set out at clause 122 of the Bill in our view is very weak and as drafted is unlikely to operate as a strong deterrent to non-compliance.

We acknowledge that the civil penalty framework set out at clause 122 of the Bill appears to be modelled on a similar framework in the *Environment Protection Act 1993* (SA), introduced in 2005. However, we query the likely efficacy of this framework due to two unusual elements (relative to civil penalty provisions in, for example, Commonwealth laws) which we consider are likely to undermine the utility of the inclusion of a civil penalty framework:

- that the penalty can be negotiated between the regulator and the alleged offender, and such a negotiated amount is capped at $150,000; and
- that the person can elect to be prosecuted for a criminal offence instead of the matter being heard by the court as a civil penalty proceeding (see clause 122(3)).

Together, these elements render civil penalty proceedings essentially voluntary: the alleged offender has two ways it can opt out of civil penalty proceedings, both of which are arguably more attractive than being subject to civil penalty proceedings.[26]

In our view, both options should be removed from the Bill. We provide more commentary on each option below.

Negotiated penalty amounts

In our view, providing for a pecuniary penalty that can be negotiated by the alleged wrongdoer blurs the line between truly administrative pecuniary penalties, such as expiation fees or penalty infringement notices (imposed automatically for a non-negotiable amount), and the judicial role of determining an appropriate penalty amount.[27]

The ability of an alleged offender to negotiate the penalty amount they will pay for breaching the Act is likely to undermine public confidence in the independence and efficacy of the regulator and of the regulatory framework. Negotiated penalties can give rise to community perception that the regulator and the regulated community are inappropriately intertwined (also known as regulatory capture).

We note that a key overarching finding of the Royal Commission into the Banking Sector[25] was criticism of the use of negotiated and administrative sanctions rather than court-imposed penalties.[26]

[26] See discussion of the scheme established by the *Environment Protection Act 1993* (SA) in B. Grigg, *Environmental civil penalties in Australia: Towards deterrence?,* Environmental Planning Law Journal (2011) 28 EPLJ 36.
[27] See Commonwealth Attorney General's Department, 2024, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, available at < https://www.ag.gov.au/sites/default/files/2024-05/Guide-Framing-Commonwealth-Offences.pdf >; Australian Law Reform Commission, 2002, *Report 95: Principled Regulation: Federal Civil and Administrative Penalties in Australia* examines alternatives to criminal offences, Report 95, available at < https://www.alrc.gov.au/publication/principled-regulation-federal-civil-and-administrative-penalties-in-australia-alrc-report-95/ >.

Further, the Bill provides at **clause 122(5)** that the maximum amount that may be recovered by negotiation as civil penalty in respect of a contravention is the lesser of: the amount specified by the Act as the criminal penalty; or $150,000.

This means the maximum negotiated civil penalty is in effect $150,000 for any breach of the Act, no matter how egregious, or whether the breach is by an individual or corporation. This is inadequate to provide general or specific deterrence and is likely to be absorbed as the cost of doing business.

Opting into criminal prosecution

Criminal offences have a much higher evidentiary threshold for each element of an offence to be proved in Court, therefore they are much more difficult for regulators to enforce. This is particularly the case in an environmental context where harm is an element, and cause and effect are rarely able to be proved to the criminal standard of beyond reasonable doubt. This means that prosecution, particularly for corporate offenders (who do not face the prospect of a prison sentence for an offence), is a much more attractive prospect than civil penalty proceedings.

Opting into prosecution by way of refusing to pay a fine or expiation fee is a common feature of many regulatory schemes (the most common example being parking infringements). However, a key feature of such schemes is that the fines are truly administrative- that is, the pecuniary penalty to be paid is automatically applied if a particular factual circumstance arises and is a standard amount. The scheme proposed by the Bill does not do this: it provides for the penalty amount to be negotiated, *and* for prosecution to be elected over the matter being pursued in Court as a civil matter.

Recommendation 60: Amend clause 122 to remove the option to negotiate an out-of-court civil penalty amount and to remove the option to elect to be prosecuted. Consider civil penalty regimes modelled on, for example, the EPBC Act or the *Environment Protection Act 2017* (Vic).

Criminal enforcement of offences

Penalty amounts

We note that maximum penalties for corporate offenders are only double the maximum penalty amount for individuals. While we recognise that this is broadly consistent with the penalty regime in the *Environment Protection Act 1993* (SA), the latter also includes potential imprisonment for individuals. It is also, in our view, a low differential between corporate and individual offenders and inconsistent with penalty regimes in other Australian jurisdictions.

For example, a number of Australian jurisdictions, including the Commonwealth and Victoria use a "corporate multiplier" of 5 times the maximum penalty for an individual. The NSW *Biodiversity Conservation Act 2016* (NSW) also prescribes maximum penalties for body corporates of five times the maximum penalty for individuals.[28] We recommend revisiting the maximum penalties contained in the Bill in light of the likely considerably greater resources available to a body corporate and therefore the magnitude of maximum penalty that may be required for general and specific deterrence in comparison to individual offenders.

[28] See *Biodiversity Conservation Act 2016* (NSW), s 13.1.

With respect to maximum penalties we note that these are the maximum penalties that can be imposed by a court if a person is prosecuted and found guilty of the offence. Maximum, or even high-range, criminal penalties for environmental offences are almost never imposed,[29] and should therefore be designed set at an amount that is appropriate for the very worst exemplar of the conduct or/ consequence giving rise to the offence. In our view the amounts in the Bill, when viewed through this lens, are inadequate and should be increased substantially. This is particularly the case in light of the matters set out at **clause 128** of the Bill, as these matters provide a framework for the Court to determine the sorts of actions and impacts that warrant the imposition of the maximum penalty which set a very high bar. Offences not meeting these markers will inevitably receive a lesser penalty.

Expiation fees for offences are in our view inappropriately low for offences. For example, the EPBC Act provides for penalty infringement notices (equivalent to an expiation fee) of a maximum of one fifth of the maximum penalty for the offence.

Recommendation 61: Increase maximum penalties, having regard to the circumstances in which maximum penalties may be imposed.

Recommendation 62: Increase maximum penalties and expiation fees for bodies corporate to provide for a standard 5:1 ratio for corporate to individual maximum penalties and expiation fees. This should apply to all penalties and expiation fees.

Other compliance and enforcement mechanisms

EDO **supports** the introduction of new mechanisms to respond to contraventions of the Act and to seek to repair harm.

Enforceable undertakings such as those provided for at **clause 113** of the Bill, if carefully drafted with SMART requirements,[30] are a useful mechanism for regulators.

However, enforceable undertakings should not by default be used in lieu of prosecution or civil penalty proceedings. We again note the findings of the Royal Commission into the Banking Sector[25] that over-use of negotiated and administrative sanctions rather than court-imposed penalties undermined the regulatory scheme and the regulator.[26]

In our view, the Bill may benefit from a greater range of enforcement mechanisms. A range of mechanisms and analysis of their implementation are discussed in the 2024 Queensland *Independent review of powers and penalties under the Environmental Protection Act 1994*.[31] This review was commissioned following difficulties enforcing Queensland's primary environmental protection legislation.

An important accountability and deterrence mechanism is publication of compliance and enforcement actions. We **support** clauses 162 (p), 162(q) and 162(r) of the Bill which require records of compliance and enforcement action to be included on the Biodiversity Register. We recommend that this information includes the person against whom the compliance action was

[29] See, for example, Australian Government Australian Institute of Criminology, 2010, *Environmental Crime in Australia*, p 18, https://www.aic.gov.au/publications/rpp/rpp109,
[30] Specific, measurable, achievable, relevant and time-bound.
[31] https://environment.desi.qld.gov.au/management/policy-regulation/independent-review

taken, the details of the contravention, details of the enforcement measure taken, and any other relevant matters (see Recommendation 67(e)).

Part 9 – Permits

Our overarching concerns with Part 9 are:

- the broad nature of permits that are able to be created via regulation, and no guidance in **clause 146(12)** as to what should be taken into account or guidance on conditions in a permit, including with respect to ensuring humane methods of taking animals; and
- **clause 146(1)** provides no guidance as to what needs to be in an application for these permits, and only empowers the Minister to make a process up, with no guidance even as to what the Minister needs to consider in making this process or minimum standards for application materials to ensure adequate information is received to assess the application – these are matters that should be specified in the Bill and not left to the complete discretion of the Minister with no guidance;
- there is no consultation required nor a requirement to seek advice from scientists and First Nations peoples with respect to the development of permits for the take of animals, creating a significant risk that permits allowed may not be in alignment with First Nations knowledge and western scientific understanding of the key considerations as to whether the permit should be established and, if so, under what criteria;
- strangely consultation is required for permits for native plants under **clause 147**, we query if the differences in these processes was intentional. The consultation provided for plants is also quite fulsome, providing for recommendations first and 3 months of public comment, and a requirement to consider the comments is stipulated at clause (3). These consultation requirements should be mirrored in all other relevant areas of the Bill;
- the criteria under **clause 146(5)** is quite generally framed. We recommend particularly that clause 146(5)(e) be extended to consider broadly the record of compliance of the applicant, including consideration of compliance in any jurisdiction in or outside of Australia. This will provide a helpful guide as to the responsibility of the applicant in meeting regulations and ensure that the risk of irresponsible operators breaching the law is reduced.
- **clause 146(14)** should be amended to also require a condition that the offset be achieved in a timely and effective way, however please see our comments above on the validity of offsets frameworks generally;
- as for Part 5, there is no requirement in this Part to consider the welfare of animals in the allowance or methods allowable for taking an animal;
- we do not support the allowance of permits to take native plants that are a critical habitat feature provided for under clause 148, as stated above in this submission. The purpose of a declaration of critical habitat it to ensure the protection of habitat that is at serious threat – therefore there should be only provisions that promote the support of critical habitat recovering and thriving – this section is not in alignment with the objects of the Bill and should be removed; and
- the broad power of the Minister to grant to any person a permit to hunt, without any criteria for making this decision or limitations on the animals that the permit can be applied to – this is a vast overreach that could be misused to the detriment of threatened

species. Further there are no requirements around the conditions that would apply to these permits, including ensuring the hunting is only allowed in a season to not risk the species, the hunting of only animals of a specific age or gender to not risk the species etc. We strongly recommend that any proposal to allow permits to hunt be opened for long public consultation, with a requirement also to seek advice from First Nations and relevant scientists, and not be allowed for threatened or near-threatened species.

We support the broad power to vary or revoke a permit or condition of a permit under **clauses 146(10) and (12)(b),** to ensure that permits that have become inappropriate or risk a species or ecosystem can be amended or withdrawn.

We suggest that **clause 146(20)** could also include a requirement to specify where the animals and eggs were taken, the season/time and photos of the animals or eggs taken, to ensure sufficient evidence is provided to assess compliance with the permit. Information of this nature could also be required under subsection 22 and 23.

Recommendation 63: We recommend the amendment of Part 9 to:

(a) reduce the significant discretions provided to the Minister under this Part, in the development of permits and regulation of them – particularly to introduce guidance as to what should be taken into account in creating permits, conditioning permits, what should be required in an application etc;
(b) introduce a prohibition on granting a permit to take a threatened species or a critical habitat feature, to ensure that appropriate protection is provided for these species in accordance with the objects of the Bill;
(c) provide for consistency in consultation requirements for the processes under Part 9, requiring consultation with the public and also proactively seeking advice from scientists and First Nations peoples with respect to the development of types of permits and to support better processes under the Part generally;
(d) amend clause 146(5) to require consideration of the applicant's compliance history generally, including across Australia or internationally, to ensure the risk of poor operators breaching the law is reduced; and
(e) require that any proposal to allow permits to hunt be opened for long public consultation, with a requirement also to seek advice from First Nations and relevant scientists, and not be allowed for threatened or near-threatened species.

We further generally **support**:

- the provisions of circumstances where permits cannot be granted, where this should be used for example to require a person to demonstrate that non-lethal alternatives have been truly exhausted prior to allowing permits to kill protected animals to protect private property;
- the imposition of fees for permits, where currently we understand there is no fee required to accompany an application to destroy protected wildlife; and
- increased penalties provided for in the offence provisions, to ensure these provisions are taken seriously. We note that these provisions must be coupled with sufficient resources dedicated to enforcement or else they will be rendered useless.

It appears the inclusion of **clause 149(3)** duplicates **clause 149(2).**

Part 10 – Miscellaneous

State biodiversity data

We **support** provisions in the Bill aimed at setting up a centralised system for compiling, maintaining and updating State biodiversity data and for providing access to such data. We acknowledge that key requirements will be prescribed in the regulation.

State Biodiversity Plan

We **support** provisions in the Bill requiring the Minister to prepare, publish and maintain a State Biodiversity Plan. We make the following comments and recommendations for strengthening the provisions in the Bill:

- Clause 160(5) provides that in preparing or reviewing the State Biodiversity Plan the Minister must undertake such consultation as the Minister considers necessary or appropriate. Yet, perhaps inconsistently, clause 160(9) provides that the regulations may prescribe requirements for consultation in respect of preparing or reviewing the State Biodiversity Plan. As noted elsewhere in our submission, our view is that the Bill itself should be more prescriptive about consultation requirements generally.
- With regard to the requirement that the Plan *set expectations* for monitoring and evaluating the state and condition of biodiversity, we suggest it should more clearly be required to include *a process for* monitoring and evaluating, *and reporting* on, the state and condition of biodiversity.
- If the objects of the Bill are amended to reflects the goals of the Kunming-Montreal Global Biodiversity Framework, including with specific inclusion of objects to stop and reverse biodiversity loss by 2030, and to fully restore biodiversity by 2050, then the State Biodiversity Plan should set short-term targets consistent with meeting these 2030 and 2050 goals.
- As outlined earlier in our submission, to improve the interaction between the biodiversity conservation framework established under the Bill and frameworks that regulate acts or actions that may impact on biodiversity (such as the PDI Act), decision makers under those Acts must be required to make decisions consistent with the State Biodiversity Plan (and any relevant conservation plan or biodiversity policy). This would ensure that decisions made about land use or the carrying out of acts or activities do not undermine targets and actions set under the Bill or the ability for the Bill to achieve its objectives.
- Clause 167 provides for a statutory review of the Act after 5 years. This clause should prescribe engagement with First Nations as part of this review.

Recommendation 64: Strengthen provisions relating to the State Biodiversity Plan as follows:

(a) amend clause 160(5) to specify prescriptive requirements around consultation;
(b) clarify the expectations on monitoring and reporting the state and condition of biodiversity by clearly requiring the development of a process for monitoring and evaluating and reporting on the state and condition of biodiversity;

(c) require that decision makers under other development or environment Acts, such as the PDI Act, must make their decisions in a way that is consistent with the State Biodiversity Plan, and any relevant conservation plan or biodiversity policy; and
(d) require engagement with First Nations as part of the statutory review of the Act under clause 167.

Biodiversity policies

As outlined elsewhere in our submission, we have concerns about how the Bill currently provides for the use of biodiversity policies. Many provisions in the Bill provide for matters to be prescribed in either the regulation or a biodiversity policy. Our understanding is that biodiversity policies will not be statutory instruments, meaning there is less oversight in the making of a biodiversity policy than there would be for making regulations (because regulations can be disallowed by the Parliament).

Unless biodiversity policies are given the status of statutory instrument (which would be analogous to State Planning Policies, which are statutory instruments made under the PDI Act), provisions that provide the option to use either the regulation or biodiversity policies to set subordinate rules should be amended to remove the option to use a biodiversity policy, and require matters to be prescribed in regulations only. Biodiversity policies could be retained in circumstances where it would be appropriate for them to be used to provide additional guidance, as opposed to setting rules.

Additionally, we recommend:

- As noted earlier in our submission, the substantive SEB framework should be in the Bill itself (with any biodiversity having a guiding role only).
- The process for making a biodiversity policy should mandate a role for the Biodiversity Council in providing advice to the Minister on any proposed biodiversity policy (which would require commensurate provisions to the function of the Council).

Recommendation 65: To ensure that biodiversity policies are an effective part of the regulatory framework, and provide appropriate oversight to the making of subordinate rules, either:

(a) make biodiversity policies statutory instruments; or
(b) amend provisions that provide the option of using either the regulation or biodiversity policies to set subordinate rules to remove the option to use a biodiversity policy, and require matters to be prescribed in regulations only; and limit the use of biodiversity policies to circumstances where it would be appropriate for them to be used to provide additional guidance, as opposed to setting rules.

Recommendation 66: Mandate a role for the Biodiversity Council in providing advice to the Minister on any proposed biodiversity policy (which would require commensurate provisions to the function of the Council).

Biodiversity Register

We **support** provisions in the Bill to establish a Biodiversity Register and publish key documents and information pertaining to the administration of the Bill on that Register. This is important for

creating transparency and establishing accountability. We provide the following comments and recommendations regarding the Register.

Recommendation 67: Amend clause 162 of the Bill as follows:

(a) While it might be implied in clause 162(2)(iv), conditions of a consent to clear native plants should be included on the Register.
(b) In line with Recommendation 42(g), the following information should be published on the Register:
    i. SEB annual progress reports (as currently required under the *Policy for a Significant Environmental Benefit* or as otherwise required); and
    ii. Other information on how SEB requirements are being met, including progress on establishing, protecting and managing vegetation, and biodiversity outcomes delivered. See, for example, clause 58 of the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (NSW), which requires the register established under that Act to track progress against meeting offset requirements.
(c) Native plant management plans should be published on the Register.
(d) The term 'prescribed area' in 162(2)(f) should be bold italics, so it is clear it is a defined term (defined in clause 162(9)). We suggest the definition could be moved to clause 3 as it is not used elsewhere in the Bill (so there would be no confusion in adopting that definition for the purpose of the Bill).
(e) Compliance and enforcement information published on the register should include the person against whom the compliance action was taken, the details of the contravention, details of the enforcement measure taken, and any other relevant matters.

False and misleading information

We generally **support** the inclusion of **clause 163** in the Bill which creates an offence relating to false and misleading information. We note the provision proposed differs to that currently in the NPW Act, and instead mirrors the offence in the *Landscape South Australia Act 2019,* including limiting the scope of the offence to 'material particulars'. This appears to be consistent with false and misleading provisions in other Acts, including, for example, the *Corporations Act 2001* (s1041e). We also support the increase in the penalty for this offence (compared to the current offence in the NPW Act).

Transitional provisions

The Bill itself does not contain any savings and transitional provisions, although **clause 166(3)(c)** does allow for the regulation to make saving and transitional provisions. Given that Bill intends to repeal the NV Act in full and parts of the NPW Act, we would expect the Bill to directly include savings and transitional provisions in relation to key aspects of the existing framework. We also note that Explanatory Material provides no policy detail in relation to important transitional considerations, such as the status of the existing threated species list or existing heritage plans under the new framework. Presumably these will continue to have effect under the new framework but that is not explicit. See recommendations for specific transitional provisions earlier in our submission.

Recommendation 68: Transitional provisions should be provided in the Bill so the full impact of the amendments and repealed provisions can be properly understood by all stakeholders –and the Parliament.

New concurrence role for Minister responsible for the administration of the Biodiversity Act 2025

We **support** changes made by the Bill to insert a new provision into the PDI Act (proposed s73(6)(da)) requiring the concurrence of the Minister responsible for the administration of the Biodiversity Act 2025 when proposing an amendment to the Planning and Design Code that impacts on a zone or overlay that is prescribed by the regulations as a zone or overlay of importance to biodiversity. In determining whether to give concurrence, we recommend the Minister also be required to make decisions consistent with (and not just have regard to) the objects and principles of the Bill and the State Biodiversity Plan. We also suggest that biodiversity policies be included in this requirement.

Schedule 5 - Related amendments and repeals

We have not had time to consider the consequential amendments to other Acts set out in Schedule 5 of the Bill. We may provide supplementary comments on this part of the Bill in due course.

APPENDIX 1 – CONSOLIDATED LIST OF RECOMMENDATIONS

Whole-of-Bill issues

Recommendation 1: Insert a legal mechanism into the Bill that will provide absolute protection for biodiversity when it is most needed (e.g. when impacts on biodiversity would be so serious that biodiversity decline, and extinction, would be inevitable). This could be identified areas that are off limits to activities (e.g. no-go zones, or stronger protections for critical habitat), or a mandatory refusal trigger (e.g. unacceptable impacts).

Recommendation 2: Make amendments to the Bill to require that decisions are made consistent with the State Biodiversity Plan, conservation plans (e.g. Action Plans and Threat Abatement Plans), and biodiversity policies. This should include:

(a) Strengthening existing provisions in the Bill to require 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.
(b) Require decisions made under frameworks that regulate acts or actions that may impact on biodiversity (such as the PDI Act) to be consistent with the State Biodiversity Plan, and any relevant conservation plan or biodiversity policy.

Recommendation 3: Make amendments to better protect and respect First Nations Culturally Significant Biodiversity Entities, by ensuring these entities are required to be considered in all decision-making processes under the Bill, and clarifying the process for identifying a Culturally Significant Biodiversity Entity , including that this process should be led by First Nations peoples only and not be at the discretion of the Minister.

Recommendation 4: Remove drafting that provides for subjective decision-making from the Bill to ensure that the Bill provides sufficiently clear guidance, transparency and accountability for decision-makers, stakeholders and the public.

Recommendation 5: Constrain Ministerial and Governor discretion and the risk of government overreach by ensuring there are clear criteria directing the exercise of power throughout the Bill, and that these are included in the Bill, and not left to be prescribed by the Regulation.

Recommendation 6: To avoid ambiguity, define the general term 'entity' in the Bill.

Recommendation 7: Make biodiversity policies statutory instruments or clarify subordinate rules are to be provided in regulations only.

Recommendation 8: Where lacking, the Bill should be more prescriptive as to how consultation should occur, including by setting out, or allowing the regulation to prescribe, minimum requirements. This will provide more certainty to all stakeholders, reduce regulatory burden of creating consultation processes afresh for each decision, and ensure consistency in the quality of consultation undertaken.

Recommendation 9: Ensure that adequate resourcing is provided upfront to deliver the key elements of the Bill and maintained annually to support good administration of this Bill, to build

public and industry confidence in the regulators and to ensure good quality, informed, decision-making.

Part 1 - Preliminary

Recommendation 10: Address concerns about the operation of the Bill by:

(a) Omitting clause 6(5) (and consequentially clause 6(6) from the Bill). Alternatively, explicitly limit the scope of 6(5) to its equivalent current operation in the NPW Act (i.e. the taking and disposal of plants and permits authorising such activities), and explicitly exclude (in clause 6(6)) its application to the remainder of the Bill.
(b) Extending clause 6(3) to include 'failures to act', to ensure omissions that cause environmental damage can still be enforced.

Recommendation 11: To avoid the Bill being either inadvertently or deliberately overridden by other legislation, exclude clause 4(1) from the Bill.

Recommendation 12: Clarify the Bills application to both aquatic and terrestrial species, including in the definitions of *biodiversity, animal, protected animal* and *native plant.*

Recommendation 13: Amend the definition of native plant to address concerns about the ability to manage pest native species in South Australia.

Recommendation 14: To guarantee protection for fragmented or small patches of vegetation, amend clause 3(2) of the Bill as follows and provide a clearer definition of stratum:

(a) Omit clause 3(2)(a), which refers to a contiguous area of native plants.
(b) Cross-reference clause 3(2) in the definition of ***stratum*** in clause 3(1).

Recommendation 15: Amend the definition of ***protected animal*** to:

(a) Expand the definition of protected animal to include fish, amphibians or invertebrates that are not threatened (i.e. these should not be excluded from the definition).
(b) Remove the ability for the regulation to exclude classes of animal from the definition.

Part 2 - Objects, principles and general duty

Recommendation 16: Amend the objects of the Bill to better reflect the goals of the Kunming-Montreal Global Biodiversity Framework, including with specific inclusion of objects to stop and reverse biodiversity loss by 2030, and to fully restore biodiversity by 2050.

Recommendation 17: Include specific objects in the Bill relating to the conservation, protection and enhancement, and management, of native vegetation and protection and recovery of threatened species (e.g. halt extinctions, recover species).

Recommendation 18: Expand the principles in clause 8 of the Bill by:

(a) including the precautionary principle and principle of intergenerational equity;
(b) expanding clause 8(b) to add recognition that transparency and community participation in decision-making leads to better quality decisions, and that open access to information should be provided for as much as possible; and

(c) expanding clause 8(c) to reflect Articles 14 and 25 of the United Nations Declaration on the Rights of Indigenous Peoples to which Australia is a signatory. This should include embedding the principle of Free, Prior and Informed Consent of First Nations in management of biodiversity resources as a principle in the new Act and recognising Indigenous Data Sovereignty and Indigenous Cultural & Intellectual Property rights.

Recommendation 19: Amend clause 9 of the Bill (as emphasised) to provide that a person or body engaged in the administration of this Act *must act consistently with*, and where appropriate give effect to, the State Biodiversity Plan in making decisions under this Act.

Recommendation 20: Extend the application of clause 10 of the Bill (e.g. by adding a new sub-clause (f)) that provides that a person or body engaged in the administration of this Act must, as far as is practicable, seek, consider and apply First Nations' knowledge (where it is available and endorsed by the knowledge holders), in exercising any other function in the Act.

Recommendation 21: To strengthen the general duty in clause 11 of the Bill:

(a) make a breach of the duty an offence, similar to duties under pollution and waste, and biosecurity laws;
(b) allow the duty to be enforced by third parties (i.e. remove the exemption of enforcing breaches of the general duty by third parties under clause 114(1)(g));
(c) define the term entity within the Bill (see Recommendation 6);
(d) remove the words “and practicability (including cost)” from clause 11(2)(e), as practicability, and in particular cost, implies that significant costs could be an excuse for preventing harm; and
(e) amend clauses 11(2)(g), 11(3), 11(4)(d) and 11(6) so that matter can be prescribed in the regulation only.

Part 3 – Administration

Recommendation 22: Strengthen the conflict-of-interest provisions in the Bill by providing that a person must not undertake a duty under this Act where they hold a material conflict of interest and create this as an additional offence in the Bill.

Recommendation 23: Insert specific, appropriate criteria in the legislation for the membership of all statutory bodies created under the Bill, given the importance of these roles.

Recommendation 24: Seek meaningful input from First Nations on the establishment and functions of the First Nations Expert Biodiversity Committee.

Recommendation 25: In order to empower the Biodiversity Council with the ability to provide advice to the Minster on biodiversity policies on its own initiative, remove the words “at the request of the Minister” from clause 16(d), or provide for a separate power to provide advice without external request.

Recommendation 26: To clarify the function of the NPCAC as it relates to the SEB scheme, amend clause 19(c) of the Bill, (e.g. “*apply* the SEB scheme” (rather than administer).

Recommendation 27: Amend clause 19(e) of the Bill (as it relates to the NPCAC's function to undertake enforcement action relating to the unlawful clearance of native plants), and place responsibility for enforcement of the clearance provisions of the Bill directly with the Department, with the NPCAC retaining an advisory role in relation to this function.

Recommendation 28: Retain a role for peak bodies in appointing members to the NPCAC and Biodiversity Council.

Part 4 – Native plants

Recommendation 29: Establish a stand-alone fund used solely for the purpose of receiving and expending money under the SEB scheme.

Recommendation 30: Include a specific object in the Bill relating to the conservation, protection and enhancement of native vegetation.

Recommendation 31: Amend the Bill to provide more clarity on the distinction between the regulation of native vegetation and the regulation of protected animals; and also the distinction between clearance of native plants, and dealing with and taking native plants. For example:

(a) clarify that references to regulated acts or activities in Part 4 refer specifically to those relating to native plants as described in clause 42 (in Part 4), and similarly references to regulated acts or activities in Part 5 refer specifically to those relating to protected animals as described in clause 62 (in Part 5); and
(b) amend the offence in clause 44 to make it clear that 'unless authorised to do so in accordance with Division 3' refers to an authorisation described in clause 47 (which includes a permit granted under Part 9).

Recommendation 32: To better reflect the scale of clearing activities, and to provide greater consistency and clarity around activities that require oversight by the NPCAC (e.g. native plant management plan or referral), amend the Bill to:

(a) restrict exclusions in Schedule 2 to true exemptions, namely categories of acts and activities that equate to the NV Regulations Schedule 1, Part 1, Division 1—Permitted clearance where notification not required and Schedule 1, Part 1, Division 2—Permitted clearance where notification required; and
(b) move acts or activities that require a referral to the NPCAC under another Act and/or a native plant management plan out of Schedule 2 and regulate those activities under the Bill (e.g. in a stand-alone sub-division in Part 4).

Recommendation 33: To improve transparency and accountability, require all clearing undertaken in reliance on exclusions to be notified (e.g. to the NPCAC) or tracked in some way that is publicly accessible.

Recommendation 34: Strengthen the application of the principles of preservation of native plants by:

(a) amending clause 49(1)(b) to require the NPCAC to give effect to (rather than have regard to) the principles of preservation of native plants; and

(b) require the NPCAC to give effect to the principles of preservation of plants when approving a native plant management plan.

Recommendation 35: Amend clause 48(4) to require an application for consent to include information that supports the assessment of the criteria referred to in clause 49(1) as well as the matters in clause 50.

Recommendation 36: Provide additional guidance (e.g. in a biodiversity policy) on matters to be considered by the NPCAC under clause 49, including in relation to:

(a) the application of the mitigation hierarchy;
(b) consideration of cumulative impacts; and
(c) actions that would demonstrate applicant's desire to facilitate the management of other plant.

Recommendation 37: Provide more specific parameters on when the scope of clearing constitutes 'specified circumstances' in clause 50(12) (e.g. maximum distance or area of native plants that can be cleared in each circumstance).

Recommendation 38: In relation to consultation requirements for consents under Part 4, consolidate all the consultation requirements in two sub-sections of a single provision (rather than in both clause 51 and clause 53), to make it clearer for readers.

Recommendation 39: Tighten provisions related to lapsing of consent for clearance of native plants, including by providing stricter parameters and more specific guidance as to when the NPCAC may provide for longer periods for which a consent can remain in force.

Recommendation 40: Provide additional guidance or prescription to guide decision making under clause 57 to ensure consistency and certainty in how decisions are made as to the application of credits for environmental benefits in Division 4.

Recommendation 41: Provide greater clarity on the role of and process for preparing and approving native plant management plans, including by:

(a) inserting a new sub-division in Part 4 that regulates all acts or activities that require a native plant management plan, and clearly sets out a process for assessing and approving such plans;
(b) including key matters for consideration that reflect those pertaining to the granting of consent by the NPCAC, including that the NPCAC, in approving a native plant management plan must:

- be satisfied that the mitigation hierarchy has been applied;
- give effect to the principles of preservation of native plants; and
- consider cumulative impacts.

(c) amending Schedule 2 of the Bill to remove any acts or activities that require a native plant management plan to be approved by the NPCAC (e.g. Schedule 2, clauses 8, 9, 13, 14, and 25). This would have the effect that these activities become 'regulated acts or activities' under the Bill;
(d) creating a new offence for failure to comply with a native plant management plant; and
(e) requiring native plant management plans to be kept on the biodiversity register.

Recommendation 42: Use the Biodiversity Bill to overhaul and strengthen the SEB scheme to ensure that it truly provides for effective offsets, and in particular:

(a) clearly frame the Scheme as an offsets scheme;
(b) set clear parameters in legislation that would bring the Scheme in line with best practice and the objects of the new Biodiversity Act;
(c) embed the requirement to achieve net environmental gain, and other Biodiversity Offsetting Principles, in the legislation;
(d) better embed the Scheme, including the key policy settings for the Scheme, into the Bill itself, rather than a biodiversity policy;
(e) remove the option to pay money in lieu of offsets (or otherwise introduce strict parameters around the payment of money in lieu of offsets, particularly where offsets are difficult or unlikely to be secured);
(f) only allow biodiversity agreements (and not conservation agreements) to be used to satisfy SEB (offset) obligations; and
(g) require the following information to be included on the Biodiversity Register:
    i. SEB annual progress reports; and
    ii. other information on how SEB (offset) requirements are being met, including progress on establishing, protecting and managing vegetation, and biodiversity outcomes delivered.

Part 5—Protected animals

Recommendation 43: Amend clauses 64 and 65 to provide higher penalties for the take of an animal that is a threatened species and amend clause 67 to include:

(a) specific criteria guiding and limiting when the Minister can utilise the power to allow protected animals or eggs to be taken, to provide certainty and accountability around how this broad power may be used; and
(b) a requirement that impact assessment is needed to provide evidence of the need for the take, whether non-lethal solutions may be available, and to ensure the conservation status of the species will not be impacted;
(c) a requirement to consult with the public prior to making this declaration, and to consider the submissions received;
(d) a requirement to seek advice from scientists and First Nations prior to making any declaration, and to consider this advice.

Recommendation 44: Include greater consideration of animal welfare and consideration of scientific and First Nations knowledge throughout decision-making in Part 5, including for permits and for the development of management plans. Further, we recommend introduction of a power to restrict or prohibit the use of harmful devices such as 1080 poison, strychnine, and leg-hold traps. The use of these devices can cause suffering to many different species of animals that are not the target of the legislation and should be prohibited.

Recommendation 45: Remove reference to kangaroos in the Bill as a relevant protected animal until an inquiry is undertaken into kangaroo culling practices, and pending the outcomes of that inquiry.

Part 6 - Threatened species, threatened ecological communities and listed ecological entities

Recommendation 46: Amend Part 6 of the Bill to:

(a) remove the distinction between Commonwealth and South Australian species listing, where this is considered unnecessary;
(b) provide for the process for establishing or revoking designated lists to be in the legislation and not to be determined by the Minister;
(c) require that the listing decision is made by the Scientific Committee and based on objective, scientifically robust eligibility criteria;
(d) inserting a prescribed period into the Act with respect to undertaking a listing assessment and making a preliminary and final listing decision, to ensure the listings occur in a timely way;
(e) require review of the lists at least every 5 years, to ensure it remains up to date, with clear criteria for undertaking the review;
(f) require threatened species lists to be reviewed following a major event; and
(g) include transitional provisions in the Bill that provide that on commencement of the Act the lists in relevant schedules of the NPW Act are taken to be the threatened species list for the purpose of the Bill.

Recommendation 47: Ensure Action Plans are an effective tool for delivering improved outcomes for biodiversity, by strengthening the Bill as follows:

(a) The Bill must require action plans to be made for listed threatened species and threatened ecological communities. As it stands, the Bill provides that the Minister *may* make an action plan. There must be a clear process, that includes provision for community engagement and statutory timeframes for finalising plans (e.g. within 12 months from listing date). The Bill could allow for the Minister, on advice from the scientific committee, to determine that an action plan is not required in exceptional circumstances only, based on clear matters for consideration set out in the legislation.
(b) In the case of critical habitat, the Bill could specifically require action plans to be made for critical habitat, or similar to the *Environment Protection and Biodiversity Conservation Act* (Cth) (**EPBC Act**), could require actions plans for threatened species to identify critical habitat. In the latter case, identification of critical habitat in an action plan could become part of the process for identifying and declaring critical habitat (which as we outline below, should also be mandatory for listed threatened species).
(c) The requirement to make an action plan should be an enforceable duty under the Act, which can be enforced by members of the community.
(d) The Act should retain the ability for action plans to be made for listed ecological entities, and as this concept is developed, further consideration should be given to making this requirement mandatory as well.

(e) The Bill could be strengthened by setting a timeframe for reporting on implementation rather than leave this to the regulation (e.g. every 3-5 years). However, we **support** clause 77(6) which provides that the Minister must— (a) take reasonable steps to implement an action plan; and (b) report on the implementation and effectiveness of the plan in accordance with the requirements prescribed by the regulations for the purposes of this paragraph. Our understanding is that this duty would be enforceable under clause 114 of the Act.
(f) The Minister should also have a duty to review and update action plans, at least once every 10 years or after 'major events' (see further comments on updating threatened species protections following a major event below).
(g) In order to ensure conservation action and action plans are not undermined by decisions made by land use planning decisions and action approvals, decisions made under the PDI Act or Part 4 or Part 9 of the Bill should be required to be consistent with action plans.

Recommendation 48: Ensure the identification of key threatening process and implementation of Threat Abatement Plans are effective tools for delivering improved outcomes for biodiversity, by strengthening the Bill as follows:

(a) The Bill must provide a clearer role for the Scientific Committee in identifying key threatening processes, and for the Minister to act on the advice of the committee in declaring such threats.
(b) Where a key threatening process has been declared, the Bill must require that a Threat Abatement Plan be prepared, and set requirements for reporting on implementation and effectiveness of Threat Abatement Plans, and requirements to review Threat Abatement Plans at regular intervals and following major events (see below).
(c) The broader regulatory framework could be strengthened to ensure key threatening process are more comprehensively taken into consideration in decision making. For example:
    i. require environmental assessments to state whether approving the development will contribute to or exacerbate key threatening processes, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider; and
    ii. require decision makers to consider and not make decisions that would increase the impact of key threatening processes when making strategic plans or granting approval under the PDI Act or Part 4 or Part 9 of the Bill.

Recommendation 49: Introduce new provisions into the Bill that trigger a review of relevant rules relating to threatened species protection following a major event.

Recommendation 50: Amend the Bill to require the Scientific Committee to conduct an inquiry in circumstances where a native species, ecological community or ecological entity has moved to a category within a designated list with a higher extinction risk (e.g. a species is uplisted from endangered to critically endangered), to prevent a species becoming extinct.

Recommendation 51: Make the identification and declaration of critical habitat mandatory. Further, consider linking the identification of critical habitat to the development of Action Plans (e.g. Action Plans be required to identify critical habitat). Additionally, to remove discretion, the

identification of critical habitat should be based on the objective advice or decision of the Scientific Committee rather than at the discretion of the Minister.

Recommendation 52: Amend the definition of critical habitat to link it to the eligibility criteria rather than the act of declaring something as critical habitat. Ensure that more prescriptive criteria are provided to assist with declaring critical habitat.

Recommendation 53: Amend the Bill to provide real protection for areas of critical habitat (e.g. critical habitat could be identified as 'no-go areas' that are off-limits to development, or the framework could require mandatory refusal of projects that significantly/unacceptably impact critical habitat).

Recommendation 54: Amend the Bill to be more prescriptive at clause 82 as to how consultation must be carried out.

Part 7 – Conserved areas

Recommendation 55: Remove provisions that allow a conservation agreement to be used to satisfy SEB requirements. Only biodiversity agreements should be allowed to satisfy SEB requirements.

Recommendation 56: To the extent that biodiversity agreements will be used to meet SEB obligations, the provisions must be tightened to provide guaranteed protection for the biodiversity values intended to be protected to offset loss from approved actions and approvals. This should include:

(a) explicit provisions in the Bill providing for biodiversity agreements to have effect in perpetuity, unless otherwise specified (and limiting circumstances in which they may otherwise than in perpetuity); and
(b) restricting circumstances in which biodiversity agreements can be varied or terminated (e.g. a biodiversity agreement cannot be varied or terminated unless measures are taken to offset any negative impact of the termination on the biodiversity values protected by the agreement).

Recommendation 57: Amend clause 166(3)(c) to explicitly provide that heritage agreements made under the NV Act will continue in force under the new Act as if they are biodiversity agreements.

Part 8 – Enforcement

Recommendation 58: Civil enforcement of the Bill be simplified to provide open standing to any person to apply to the ERD Court to remedy or restrain a breach of the Act or regulations.

Recommendation 59: Consistent with Recommendation 21, the general duty in clause 11 should be constructed as an offence, and there should be no limitation preventing third party civil enforcement of breaches of that offence. A transitional arrangement could be added to phase in the introduction of the general duty offence if that is seen as helpful.

Recommendation 60: Amend clause 122 to remove the option to negotiate an out-of-court civil penalty amount and to remove the option to elect to be prosecuted. Consider civil penalty regimes modelled on, for example, the EPBC Act or the *Environment Protection Act 2017* (Vic).

Recommendation 61: Increase maximum penalties, having regard to the circumstances in which maximum penalties may be imposed.

Recommendation 62: Increase maximum penalties and expiation fees for bodies corporate to provide for a standard 5:1 ratio for corporate to individual maximum penalties and expiation fees. This should apply to all penalties and expiation fees.

Part 9 – Permits

Recommendation 63: We recommend the amendment of Part 9 to:

(a) reduce the significant discretions provided to the Minister under this Part, in the development of permits and regulation of them – particularly to introduce guidance as to what should be taken into account in creating permits, conditioning permits, what should be required in an application etc;
(b) introduce a prohibition on granting a permit to take a threatened species or a critical habitat feature, to ensure that appropriate protection is provided for these species in accordance with the objects of the Bill;
(c) provide for consistency in consultation requirements for the processes under Part 9, requiring consultation with the public and also proactively seeking advice from scientists and First Nations peoples with respect to the development of types of permits and to support better processes under the Part generally;
(d) amend clause 146(5) to require consideration of the applicant's compliance history generally, including across Australia or internationally, to ensure the risk of poor operators breaching the law is reduced; and
(e) require that any proposal to allow permits to hunt be opened for long public consultation, with a requirement also to seek advice from First Nations and relevant scientists, and not be allowed for threatened or near-threatened species.

Part 10 – Miscellaneous

Recommendation 64: Strengthen provisions relating to the State Biodiversity Plan as follows:

(a) amend clause 160(5) to specify prescriptive requirements around consultation;
(b) clarify the expectations on monitoring and reporting the state and condition of biodiversity by clearly requiring the development of a process for monitoring and evaluating and reporting on the state and condition of biodiversity;
(c) require that decision makers under other development or environment Acts, such as the PDI Act, must make their decisions in a way that is consistent with the State Biodiversity Plan, and any relevant conservation plan or biodiversity policy; and
(d) require engagement with First Nations as part of the statutory review of the Act under clause 167.

Recommendation 65: To ensure that biodiversity policies are an effective part of the regulatory framework, and provide appropriate oversight to the making of subordinate rules, either:

(a) make biodiversity policies statutory instruments; or

(b) amend provisions that provide the option of using either the regulation or biodiversity policies to set subordinate rules to remove the option to use a biodiversity policy, and require matters to be prescribed in regulations only; and limit the use of biodiversity policies to circumstances where it would be appropriate for them to be used to provide additional guidance, as opposed to setting rules.

Recommendation 66: Mandate a role for the Biodiversity Council in providing advice to the Minister on any proposed biodiversity policy (which would require commensurate provisions to the function of the Council).

Recommendation 67: Amend clause 162 of the Bill as follows:

(a) While it might be implied in clause 162(2)(iv), conditions of a consent to clear native plants should be included on the Register.
(b) In line with Recommendation 42(g), the following information should be published on the Register:
    i. SEB annual progress reports (as currently required under the *Policy for a Significant Environmental Benefit* or as otherwise required); and
    ii. Other information on how SEB requirements are being met, including progress on establishing, protecting and managing vegetation, and biodiversity outcomes delivered. See, for example, clause 58 of the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (NSW), which requires the register established under that Act to track progress against meeting offset requirements.
(c) Native plant management plans should be published on the Register.
(d) The term 'prescribed area' in 162(2)(f) should be bold italics, so it is clear it is a defined term (defined in clause 162(9)). We suggest the definition could be moved to clause 3 as it is not used elsewhere in the Bill (so there would be no confusion in adopting that definition for the purpose of the Bill).
(e) Compliance and enforcement information published on the register should include the person against whom the compliance action was taken, the details of the contravention, details of the enforcement measure taken, and any other relevant matters.

Recommendation 68: Transitional provisions should be provided in the Bill so the full impact of the amendments and repealed provisions can be properly understood by all stakeholders –and the Parliament.