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OF CONCERNED SCIENTISTS

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WENTWORTH GROUP SUBMISSION TO PUBLIC CONSULTATION SOUTH AUSTRALIA'S DRAFT BIODIVERSITY BILL

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About the Wentworth Group

The Wentworth Group of Concerned Scientists is an independent group of scientists, economists and professionals working to secure the long-term health of Australia's land, water and biodiversity. Our members comprise leading Australian experts in climate science, biodiversity conservation and natural resource management, as well as eminent environmental lawyers, sustainable business leaders and natural capital market experts. We focus on solutions-based, science-driven policy reforms and work strategically to drive outcomes than benefit the environment, communities and the economy.

The Wentworth Group appreciates the opportunity to provide feedback on South Australia's Draft Biodiversity Bill 2025 (the Draft Bill).

Overview

The Wentworth Group commends the South Australian Government for recognizing the problems with the current piecemeal approach to environmental protection in South Australia and for committing to developing the State's first biodiversity legislation. The management of South Australia's natural assets is currently split across multiple pieces of legislation and there are significant gaps in protection. Creating an over-arching piece of legislation that incorporates the *Native Vegetation Act 1991* and components of the *National Parks and Wildlife Act 1972,* and introduces a range of new biodiversity protections is a welcome step forward.

Given the trajectory of biodiversity in South Australia, the adoption and implementation of effective biodiversity legislation is also a time critical issue. The South Australian State of the Environment 2023 Report demonstrates that South Australia's biodiversity is globally unique, and 85% of marine life in southern Australia is found nowhere else on Earth.[1] Alarmingly, the report also finds that biodiversity in South Australia is in a state of decline: native species and ecosystem health are deteriorating; more than 40% of terrestrial flora and fauna species are declining and the rate of decline is accelerating; inland water flora and fauna and coastal and marine fauna are also declining; and, seven out of nine landscape regions are also showing a declining trend in their health.[2]

The development of draft biodiversity legislation not only provides an important opportunity to bring South Australia into line with other states and territories, but it also gives the advantage of being able to learn from the mistakes of biodiversity legislation in other jurisdictions. Thus, while we support South Australia's development of the Draft

[1] South Australia State of the Environment 2023, South Australian EPA, Adelaide, viewed 13 February 2025, <https://soe.epa.sa.gov.au/>.
[2] Ibid.

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Bill, we will use this submission to highlight opportunities to strengthen the Draft Bill and better enable the legislation to deliver on the South Australian Government's priorities of strengthening protection, enabling greater restoration and improving transparency around decision making.

Review and recommendations

The Draft Bill takes positive steps to embed Indigenous knowledge, values and aspirations for Country in decision-making

The Wentworth Group strongly supports the emphasis the Draft Bill places on recognizing and respecting the enduring legacy of First Nations peoples in caring for Country, including through the objects of the Act, the establishment of a First Nations Expert Biodiversity Committee (FNEBC), inclusion of two members of the FNEBC on the Biodiversity Council, introduction of a definition and related provisions for culturally significant biodiversity entities and inclusion of standing provisions for First Nations persons with cultural or spiritual connections to land affected by a decision made under the Act.

Aboriginal and Torres Strait Islander peoples have been custodians of Country for over 60,000 years and have continuing cultural connections to land and waters. However, European settlement has led to drastic changes in landscape management and disenfranchised Aboriginal and Torres Strait Islander peoples from fulfilling their customary responsibilities for caring for Country.

There is growing evidence to indicate that conservation outcomes improve, and well-being is enhanced, when legislative and policy settings are equitable, supportive and designed to recognise local knowledge and empower the environmental stewardship of Indigenous peoples and local communities.[3] Garnett et el., 2018 found "Collaborative partnerships involving conservation practitioners, Indigenous Peoples and governments would yield significant benefits for conservation of ecologically valuable landscapes,ecosystems and genes for future generations."[4]

We recommend the following amendments to further strengthen the positive measures proposed in the Draft Bill:

1. *Update the definition Country to capture both tangible and intangible values;*
2. *Add culture to principle s8(a), whereby it reads ".....to support the environment, economy, **culture** and wellbeing....";*
3. *Add Indigenous Knowledge to the list of skills, knowledge and experience to be encompassed by the members of the Biodiversity Council (s15(2)(a));*
4. *Add South Australia's First Nations Voice to Parliament to the list of groups the Minister must consult with when forming the Biodiversity Council;*
5. *Update s18(4) to require two members of the National Plants Clearance Assessment Committee to be First Nations persons, one female and one male;*

[3] Dawson, N., Coolsaet, B., Sterling, E., Loveridge, R., Gross-Camp, N.D., Wongbusarakum, S., Sangha, K., Scherl, L., Phuong Phan, H., Zafra-Calvo, N. et al. 2021. The role of Indigenous peoples and local communities in effective and equitable conservation. Ecology and Society, Resilience Alliance, 26 (3).

[4] Garnett, S.T., Burgess, N.D., Fa, J., Fernández-Llamazares, A., Molnár, Z., Robinson, C.J., Watson, J.E.M., Zander, K.K., Austin, B., Brondizio, E.S., French Collier, N., Duncan, T., Ellis, E., Geyle, H., Jackson, M.V., Jonas, H., Malmer, P., McGowan, B., Sivongxay, A. & Leiper. I. 2018. A spatial overview of the global importance of Indigenous lands for conservation. Nature Sustainability, 1, July 2018, 369–374.

6. *Consider removing s21(5) which states that the chair of the FNEBC may be a public servant;*[5]
7. *Update s24(4) to require two members of the Scientific Committee to be First Nations persons, one female and one male;*
8. *Consider amending s43(1) to restrict the provision to the taking of plants not clearing;*
9. *Update provisions relating to the list of threatened species (s68) and the list of threatened ecological communities (s69), so that the list notes when an entity listed as threatened is also a culturally significant biodiversity entity;*
10. *Update s77(3) to also include critical habitat that comprises or supports a culturally significant biodiversity entity as one of the triggers for engagement between the Minister First Nations persons and groups;*
11. *Update s161(7) to also apply to 161(4)(f), so that the Minister must also seek advice from the FNEBC before making biodiversity policy in regards to cultural burning of native plants undertaken by First Nations; and*
12. *Update Division 5, s13(3) to specify that a payment into the Biodiversity Restoration Fund must be sufficient to achieve a significant environmental benefit in the same Traditional Owner's Country in which the clearing is to occur.*

Robust State Biodiversity Data are critical to improving environmental management

We welcome the commitment in s159 to compiling, maintaining and updating State biodiversity data and making such data accessible. We are pleased to see the provision allowing for the setting of mandatory data sharing requirements within State biodiversity data regulations (s159(4)(b) and encourage the Government to utilise this provision with a focus on the sharing of interoperable environmental data that are of relevance to the biology, ecology, distribution/extent, condition or status of biodiversity in South Australia or broader state of the environment reporting. However, the use of this provision must not undermine the principle of free, prior and informed consent for Indigenous-owned data.

We recommend that, in addition to biodiversity data, the Minister also compile, maintain and update data on environmental impacts, including the data and information needed to enable robust and independent monitoring and evaluation of the significant environmental benefits scheme, and inform improvement of the scheme over time. This should include:

1. *A sufficient level of data and information to facilitate understanding of:*
    a. *The type and amount of loss approved at each development/clearing site;*
    b. *The type and amount of gain projected at each associated offset site, including the way in which gains are expected to be generated and the counterfactual assumptions against which projections have been made; and*
    c. *The actual gain achieved at each offset site, as tracked through time.*
2. *Public access to the data and information collected under 1(a-c) and searchability in relation to spatial boundaries and protected entities.*

Third party enforcement provisions send a strong signal

We welcome the inclusion of standing provision for third party enforcement of breaches of the Act. However, we note there are no provisions to allow third party judicial review of decisions. Similar provisions in the *Environment Protection and Biodiversity Conservation*

[5] We put forward that if the Chair of the FNEBC were a public servant, this could create a real or perceived conflict of interest.

Act 1999 have not led to frivolous or vexatious cases and have not led to an undue burden on the Court.[6]

We recommend that additional provisions also be included to allow for third party judicial review of decisions.

Other positive elements of the Draft Bill

In addition to the measures described above, we welcome a number of other positive provisions of the Draft Bill, including but not limited to:

- Modernized objects of the Act which are strongly centered around conservation and restoration (s7);
- Provisions enabling the Minister to make a provisional listing to provide additional protections for a native species or ecological community for a temporary period or until such time as a full assessment is undertaken (s76);
- Provisions enabling, and in certain circumstances requiring, the Scientific Committee to undertake an Extinction Inquiry into the potential risk of extinction of a native species or collapse of an ecological community (s80);
- The ability to make critical habitat declarations (s82) and the establishment of offence provisions relating to unauthorized destruction, damage or disturbance of critical habitat; and
- Exemptions from the requirement to obtain permits for the clearing of native plants when that clearing is to be undertaken for the purpose of conserving, managing or restoring biodiversity (Schedule 2, s25).

The Biodiversity Restoration Fund and Biodiversity Conservation Fund are narrow in scope and fail to learn from the shortcomings of other jurisdictions

While the Wentworth Group welcome the intent of establishing funds to facilitate the protection and restoration of biodiversity in South Australia, we are concerned that the Funds as currently proposed lack ambition and introduce the potential for perverse outcomes, as documented below.

Payments for destruction

We understand that South Australia currently provides an option for a person to offset the clearance of native vegetation by making a payment into the Native Vegetation Fund if the achievement of an on-ground significant environment benefit is not possible. The use of similar payment models in New South Wales and Queensland has resulted in an accumulation of unfunded compensation requirements where the 'fund' has been unable to find or secure like-for-like offsets.

Environmental offsets are intended to compensate for impacts by offsetting losses at one location with "like-for-like" gains (i.e., equivalent benefits to the same protected entity that suffers the loss) at a secondary location. However, in practice, environmental offsets

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

are increasingly well recognised as being poorly implemented and governed[7] with the potential to contribute to further environmental decline.[8]

We are greatly concerned by the proposal to enshrine South Australia's existing payment pathway in the Draft Biodiversity Bill (s48(5) allows an applicant to apply to make payment into the Biodiversity Restoration Fund in lieu of a requirement to achieve a significant environmental benefit if, under s48(4)(c)(ii) they can provide information establishing that it is not possible for the applicant to achieve a significant environmental benefit).

To enshrine this payment pathway in the Biodiversity Bill runs the risk of replicating the problems prevalent in other jurisdictions and would be at odds with the objects of the Draft Bill, particularly s7(b) "to protect, restore and enhance biodiversity such that there is an improvement in the state of biodiversity at all scales….". Unless impacts to protected matters are prohibited, avoided, or minimised, AND residual impacts are compensated for in full, we will by definition continue to see further declines in biodiversity, and accelerating extinctions of species and collapse of ecological communities.

We recommend that the proposed payment pathway described above be removed from the Draft Bill.

Lack of a legislated investment plan and inappropriate expenditure of funds

Efforts and ambitions to recover threatened species and ecological communities regularly suffer from chronic underspending, often leading to a failure to halt decline and commence recovery of the majority of listed matters. At the national level, even when robust conservation plans and threat abatement plans are developed, there is rarely any funding to implement the actions identified in the plan or establish inter-disciplinary recovery teams. Even when this happens, there is rarely rigorous assessment of effectiveness. Funding programs can be ad-hoc and short-term and are not often implemented in a coordinated manner, reducing the overall effectiveness of existing investments.

To avoid this issue arising in South Australia, we recommend the development of legislative provisions to require the Government to develop and implement a whole-of-portfolio investment plan to guide the expenditure of funds in the Biodiversity Restoration Fund and Biodiversity Conservation Fund. *This plan should limit expenditure to activities that can be reasonably expected to contribute to the achievement of the objects of the Act. All examples of proposed expenditure that is inconsistent with the objects of the Act, should be removed from the Draft Bill, for example:*

> *s38(4)(c) which would allow the Minister to apply any portion of the Biodiversity Conservation Fund to "programs for the benefit of an industry requiring a permit under this Act"*

[7] ANAO 2020, *Auditor-General Report No.47 2019–20 Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office, Canberra, June. CC BY 3.0.
[8] Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October. CC BY 4.0.

Recognising the scale and value of the Indigenous estate when allocating funds

Up to 57% of the Australian continent is encompassed within the recognised Indigenous estate, including a wealth of high conservation priority lands and 46% of the formal National Reserve System[9] and 376.9Mha of threatened species habitat, about 51% of the national range of threatened vertebrate species.[10]

We recommend that a portion of funds from both the Biodiversity Restoration Fund and Biodiversity Conservation Fund be used to facilitate the participation of First Nations persons in protection and restoration activities, and that this portion be of a scale representative of the size and value of the Indigenous estate in South Australia.

Significant discretion in the granting of consents, permits and authorisations could undermine many of the protections established in the Draft Bill

We are concerned that the Draft Bill lacks clarity and provides significant scope for discretion in relation to the granting of consents, permits and approvals to carry out or undertake a regulated act or activity. There are numerous circumstances in which the protections established within the Draft Bill for threatened species, ecological communities and other protected entities can effectively be turned off, with a lack of adequate guardrails to restrict the misuse of approval powers.

We point to s50 as an example. In the first clause it is stated that consent cannot be given to clear native plants if the stratum is substantially intact (s50(1)), then in the very next clause its stated that consent can in fact be given in specified circumstances (s50(2)), with a wide array of development activities listed among the specified circumstances (s50(12)). This section then goes on to detail how payments into the Biodiversity Restoration Fund may affect the consent process (s50(3)), states that consent cannot be given if the decision would be seriously at variance with the principles of preservation of native plants (which have yet to be developed) (s50(4), and subsequently states that consent can be given in contravention of s50(4) if particularly circumstances justify the giving of consent (s50(6)). A concept of significant environmental benefit is then introduced in the same provision, however the application of the test raises two major red flags: firstly, the determination of a significant benefit appears to be largely discretionary, and: second, a benefit that has already been achieved may be counted as the justification for allowing a future adverse impact.

We have not provided an exhaustive list of sections of the Draft Bill where approval powers could be strengthened, instead we draw your attention to a number of key concepts that could be applied to considerably strengthen the Draft Bill.

We recommend that the Minister be subject to the same requirements as Councils established under the Act to develop an annual report (s33) *documenting the work of the Minister in carrying out their functions and achieving the objects of this Act during the previous financial year, and that this report be published on a publicly accessible website.*

[9] Goolmeer, T., Skroblin, A. & Wintle, B.A. 2022. Getting our Act together to improve Indigenous leadership and recognition in biodiversity management. Ecological Management & Restoration, 23, S1, 33-42.
[10] Renwick A.R., Robinson C.J., Garnett S.T., Leiper I., Possingham H.P. and Carwardine J. 2017. Mapping Indigenous land management for threatened species conservation: an Australian case-study. PLoS One 12.

Significant environmental benefit

We recommend strengthening the definition of a significant environmental benefit as follows:

> *Significant environmental benefit: means across **affected sites** there is an **absolute increase** over an **ecologically meaningful timeframe** in the viability of the **threatened species**, **ecological community** or **migratory species**, whereby viability means the ability of the species or community to survive and recover in the wild.*
>
> *For the purposes of this definition:*
>
> - ***Absolute increase**: means, across affected sites, the number of a given thing (for example, quality-weighted hectares or number of individuals) is greater following the action and offset than it was prior to the commencement of the action.*
> - ***Affected sites**: means the site that is being impacted and any associated offset site(s)*
> - ***Ecologically meaningful timeframe**: means a timeframe in which the benefits of the offset can accrue before the impact of the action is too great to be compensated for in full. Noting this timeframe will be different for different entities and will need to be determined based on the ecological needs of the specific affected matter, including consideration of the immediacy of the threat of extinction.*

This definition should be reflected in decision making provisions to ensure that consents, permits and authorisations will, based on the best available scientific evidence, result in a significant environmental benefit for the protected entity in question.

In addition, we recommend enshrining a like-for-like requirement in legislation and applying it to all parties that may acquire an obligation to deliver a significant environmental benefit.

Cumulative impacts

In 2023, the Wentworth Group provided a report to Government with detailed recommendations on the practical solutions needed to address cumulative impacts to matters of national environmental significance. Many of the recommendations in that report are also applicable here.

We recommend considering the inclusion of cumulative impact provisions with the Draft Bill, as follows:

1. *Inserting an additional object in the Draft Bill to "to consider and address adverse cumulative impacts to biodiversity in South Australia";*
2. *Inserting a definition of impact that recognises:*
    a. *An event or circumstance is an impact of an act or activity taken by a person if:*
        i. *the event or circumstance is a direct consequence of the act or activity; or*
        ii. *for an event or circumstance that is an indirect consequence of the act or activity, the act or activity is a substantial cause of that event or circumstance.*
    b. *An impact may:*
        i. *be a consequence of an individual act or activity;*

ii. *be a consequence of an individual act or activity in the context of other past and/or present acts or activities (whether or not they require a consent, permit or authorisation under the Act);*

iii. *be a consequence of an individual act or activity and present and/or reasonably foreseeable future environmental conditions, including climate conditions; or,*

iv. *any combination of the above.*

3. *Updating decision making provisions to ensure that the decision maker has considered the potential adverse cumulative impacts that may arise if approval of the act or activity were granted and accounted for these in the setting of any requirement to deliver a significant environmental benefit.*

This could be further strengthened through the introduction of a provision requiring the Minister to prepare one or more set of guidelines, in writing, to provide guidance on how to undertake an assessment of cumulative impacts. Guidelines should address but not be limited to such matters as how far into the past and future the assessment should apply, the appropriate spatial scale within which cumulative impacts should be considered and the baselines to be used to assess the significance of the impact.

Unacceptable impacts/Irreplaceability

A fundamental principle of ecologically sound biodiversity offsetting schemes is that not all impacts can be compensated for; in other words, some things are simply not replaceable in a like-for-like manner, in an ecologically meaningful timeframe or in a given geographic region. In these circumstances, where avoidance and minimization are not feasible, impacts must not be allowed to occur, unless we wish to accept the continued decline of biodiversity and potential loss of species or ecological communities.

We recommend clearly and comprehensively identifying irreplaceable biodiversity values and setting thresholds for the protection of these values.

Climate change considerations

Climate change poses a significant threat to the viability and persistence of threatened species and ecological communities and is one of the greatest threats to our environment more broadly. The impacts of climate change, and the underlying drivers of those impacts, will have a profound effect on the long-term survival of species and ecosystems, yet this is not adequately addressed under the Draft Bill.

We recommend that provisions be inserted in the Draft Bill requiring that when a decision maker is determining whether to grant a consent, permit or authorisation for an act or activity, they consider whether that act or activity will or is likely to increase risk, frequency or severity of climate change impacts on entities protected under the Act.

We further recommend that provision s82(3) be expanded so that the eligibility of habitat to be declared as critical habitat also includes consideration of potential species range shifts under climate change (e.g., habitat that is not occupied by a species or ecological community now may be critical to its future survival under a changing climate).

Conclusion

The Wentworth Group again reiterate our support for South Australia in taking this first step towards the introduction of the State's first biodiversity legislation. However, we encourage the South Australian Government to be more ambitious and to undertake the revisions needed to ensure that the new legislation is best equipped to protect and restore the State's unique and precious biodiversity.

The Wentworth Group would welcome the opportunity to engage with the Government and Department on this matter further.