



**Biodiversity  
Council**

# Submission to South Australia's Draft Biodiversity Bill

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## ***About The Biodiversity Council***

The Biodiversity Council brings together leading experts including Indigenous knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. The Council was founded by 11 universities with the support of Australian philanthropists.



## Introduction

The Biodiversity Council welcomes the opportunity to provide feedback on South Australia's Draft Biodiversity Bill ('the Bill').

South Australia's biodiversity is in steep decline and we see no sign that the decline is being reversed. The abundance of threatened species has declined about five-fold in the past 50 years.<sup>1</sup> The 2020 Threatened Bird Index shows that between 1985 and 2020, South Australia's Threatened birds declined by over 90% on average, the worst of any Australian State or Territory.<sup>2</sup>

This draft Bill puts forward the South Australian government's plan for how to best care for biodiversity within the state. The bill was developed as a response to declining biodiversity in South Australia, and increasing threatening processes. By designing this bill to consolidate the *Native Vegetation Act 1991* and *National Parks and Wildlife Act 1972*, South Australia is on its way to safeguarding the longevity and health of the state's biodiversity.

The creation of such a bill is a critical step in the conservation and restoration of biodiversity, especially on a statewide, cohesive scale. The Bill demonstrates that South Australia is leading the Country in protecting cultural environmental values and supporting First Nations self-determination.

As currently drafted, we are very supportive of the Bill, in particular:

- The introduction of a new general duty requiring anyone undertaking an activity to take reasonable and practicable measures to avoid non-trivial harm to biodiversity.
- The increase in penalties for illegal land clearing. Too often the cost of illegal land-clearing fines are so small they can be factored into business operations so they do not act as a deterrent.
- Enabling third parties to take civil action in the Environment, Resources and Development Court against individuals who, and businesses that, breach the Act.
- The creation of a 'First Nations Expert Biodiversity Committee' (FNEBC) to support First Nations peoples to provide advice about the way the environment is managed.
- This listing of Culturally Significant Biodiversity Entity in the legislation.
- The independence of the new Scientific Committee.
- The definition of 'native plant' to include any plant indigenous to Australia, rather than a plant indigenous to South Australia, noting that there are a small number of native plant species that have become over-abundant (e.g. Coastal wattle *Acacia longifolia*).

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[https://tsx.org.au/tsx2024/?type=all&tgroup=All&group=All&subgroup=All&state=South%20Australia&status=Max&status=NT\\_VU\\_EN\\_CR&management=All&refyear=1985](https://tsx.org.au/tsx2024/?type=all&tgroup=All&group=All&subgroup=All&state=South%20Australia&status=Max&status=NT_VU_EN_CR&management=All&refyear=1985)

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[https://tsx.org.au/tsx2023/?type=all&tgroup=Birds&group=All&subgroup=All&state=South%20Australia&status=BirdActionPlan&status=NT\\_VU\\_EN\\_CR&management=All&refyear=1985](https://tsx.org.au/tsx2023/?type=all&tgroup=Birds&group=All&subgroup=All&state=South%20Australia&status=BirdActionPlan&status=NT_VU_EN_CR&management=All&refyear=1985)

The Biodiversity Council has identified opportunities to improve parts of the Bill. These are:

- primacy of the new Act
- strengthening critical habitat provisions
- establishing a levy for the Biodiversity Conservation Fund
- implementation considerations
- specific amendments to provisions to ensure better outcomes for First Nations including cultural heritage, healthy Country and self-determination (see Table 1).

### **Primacy of the new Act**

Section 4(1) of the Bill states that:

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.

This provision appears to make the new Act explicitly subordinate to other legislation. This has significant implications if the Ministers responsible for mining or land-use legislation, such as the *Planning, Development and Infrastructure Act 2016* (SA) or the *Mining Act 1971* (SA) approve projects which impact on biodiversity. The [Henry review](#) into the *Biodiversity Conservation Act 2016* (NSW) found the Act failed to achieve its objectives because the provisions of the Act were too limited in scope and because the Act lacked statutory primacy. This is clearly a risk for the proposed South Australian Biodiversity Act as well. In order to ensure that its objects are achieved, the Bill should be amended to ensure that the responsible Minister has the power to refuse specific individual, proposed actions that will have an unacceptable impact on biodiversity that may be received and considered through other decision-making systems, such as land-use planning and mining.

### **Strengthening critical habitat provisions**

Section 82(3) of the Bill defines critical habitat as that which 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. Critical habitat thus defined, is fundamental to the survival, conservation and recovery of threatened species. The United States has strict limits on the destruction or disturbance of critical habitat which has contributed to maintaining or recovering populations of many threatened species.<sup>3</sup> By contrast, provisions in Australian Federal and State legislation that are intended to protect critical habitat have universally failed to do so.<sup>4</sup>

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<sup>3</sup> Biodiversity Council 2023 *Delivering on nature positive: 10 essential elements of national environmental law reforms*. Biodiversity Council. Melbourne, Australia

<sup>4</sup> <https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>  
<https://www.edo.org.au/wp-content/uploads/2022/07/Assessment-of-the-adequacy-of-threatened-species-planning-laws.pdf>

The Bill provides an opportunity for South Australia to lead the country in the declaration and protection of areas of critical habitat.

The Bill provides broad public standing for third parties to apply to the Environment, Resources and Development Court (ERD Court) to enforce that Act. However, it severely limits standing for review of decision-making under the Act. Section 144 of the Bill provides for review of Ministerial decisions by the South Australian Civil and Administrative Tribunal. However, it only applies to a person who has applied for a permit to take a protected animal or protected egg. This should be expanded, particularly for decision-making that impacts critical habitat as they are so fundamental to meeting the objects of the Bill, especially 7(a) and (b).

Section 86 of the Bill enables the Native Plants Clearance Assessment Committee (NPCAC) to give consent to destroy, damage or disturb critical habitat. Section 87 of the Bill states that “NPCAC must not give consent under this Division unless satisfied that the proposed destruction, damage or disturbance of critical habitat features of critical habitat will not cause or contribute to an increase in the risk of extinction or collapse of the threatened species, threatened ecological community or listed ecological entity that was the basis for the habitat's eligibility to be declared as critical habitat.” Section 89 requires the NPCAC to undertake consultation as required by the regulations and publish reasons for its decision on the Biodiversity Register.

The determination of whether habitat destruction, damage or disturbance will increase extinction risk requires input from scientists who are experts on the species or ecological community in question. If following a decision, reasons provided by the NPCAC do not reflect best available evidence, then there should be broad standing to call for a review of the decision by the ERD Court. The regulations should require an adequate consultation process (open to the public for a minimum of 28 days and published on the YourSay website). Provided that they do, then an appeal right could be modelled on [Section 8.8](#) of the New South Wales *Environmental Planning and Assessment Act 1979* which allows any person who made a submission by way of an objection during the public exhibition of the application for development consent which was granted, to appeal to the [NSW Land and Environment} Court.

Section 148 of the Bill enables the Minister to permit the take of plants from critical habitat “if satisfied that the taking of the native plant will not cause or contribute to an increase in the risk of extinction or collapse of the threatened species, threatened ecological community or listed ecological entity that was the basis for the habitat's eligibility to be declared as critical habitat”. In making this determination, the Minister may have regard to any previous or proposed offset, including payment into a fund to offset impacts.

Offsetting critical habitat that is fundamental to the survival of a threatened species or ecological community is problematic. Offsets are often subject to time lags, which means that it may be many years before we know if, and when, it is effective at compensating for

loss.<sup>5</sup> Offsets that provide suitable habitat for threatened species are likely to be difficult to source due to the fact that most threatened species face significant habitat declines. To achieve recovery of threatened species and ecological communities, then any suitable areas should be subject to protection and management anyway, so there is a fundamental question about what additional ‘gain’ is provided by the offset that is equal to, or exceeds the loss. It would be highly beneficial if decisions made by the Minister to allow offsetting of critical habitat were subject to review. Unlike consents to clear critical habitat granted by the NPCAC, the Minister is not required to consult on decisions to permit the take or plants from critical habitat and is not required to publish reasons for their decision on the Biodiversity Register. This is a glaring gap. The consultation and publication requirements of the NPCAC should apply to Ministerial decisions under Section 148. We would then also recommend that the appeal rights modelled on [Section 8.8](#) of the New South Wales *Environmental Planning and Assessment Act 1979* should be applied.

### **Establishing a levy for the Biodiversity Conservation Fund**

The draft Biodiversity Bill 2025 outlines the funding sources for the Biodiversity Restoration Fund (‘Restoration Fund’), Biodiversity Conservation Fund (‘Conservation Fund’) and the Biodiversity Administration Funds (‘Administration Fund’).

The Restoration Fund was previously the Native Vegetation Fund under the *Native Vegetation Act 1991*. As noted in the explanatory guide, the Restoration Fund will receive money from fees and penalties for native-plant related offences, payments ordered by the ERD Court and Significant Environmental Benefit payments. These are used for the research, preservation, enhancement, re-establishment and management of native plants. One of the main functions of the Restoration Fund is to provide offsets from Significant Environmental Benefit payments. Importantly, the NPCAC may determine whether the amount of the Significant Environmental Benefit payments is sufficient under Section 52 (1)(c). History has shown that the payments so far are grossly inadequate to compensate for the losses.

The Conservation Fund is intended for plant and animal conservation and research programs. The Conservation Fund receives monies from fees and penalties for offences not payable to the Restoration Fund or the Administration Fund, or for royalties paid under the Act. This is unlikely to provide a large pool of money. The cost of stabilising and ultimately recovering South Australia’s biodiversity is over \$200 million per annum.<sup>6</sup> To ensure that even a portion of this is available for plant and animal conservation on an ongoing basis, the Biodiversity Council recommends that the South Australian government introduce a biodiversity levy. The Victorian [Water Industry Act 1994](#) provides a useful model for development of the levy. Part 9 of the Act sets out the obligation for water authorities to pay

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<sup>5</sup> Maron, M., Dunn, P. K., McAlpine, C. A. and Apan, A. 2010. Can offsets really compensate for habitat removal? The case of the endangered red-tailed black-cockatoo *Journal of Applied Ecology* **47**(2): 348-355. <https://besjournals.onlinelibrary.wiley.com/doi/full/10.1111/j.1365-2664.2010.01787.x>

<sup>6</sup> Biodiversity Council. 2023. *South Australia’s biodiversity in a changing climate: the path to nature positive by 2030*. Biodiversity Council. Melbourne, Australia

an environmental contribution into the fund (sourced from charges on customer's water bills), the purposes on which it can be spent, and reporting requirements. A levy that would fairly distribute costs would serve the first object in Section 7(a) of the Bill - "to promote biodiversity conservation and restoration as a responsibility equally shared by all of society across all sectors and supported by individual accountability."

## **Implementation considerations**

### Investment

Legislation to reduce harms is not sufficient to maintain and recover biodiversity. Significant investment is also required. Numerous studies have shown that the recovery of populations and ecosystems is possible but expensive. Costs may increase over time as the rapidly changing climate necessitates dramatic and often expensive interventions such as assisted migration. It is estimated that the investment required to reverse the decline in South Australian biodiversity is about ten times the current investment in the environment. The biodiversity levy outlined above would be one source of funding. However, there are also opportunities for the South Australian government to work with philanthropists, eNGOS, the community and industry to fund biodiversity conservation. Collaboration and partnerships take time, and often require more flexible approaches to delivery. The South Australian government should consider the opportunities for increasing co-investment in biodiversity programs.

### Mapping

To achieve the objects of the Act it will be critical for the South Australian government to develop maps that identify important areas for biodiversity, such as critical habitat of listed threatened species and ecological communities, and areas where restoration investment would be most cost-effective for recovering biodiversity. This approach helps bolster avoidance by both the private sector and government agencies. Many jurisdictions have struggled to create and implement such maps. South Australia could build on the biodiversity mapping included in the draft regional plans developed by the State Planning Commission. It is crucial that biodiversity priorities are consistent across government strategies and plans to avoid adverse outcomes. The government should ensure that maps showing critical habitat of range-restricted endemic species are produced as soon as possible and are integrated into other strategies and plans such as the draft regional plans.

### Offsets

The final step in the mitigation hierarchy is biodiversity offsetting. All reviews of biodiversity offsetting in Australia have shown that it has failed to deliver no net loss of biodiversity. The investment in biodiversity offsetting monitoring and enforcement of successful offsets need to be substantially improved to meet the overall goals of the Act. The cost of offsetting will need to be more than doubled to approach the no net loss outcome that biodiversity offsetting is intended to deliver.

**TABLE 1: Specific amendments to provisions to ensure better outcomes for First Nations**

Bill section	Recommended change	Proposed amendments
3—Interpretation	Make reference to tangible and intangible cultural heritage	<b>Country</b> includes the lands, waterways, seas and all living things to which First Nations persons are connected through <b>tangible and intangible cultural heritage, including</b> language, knowledge, cultural practice and responsibility
3—Interpretation	Enable culturally significant biodiversity entities to include non-native species.	<b>Culturally Significant Biodiversity Entity</b> means a <b>native</b> species or ecological community to which some or all First Nations persons attribute cultural value and which is critical to their relationship with, and adaptation to, Country that is— (a) identified by the relevant First Nations persons as a Culturally Significant Biodiversity Entity in accordance with the biodiversity policy referred to in section 161(4)(b); and (b) recognised by the Minister as a Culturally Significant Biodiversity Entity in accordance with the biodiversity policy referred to in section 161(4)(b)
7—Objects	Strengthen the objective by making reference to fundamental rights by making reference to the <a href="#">United Nations Declaration of the Rights of Indigenous Peoples</a> .	(d) to recognise and respect that First Nations persons are the enduring custodians of the lands and waters of the State and have a fundamental role in, and knowledge of, caring for Country, including in relation to conserving and restoring biodiversity, <b>and that they have fundamental rights under the Declaration of the Rights of Indigenous Peoples;</b>
8—Principles	Make reference to supporting culture.	(a)that halting and reversing biodiversity loss, such that

Bill section	Recommended change	Proposed amendments
		<p>there is an improvement in the state of biodiversity, will require embracing new and transformative ways of thinking and acting to support the environment, <b>culture</b>, economy and wellbeing of today's generation and future generations</p>
15—Composition of Council	Council should include members with Indigenous knowledge.	<p>(2)(b) selecting a reasonable range of persons who collectively have skills, knowledge and experience in the following areas:</p> <ul style="list-style-type: none"> <li>(i) terrestrial biodiversity conservation and restoration;</li> <li>(ii) aquatic biodiversity conservation and restoration;</li> <li>(iii) local government;</li> <li>(iv) energy and resources;</li> <li>(v) scientific research;</li> <li>(vi) primary production or pastoralism;</li> <li>(vii) land use, urban or regional planning; 5 (viii) climate change adaptation</li> </ul> <p><b>(vii) Indigenous knowledge.</b></p>
15—Composition of Council	When appointing a person to the Council with Indigenous knowledge, the Minister must consult with South Australia's First Nations Voice to Parliament, a representative, legislatively created elected body for Aboriginal and Torres Strait Islander people in the state.	<p>(3) The Minister must consult with, and take into account the views of—</p> <ul style="list-style-type: none"> <li>(a) the Conservation Council of South Australia before making an appointment for the purposes of subsection (2)(b)(i) and (ii); and</li> <li>(b) the Local Government Association of South Australia before making an appointment for the purposes of subsection (2)(b)(iii); and</li> <li>(c) Primary Producers South Australia before making an appointment for the purposes of subsection (2)(b)(vi); and</li> </ul>



Bill section	Recommended change	Proposed amendments
		<p>(d) the Premier's Climate Change Council established by the <i>Climate Change and Greenhouse Emissions Reduction Act 2007</i> before making an appointment for 15 the purposes of subsection (2)(b)(viii),            (e) <i>South Australia's First Nations Voice to Parliament established under the First Nations Voice ACT 2023</i> for the purposes of subsection (2)(b)(viv),            and may consult with any other entity the Minister thinks fit.</p>
18—Composition of NPCAC etc	The NPCAC should include a male and a female First Nations representative.	(4) One member of the NPCAC must be a <b>male</b> First Nations person <b>and one member of the NPCAC must be a female First Nations person</b> who may, but need not, be a members of the FNEBC.
21—Composition of FNEBC etc	Unclear why this is inconsistent with Section 24 (5) Composition of the Scientific Committee. Under 24(5), the chair may not be a member of the public service, presumably to retain the independence of the Committee. This provision should be amended so that the chair of the FNEBC should <i>not</i> be a member of the public service to avoid perceived or actual conflicts of interest, or it requires clarification of why the FNBC chair can be a member .	(5) The chair of the FNEBC may <b>not</b> be a member of the Public Service
24—Composition of Scientific	The Scientific Committee should include a	(4) One member of the Scientific Committee must be a

Bill section	Recommended change	Proposed amendments
Committee etc	male and a female First Nations representative.	male First Nations person and one member of the Scientific Committee must be a female First Nations person who may, but need not, be <del>a</del> members of the FNEBC.
43—Clearing and taking of plants by First Nations persons	The exception for First Nations persons to clear or take plants should be expanded to include groups, not just individuals. This is to provide for communal sharing of resources and ensure that First Nations persons who receive plants legally taken are not committing an offence.	(2) Nothing in this Part prevents a First Nations person, or group, from clearing or taking a native plant for the purposes of satisfying their non-commercial personal, domestic or communal needs through use of the plant as food or for a cultural or spiritual activity.
78—Declaration of key threatening process	Include a requirement for the Minister to engage with First Nations persons and groups if it relates to a Culturally Significant Entity consistent with Section 77 (3) for action plans.	(c) If a declaration of a key threatening process relates to a native species or ecological community that is a Culturally Significant Biodiversity Entity, the Minister must undertake such engagement with First Nations persons and groups as the Minister considers appropriate, having regard to any relevant policy or document published under this Act.
82—Declaration of critical habitat	Include a requirement for the Minister to engage with First Nations persons and groups if it relates to a Culturally Significant Entity consistent with Section 77 (3) for action plans.	(6) If a declaration of critical habitat relates to a native species or ecological community that is a Culturally Significant Biodiversity Entity, the Minister must undertake such engagement with First Nations persons and groups as the Minister considers appropriate, having regard to any relevant policy or document published under this Act.