



Biodiversity Coordination Unit
Department for Environment and Water
GPO Box 1047 Adelaide
South Australia 5001

By email: biodiversityact@sa.gov.au

1 March 2024

RE: National Environmental Law Association Submission: Developing a Biodiversity Act for South Australia Discussion Paper

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to make a submission to the South Australian Biodiversity Coordination Unit in relation to the Discussion Paper (**Discussion Paper**).

1. About NELA and its interest in the Discussion Paper

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes directors with expertise in international and domestic legal frameworks for biodiversity conservation, ecological restoration, environmental and carbon markets, energy transition, climate change laws and policies, natural disasters, environmental regulation and regulatory theory, natural resource management and Environmental, Social & Governance (**ESG**) frameworks.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the International Union for the Conservation of Nature (**IUCN**) Australasia Chapter; and of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

The reform project that is underway in South Australia represents a critical and unique opportunity to develop the state's first biodiversity legislation – a statute that is fit-for-purpose, ambitious, adaptable and nation-leading. NELA is pleased to contribute to that project, drawing on its expertise and experience in environmental law reform at the national level and in other states and territories. NELA supports the goal of producing a Biodiversity Act for South Australia that will, as the Minister has suggested, 'prioritise the protection of biodiversity' (p 3) and reverse the trajectory of biodiversity decline in the State.

This Discussion Paper is important to NELA's members, particularly in South Australia, but also in other states where those members have and are participating in environmental law reform projects. NELA's members recognise the importance of clear, strong, transparent and ambitious laws for safeguarding Australian environments. NELA is grateful for the opportunity to make a submission.

2. The Discussion Paper Topics

NELA makes the following points in relation to the topics set out in the Discussion Paper:

- We broadly support the framing of each of the topics.
- We strongly recommend that, in designing legislation to reflect these topics, the South Australian government also plan for supporting infrastructure including, most crucially, appropriate resourcing.
- In particular, we strongly support the full implementation in legislation of points 1-4 under Topic 2, about avoiding impacts; and points 8-9 under Topic 4, about identifying biodiversity threats and mandating a response to those threats.
- In designing the legislation to implement Topics 2 and 4, in particular (including legislation that prioritises and provides guidance about avoidance, requires evidence to justify efforts to avoid and minimise harm, ensures that biodiversity is left measurably better off, identifies threats and creates obligations to address them), we emphasise the critical need to ensure that the proposed Act:
 - clearly articulates each relevant obligation;
 - is explicit and specific about who holds the obligation and how they can acquit it;
 - articulates when each obligation will arise; and
 - provides guidance about how the costs of meeting those obligations will be allocated; whether that includes incentives, a proponent having to bear all or some of the costs, opportunities to offset those costs through the taxation system, access to biodiversity and/or climate markets, or other arrangements.

3. Broader context for the proposed Biodiversity Act

3.1. Supporting South Australia’s achievement of Global Biodiversity Framework Target 3 – the area-based target

The Discussion Paper’s Topic 8 addresses Target 3 of the Kunming-Montreal Global Biodiversity Framework (the **GBF**), which is known as the ‘30x30’ target, to protect 30% of the area of the State – not limited to terrestrial areas but also freshwater, coasts and oceans – by 2030. We support the South Australian Government’s plan to implement mechanisms to achieve that target in the new Biodiversity Act. For a rigorous and valuable examination of what might be required to implement the target effectively, we commend the following resource to the Biodiversity Coordination unit:

Global Environment Facility, WWF and The Nature Conservancy, *30x30: A Guide to Inclusive, Equitable and Effective Implementation of Target 3 of the Kunming-Montreal Global Biodiversity Framework* (WWF 2023), www.iucn.org/resources/grey-literature/30x30-guide-inclusive-equitable-and-effective-implementation-target-3.

The Guide provides a ‘how-to’ for implementing, monitoring and reporting on this target, while maintaining, for example, policy coherence and recognising the limitations of monitoring, projections and competing values.

NELA supports the proposal from the Australian Land and Conservation Alliance that a new Biodiversity Act for South Australia represents an opportunity to establish an independent statutory Trust to broaden opportunities for private land conservation and restoration. We submit that the establishment of such a Trust could be a simple and effective mechanism to enable restoration alongside achieving strong legal protections for critical habitats on private land.

3.2. Achieving Global Biodiversity Framework Target 2 is also a priority – the restoration target

Equally important to the area-based target, is GBF Target 2: the restoration target. Under that target, parties including Australia have agreed to:

Ensure that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and marine and coastal ecosystems are under effective restoration, in order to enhance biodiversity and ecosystem functions and services, ecological integrity and connectivity.

This highly ambitious target requires countries to support and invest in large scale restoration measures to repair the legacy of environmental destruction across land- and seascapes.

At present, the Discussion Paper only refers to restoration under Topic 2 on ‘avoiding impacts’, and briefly in Topic 8 on ‘30x30’. Restoration is undoubtedly an important part of the avoid/mitigate/restore/offset hierarchy, but its role there is simply to support no net loss of nature as

part of a proposed development. The type of restoration contemplated by Target 2 of the GBF requires restoration far beyond that, to achieve significant net gains for nature, with efforts aimed at restoring ecosystem functions and connectivity. This major upscaling of restorative efforts can be supported by funding and other financial incentives, across both private and public tenures. NELA notes that there is an indication of funding for use of private land for this purpose, and this is welcomed.

The proposed Act provides the South Australian government with an opportunity to take leadership in Australia on progress towards Target 2 of the GBF, through including restoration as an object of the legislation (decoupled from development), and through including statutory machinery for public-led restoration, and funding for private restoration. On this point, drafting for South Australia's new Act could draw on the example of the European Union's new *Nature Restoration Law*, the details of which can be found here: https://environment.ec.europa.eu/topics/nature-and-biodiversity/nature-restoration-law_en.

We urge the South Australian government to place ecological restoration – and the goal of improving, enhancing and restoring South Australian environments – at the heart of its new Biodiversity Act, so that the Act will be a conservation-oriented law, rather than a development-oriented law.

3.3. The statutory goal of Ecologically Sustainable Development

As a rule, ESD principles have not proven to be a helpful and conservation-oriented guide for decision making in regulatory frameworks (see, Ken Henry's Review in 2023 of the Biodiversity Conservation Act 2016 (NSW)). The South Australian Biodiversity Act could take a number of different approaches as an alternative to the ESD framing. One approach that could be useful is to list a series of principles that can guide decision making under the Act ('directing principles', see p 5 of the following report: APEEL, *Foundations of Environmental Law: Technical Paper 1*, 2017, available at www.edo.org.au/wp-content/uploads/2022/06/APEEL-Technical-Papers-1-8-Compilation.pdf; and see the discussion on statutory objects, goals and principles in the ENREL submission to this review, cited below). To be clear, these would not be objects or goals of the Act, but principles to guide the process and focus of decision making.

The following examples should be investigated for inclusion in the South Australian Biodiversity Act:

- **precautionary principle** (framed in a way that requires decision makers to act decisively to protect biodiversity in the face of a potential threat, and to take a conservative, protective approach to any proposal to harm or destroy biodiversity);
- **principle of ecological integrity** (to draw decision makers' attention beyond individual species and ecosystems to their functions, health, resilience and integrity more broadly);

- **principle of cumulative impact** (to draw decision makers' attention to broader timescales and beyond the individual scenario that they have been presented with – such as an individual development proposal or an individual application to restore or enhance an ecosystem);
- **principle of restoration and enhancement** (this is less common than the others mentioned above and, as a result, perhaps even more important for inclusion – to ensure that enhancing and improving nature is at the forefront of decision making under the new Act); and
- **principle of Traditional Ecological Knowledge** (this has not been listed in other Australian legislation but NELA strongly recommends the specific inclusion of a principle that obliges decision makers to seek out and give weight to TEK as a guide for decision making under the Act. For more detail on what this principle may require, we refer to the submission on this point by the Biodiversity Council; and the Biodiversity Council's 10 Point Plan, discussed below).

4. NELA's submissions on *national* environmental law reforms and their relevance to South Australia's reform process

NELA has been an active contributor to national reforms in recent years. We **attach** two Position Papers which set out information that is likely to be relevant to the Biodiversity Coordination Unit's consideration of these issues: (1) Matters of National Environmental Significance and Priority EPBC Act Reforms; and (2) Environmental Offsets.

4.1. Matters of National Environmental Significance and Priority EPBC Act Reforms

In this Position Paper, we emphasised the following important considerations for national law reform, which we suggest are equally important in state legislation:

- **Legislate to achieve biodiversity recovery, not maintenance of the status quo:** the Act must include goals and substantive arrangements that embed environmental recovery and improvement. Relevant arrangements ought to include a positive obligation on government to prepare a recovery plan for any species or ecological community at the time of its listing as threatened (a requirement that is common elsewhere in the world, see e.g., the United States *Endangered Species Act 1973*, and the clear success that has flowed from this obligation to undertake and fully-resource recovery planning, see <www.govinfo.gov/features/ESA-50th-anniversary>). Recovery plans should include a list of the actions needed to prevent the species or community from declining further, and decision makers should be prohibited from approving actions that are inconsistent with a recovery plan.

- **Include strategic, landscape scale approaches:** consistent with the Henry Review of the NSW Act, and the Regional Planning process that the Australian Government foreshadowed in its Nature Positive Plan, regional or landscape-scale approaches to recovery and conservation can enable conservation of cryptic, abundant-but-ecologically-critical, and non-listed and non-charismatic species that are crucial for healthy and resilient landscapes, but often overlooked and unprotected by common conservation tools such as species listings.
- **Connect goals such as recovery with decision making powers and constraints:** NELA strongly recommends against terminology such as ‘have regard to’, which has been demonstrated in almost every review of environmental laws across Australia to be wholly insufficient to protect biodiversity. Broad discretion for decision makers typically results in far-weaker protections for biodiversity because ambitious action is less clearly supported by the legislation and thus more amendable to being overturned in litigation or political lobbying. Stronger statutory terminology, such as ‘further’, ‘act consistently with’, or ‘achieve’ are more likely to result in the Act being effective at conserving South Australian biodiversity.
- **Protect habitat:** a very large proportion of threatened species are directly threatened by habitat loss or conversion but ‘critical habitat’ protections are all but absent in Australian legislation. South Australia’s Biodiversity Act should recognise the crucial role that habitat plays in species persistence and ecological health and resilience, and provide an explicit and enforceable mechanism for protecting habitat (again, the United States’ *Endangered Species Act 1973* provides terminology for this kind of protection that has been heavily litigated but legally resilient and remarkably effective in practice, compared to Australian laws).
- **Make the connection between biodiversity and climate change explicit:** recognising the scale, speed and extraordinary threat that climate change poses for biodiversity will be very important in the new South Australian legislation. Climate is not the only threat to biodiversity, and other threats should be able to be identified and acted on (such as habitat loss, and excessive discretion for decision makers, as indicated above). However, climate change will require new and more adaptive forms of decision making (see pp 7-8 in the Position Paper), as well as adjusting the necessary focus of biodiversity laws. For example, species distributions will shift as the climate changes, undermining the clarity of what is ‘native’ to a particular area; and native species may become invasive in ways that demand active management and perhaps eradication – complicating historically ‘bright line’ distinctions and definitions (for more detail on this point, see the submission by the Environment Institute to this review).
- **Be creative in designing statutory tools for compliance:** best-practice compliance tools require sound and up-to-date data, monitoring, consistent and transparent reporting, National Environmental Accounting, tracking changes over time, mandatory approaches to learning, and

engagement with compliance hierarchies and, we recommend, with responsive forms of regulation (see Braithewaite, here: <https://johnbraithwaite.com/responsive-regulation/>).

4.2. Environmental Offsets

In the second of NELA's national Position Papers, we reviewed scholarship about biodiversity offsetting and made recommendations about what a best-practice arrangement for offsets might require. NELA has expressed reservations about the use of offsetting as a tool for environmental management, given the clear evidence that offsetting arrangements around Australia to date appear to have exacerbated environmental decline and loss.

Nevertheless, if environmental offsets are contemplated as a component of South Australia's new conservation laws, we urge the review team in South Australia to consider our recommendations for designing a market mechanism that is more effective than those currently in place elsewhere in Australia.

5. Other submissions

NELA supports the work of the Biodiversity Council, and its recently released 10 Point Plan for national environmental law reform.¹ This Plan is relevant to the South Australian Discussion Paper in the following ways:

- As a means to increase the involvement of First Nations People (**Topic 1**), the Biodiversity Council identifies the need to protect culturally significant entities through a listing process beyond threatened species listing. This is proposed to complement Indigenous heritage listing and would need to be accompanied by a realignment of policy and practice to promote the traditional management of culturally significant entities.
- Strong legal protections for critically important areas for threatened species and ecological communities are needed. Identifying, protecting and effectively managing critical habitats needs to be the highest priority to prevent species declines with conservation experts empowered to develop strategies and plans and investments made in their implementation and ongoing monitoring (**Topic 4**).
- Any new regulatory framework for improved biodiversity data (**Topic 7**) needs to be accompanied by major and ongoing investments for comprehensive data and supporting systems (including IT

¹ The 10 Point Plan is available here:

https://biodiversitycouncil.org.au/admin/uploads/Biodiversity_Council_2023_Delivering_on_nature_positive_10_essential_elements_of_national_environmental_law_reform_876c64a13a.pdf.

systems and funding of any new scientific committees (**Topic 5**). Continuous review of the state of the environment in South Australia, should be based on a consistent, integrated and comprehensive approach to natural capital accounting.

NELA has had an opportunity to review submissions to the South Australian Discussion Paper prepared by the following groups:

- Australian Land Conservation Alliance (**ALCA**);
- Biodiversity Council; and
- The University of Adelaide’s Environment, Natural Resource and Energy Law (**ENREL**) Research Unit.

We have referred to particular aspects of our support for the Biodiversity Council, ALCA and ENREL submissions in text, above.

6. Learning from other jurisdictions

In drafting the new Biodiversity Act for South Australia, NELA urges the Biodiversity Coordination Unit to learn from the scathing reviews that have followed statutory reviews of national and state legislation in Australia in recent years. NELA emphasises the value of learning from shortfalls in other jurisdictions, and taking the opportunity to improve on those legal frameworks that have come before it. In particular, NELA strongly encourages the Biodiversity Coordination Unit to avoid the shortfalls that have been demonstrated in the design, implementation and/or resourcing of other state and national environmental laws, which have prevented those laws from achieving their goals and, in fact, have presided over extraordinary biodiversity loss. Important examples include Allan Hawke’s and Graeme Samuels’ decadal reviews of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) published in 2009 and 2020, respectively; and the Ken Henry review of the *Biodiversity Act 2016* (NSW), published in 2023.

7. Conclusion

NELA appreciates the opportunity to make this submission to the South Australian Biodiversity Coordination Unit, in anticipation of a new Biodiversity Act in the state. We urge the Biodiversity Coordination Unit to be courageous in designing this law, and to avoid the pitfalls of existing legal frameworks that have resulted in such consistent biodiversity decline across this extraordinary continent.

NELA looks forward to further opportunities to participate in the consultation process as the reform project progresses. In the meantime, please direct questions about this submission to the Co-convenors of the NELA Publications, Advocacy & Submissions portfolio: Madeline Simpson and Phillipa McCormack at publications@nela.org.au.

This submission was drafted by Justine Bell-James, Sarah Brugler and Phillipa McCormack of the NELA Publications, Advocacy & Submissions Portfolio on behalf of the NELA Board.