EDO ENVIRONMENTAL DEFENDERS OFFICE (SA) INC

24 March 2015

Executive Officer

Environment, Resources and Development Committee

Email: erdc.assembly@parliament.sa.gov.au

Dear Mr Frensham

RE: Inquiry into South Australia's Biodiversity Conservation Laws

The Environmental Defenders Office (SA) Inc ("the EDO") is an independent community legal centre with over twenty years experience specialising in environmental and planning law. EDO functions include legal advice and representation, law reform and policy work and community legal education.

The EDO appreciates the opportunity to provide a submission to this Inquiry. We have worked extensively in this area over a number of years. We have made various submissions to other Inquiries, produced fact sheets and presented seminars on biodiversity law reform. In 2011 the EDO published "Land Biodiversity and the Law: the Case for Reform". Our submission builds on the ideas contained in this report.
http://www.edosa.org.au/reports

Executive Summary

The EDO submission has particular relevance to Terms of Reference 1, 7, 8, 9 and 10. It comprises a legal analysis of key South Australian legislation impacting on biodiversity conservation, protection and enhancement. Our finding is that there has been a general legislative failure to protect biodiversity. In our view this is due to three factors;

1. Inadequate legislation

Office: Level 1, 182 Victoria Square, Adelaide, SA
Post: GPO Box 170, Adelaide, SA, 5001
Phone: (08) 8359 2222 | SA Country Freecall: 1800 337 566
Email: edosa@edo.org.au | Web: http://www.edosa.org.au

2. Lack of coordination in the implementation of legislation
3. Lack of resourcing in the implementation of legislation

This submission will focus on the National Parks and Wildlife Act 1972, Native Vegetation Act 1991, Development Act 1993 and the Natural Resources Management Act 2004. There are a myriad of other Acts which impact on biodiversity conservation including the Mining Act 1971, Petroleum and Geothermal Energy Act 2000, Aquaculture Act 2000, Pastoral Land Management and Conservation Act 1989, Fisheries Management Act 2007, Marine Parks Act 2007 and the Wilderness Protection Act 1992. In our view these Acts, apart from the last two tend to compromise biodiversity outcomes as their focus is on exploiting resources not conservation. The EDO strongly supports the retention of marine park and wilderness protection laws as fundamental elements of biodiversity conservation in SA.

Whilst there are some useful biodiversity conservation measures in the National Parks and Wildlife Act 1972 it is out of date and needs a substantial overhaul. The Native Vegetation Act 1991 has a strong conservation focus but it's scope has been reduced through the creation of numerous and complex exemptions. Both Acts need better integration with the planning system to properly identify the impacts of planning proposals on biodiversity. The Development Act 1993 requires amendment to improve connection between biodiversity legislation and the planning system. The Natural Resources Management Act 2004 requires amendment to improve biodiversity protection. To assist with integration and oversight a Biodiversity Commission should be created.

Introduction

The EDO considers that biodiversity laws must be:

- Robust, clearly principled and enforceable;
- Science-based and evidence-driven;
- Strategic and integrated across the whole of government; and
- Supported by good governance, resourcing and accountability

Biodiversity laws should have positive objects for long term conservation and firmly embed the concept and long standing principles of ecologically sustainable development (ESD). Unfortunately this is not currently the case in South Australia with respect to certain legislation.

Summary of Recommendations

1. **Robust, principled and enforceable legislation**

    a. Strong, enforceable legislation (not policies or guidelines) designed to protect biodiversity, including native vegetation and threatened species
    b. Decisions are evidenced based and guided by the concept of ESD
    c. Includes obligation to maintain or improve environmental outcomes
    d. Threatened species legislation should have objects and such objects must be operationalised by decision makers
    e. Biodiversity laws must have open standing provisions for third parties to enforce breaches

2. **Science based and evidence driven**

    a. Decisions affecting biodiversity must be robust, transparent and science driven, and be underpinned by objective scientific assessment methodologies
    b. Developments with the most significant potential impacts must be subject to rigorous and comprehensive assessment
    c. Listing of threatened species, communities and ecological system must be based on scientific reasons provided by an independent scientific committee
    d. If there is prioritisation between species this should be based on scientific considerations and involve public consultation. Any Priority Action Statements should be mandatory considerations in strategic planning and development assessment.
    e. Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets should

be based on enforceable standards and be based on principles such as “like for like”. Indirect offsets should be avoided. The concept of “environmental red flags” should be used which recognises that some values cannot be offset. Offsets must be maintained in perpetuity, not subject to ongoing trade-offs.

f. Biodiversity laws and related decisions must consider climate change impacts, using adaption plans, buffers and adaptive management to enhance ecosystem resilience

3. Strategic and Integrated across government

a. Biodiversity protection must be integrated across all decision making processes such as those in planning laws, fisheries management, native vegetation protection and natural resource management.
b. To assist this integration, an independent statutory Biodiversity Commission or similar body should be created. The focus of the Commission should be on identifying, developing and implementing a whole of government approach which ensures that biodiversity protection is a genuine and fundamental consideration in planning and conservation decisions.
c. Comprehensive strategic environment assessments should be legislated, resourced and prioritised, to maximise the clear advantages of “landscape scale” biodiversity conservation. Assessment at a broad scale can better take into account cumulative impacts of a number of developments, better plan for strategic biodiversity corridors and enhance connectivity.
d. Protected areas (both marine and terrestrial) must be managed for conservation and only allow activities that are consistent with conservation goals.

4. Good governance, resourcing and accountability

a. Ecological consultants who perform environmental impact assessments (EIA) should be professionally accredited and be overseen by the Environment Protection Authority
b. Proper resourcing of agencies and government departments charged with achieving biodiversity outcomes. A biodiversity levy on development applications could be used to assist with resourcing.
c. Systematic monitoring, evaluation and reporting will aid long term effectiveness and adaptive biodiversity management. Collaboration across agencies to achieve comprehensive, accurate and genuine State of the Environment reporting.

A. National Parks and Wildlife Act 1972 (NPW Act)

The EDO submits that the NPW Act requires substantial amendment to increase its potential for positive biodiversity outcomes.

Objects, Administration and Terminology

The NPW Act needs to be modernised in all these areas.

EDO Recommendations

Amend NPW Act to;

- Include an overarching object to protect and conserve biodiversity and detailed objects as per section 3 Threatened Species Act 1995(NSW)
- Include a provision that the objects are operationalized by all decision makers under the legislation.
- Include modern terminology such as biodiversity
- Include a definition of biodiversity
- Include mandatory consideration of the precautionary principle in decision making
- Include mandatory consideration of climate change impacts in decision making.

Duty of Care

The NPW Act does not have a duty of care provision unlike other legislation such as the Marine Parks Act 2007[1]. A duty of care provides an active minimum standard by which land managers can gauge what is expected of them and what practices are acceptable. Benchmarks can be put in place to highlight 'best practice' for a particular industry or activity. These can be supported by guidelines or codes on ecological processes which articulate how the duty of care should be enacted.

Complementary approaches such as incentives and reward schemes can be used for those landholders who improve their land beyond the standard of the duty. For example, in Tasmania landowners who have entered in to conservation covenants are financially rewarded if they exercise a higher duty of care for the land than is normally required. Opposition to duty of care provisions tends to come from the agricultural sector who perceive a loss of property rights over their land and are concerned about whether it is fair for them to have the sole burden of meeting the costs involved. To assist with these concerns legislators could phase in standards or assist with costs for a limited time.

EDO Recommendation

Amend NPW Act to include a duty of care provision and associated incentive scheme.

Overview of threatened species protection

The NPW Act protects native animals and plants by classifying them as protected, and then places prohibitions on the taking and killing of protected species without a permit. If the survival of a species is under a particular threat, it may be further classified as endangered, vulnerable or rare.

EDO Recommendations

Amend NPW Act to:

[1] S37

- Extend definition of "take" to include habitat disturbance and unlawful removal.
- Remove Ministerial power to declare 'open season'[2] on protected animals
- Provide for a permit system with the following features:
    - Clear requirements as to what is required in an application for a permit;
    - Applications subject to environmental impact assessment;
    - Decisions are made according to the principle of no significant adverse effect to the wildlife in question and it's habitat or ecological community;
    - An appropriate level of public consultation;
    - Details of decisions to be on a Public Register and;
    - Third party review rights.

Listing

Currently, the Environment Minister makes a decision on listing upon receiving advice from the Department of Environment, Water and Natural Resources (DEWNR). The lists are contained in schedules to the NPW Act. We understand that DEWNR is giving consideration to removing the threatened species schedules from the NPW Act with the goal that they can be amended more frequently and better reflect the current conservation status of the listed species. The EDO is concerned that this may impact on the transparency of the process, however we are yet to see any detail of what is proposed.

EDO Recommendations

Amend NPW Act;

- To include a formal process for listing with the following features;
    - Public nomination process;
    - Public consultation;
    - Mandatory;
    - Independent;
    - Science-based;
    - To be listed;

[2] Allowing for the taking of protected animals of a specified species.

- threatened species (including fish, aquatic invertebrates and non-vascular plants);
- populations;
- ecological communities and;
- key threatening processes.

- Use of IUCN categories of threat
- Where listing occurs under the NPW Act this should automatically lead to listing under the Environment Protection and Biodiversity Conservation Act (1999) Cth (EPBC Act) and vice versa;
- Lists to be truly representative of the flora and fauna which is vulnerable or endangered in South Australia. There should not be a bias towards iconic species so attention should also be given to less well known insects, invertebrates and fungi. Adequate resourcing is critical here to enable agencies to carry out this important work;
- Concurrent determination of the critical habitat of the species, population or ecological community. Listing of critical habitat should be based solely on environmental considerations.
- A definition of critical habitat which includes an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife.[3]
- A process for emergency listing whereby a listed matter is given provisional listing and the Environment Minister has the power to make an interim protection order over land containing threatened species, populations and ecological communities or critical habitat;
- Addresses future climate change impacts. Biodiversity protection should not be triggered by the presence alone of threatened species. If an area is important for connectivity this should also be protected. Key functional groups (species which play an important role in maintaining ecosystem functioning) should be listed along with those that are likely to become threatened in the future under climate change and those species other than

[3] Nature Conservation Act (1992) Qld s13(2)

indigenous species if they have moved into South Australia in response to climate change;

    - When deciding whether to list a threatened species principles of ESD should only be taken into account in exceptional situations where the social or economic costs associated with listing are overwhelming and the environmental benefits are known to be slight;
    - Decisions are made in a timely way;
    - Reasons for decisions are made public;
    - Third party reviews and;
    - Reviews of lists to take place at least every two years.
- To provide for strategies covering the active management of species recovery and threats to biodiversity, supported by action-forcing provisions to ensure effective implementation of the strategies.

Compliance

The NPW Act's penalty and compliance regime needs to be overhauled and properly resourced. Regulators need to have a full range of compliance tools through both the civil and criminal law. The system should apply to both the public and private sectors to avoid jeopardy to threatened species, populations, ecological communities and their critical habitat. Rewards for behaviour which help to conserve biodiversity should be considered. Finally, the NPW Act should incorporate open standing provisions allowing third parties to enforce breaches as is provided for in the Development Act 1993[4]. This is a fundamental accountability mechanism.

EDO Recommendations

Amend NPW Act to:

- Increase penalties
- Enforcement tools to include;
    - criminal penalties for corporate executives;

[4] S85

- environmental audits;
- warning notices;
- civil penalties;
- orders to remediate, repair or mitigate damage that may, will or has been, caused to the environment. Remediation orders should be recorded on the title, provide that remediation take place on the cleared area, be made for an adequate period of time and all details placed on a public register.
- orders to repair or remove, mitigate or to prevent any damage that is likely to arise from the act or omission and relates to the environment;
- compensation;
- injunctions;
- forfeiture of property or financial benefits from breach and;
- publication of a contravention for which a person has been convicted or ordered to pay a penalty.

- Development of a rewards scheme for those who furnish information which leads to an arrest, criminal conviction, civil penalty assessment or forfeiture of property resulting from legislative breaches. Such persons may also receive monies to cover the reasonable and necessary costs incurred in providing temporary care of a threatened species pending any legal action.
- Publicly available information on monitoring and enforcement
- Open standing rights for third parties to enforce breaches of the NPW Act

Protected Areas

The establishment and management of protected areas is a key focus of the NPW Act. Reserves can be an effective way of conserving biodiversity through the establishment of comprehensive, adequate and representative network of large interlinked areas specifically protected by law. However there is a lack of transparency in the NPW Act. For example, there are no decision making criteria for the listing of protected areas and the purpose of

each such area is not clearly defined. They do not correlate with the 6 IUCN categories which is a global standard for defining and recording protected areas. These categories are a common language designed to achieve consistency amongst protected areas around the world. In addition the objects of this part of the NPW Act need to be clearly defined as per the Marine Parks Act 2007.[5] This problem makes it difficult to compare data across jurisdictions and to compare older and more recent data.

Further problems exist as National Parks, Conservation Parks and Recreation Parks can be constituted with exploration and mining access and as a result a number of them have mining access over all or part of them. Regional reserves by definition permit mining access. Regional reserves are appropriate as long as the concept is not used to do away with some proportion of land of full national park and conservation park status.

EDO Recommendations

- Review reserve system
- Management Plans should be subject to judicial or other outside scrutiny
- Management Plans should be regularly reviewed

Conservation on Private Land

The NPW Act has limited provisions in relation to conservation on private land. Sanctuaries are provided for and can be attractive to those who don't have many resources but would like to engage in biodiversity protection activities. However they are not subject to the same guarantees as national and conservation parks as they can be revoked by either the Minister or landholder so long term biodiversity protection is uncertain. Additionally they don't require management plans. Finally, they are not created in perpetuity and the undertaking of any management activity and reporting is voluntary.

EDO Recommendations

[5] S8

- Investigate the creation of a greater range of options open to land holders as in NSW including Conservation agreements, Nature Conservation Trust agreements, Property Vegetation plans, Wildlife refuges, Biobanking agreements, privately owned reserves and land acquisition organisation
- Options for private conservation be expanded but they should provide protection in perpetuity. This may reduce number of agreements but ensures protection is genuine and lasting.
- Land under agreement should be protected from any resource extraction activities
- Landowners should also be considered for rate relief and other assistance such as tax concessions, financial assistance with fencing materials, plant and animal surveys and stabilisation works[6].
- Arrangements should be listed on a public register.

B. Native Vegetation Act 1991 (NV Act)

Objects

The NV Act and the Native Vegetation Regulations 2003 (NVR) have been critical in reducing broadscale land clearing in South Australia. We support the broad objective of the regulatory scheme although do suggest an additional object on climate change.

A fundamental problem though is that the system has been compromised as many matters are determined by self assessment due to the exemptions listed in the Regulations. The system relies on honesty without an external arbiter giving consideration as to whether clearance should occur. This is exacerbated by the lack of a duty of care provision and third party appeal rights.

The application process itself lacks full transparency as applications are not publicly notified. Further issues include the Native Vegetation Council's discretion whether it hears from interested persons and the lack of any requirement for it to provide reasons for consenting to a clearance application.

[6] See for example National Parks and Wildlife Act 1974(NSW) S69

EDO Recommendations

- Consider amending scheme such that applications must be lodged for any clearance to occur, in line with the operation of exemptions under the Environment Protection Act 1993.

Amend NV Act to;

- Incorporate climate change as an object; for example" In making decisions under the NV Act, the contribution of broadscale clearing to South Australia's emissions of greenhouse gases should be recognised and considered, as well as the important role played by native vegetation as carbon sinks".
- Include a general duty of care provision and incentive scheme
- Include public notification of applications
- NVC must hear from interested persons in relation to clearance applications
- Require Application details on Register to include reasons for granting consent to clear

Exemptions

The exemptions allow for clearance of intact native vegetation in certain situations including activities such as fuel reduction, residential development and construction and maintenance of fence lines. Over the years the number of exemptions has increased and the detail within the exemptions has become quite complex. As a result they are now quite difficult to interpret and we believe they have contributed to a decline in South Australia's biodiversity

In our view the exemptions should be removed from the Regulations and included in the NV Act. This means that any proposed additional exemptions would be carefully scrutinised by both Houses of Parliament before coming into force. Currently exemptions can be added administratively through amendments to the Regulations.

However we do understand the Regulations are now under review by DEWNR and we hope that this results in improved biodiversity outcomes. We recommend the Review consider particularly the cumulative impacts on biodiversity of the various exemptions.

The Review's Stage 2 Report raises the issue of whether the exemptions should be activity or risk based. The starting point here is that the NV Act has two clear objectives[7]:

- "the conservation, protection and enhancement of the native vegetation of the State and, in particular, remnant native vegetation"; and
- "the limitation of the clearance of native vegetation to clearance in particular circumstances including circumstances in which the clearance will facilitate the management of other native vegetation or will facilitate the sustainable use of land for primary production".

These objectives set a clear benchmark against which any proposed changes to the NVR should be measured. Any changes to the permitted clearance regulations under the NVR or the clearance assessment methodology must be justified ecologically, rather than in terms of administrative streamlining.

The EDO opposes any weakening of environmental outcomes in the NVR as it would be inconsistent with the objectives of the NV Act. Improving or maintaining environmental outcomes is consistent with maintaining the long-term sustainability and resilience of SA communities, the SA economy and the SA environment. We are opposed to the risk-based approach and believe that the activity-based approach should be retained. The primary purpose of the risk-based approach appears to be improved efficiency and government cost savings. It involves:

- relaxing monitoring criteria and reporting processes;
- a significant shift from protecting remnant vegetation to allowing increased clearing;
- a significant shift of responsibility for NV protection from government to the private sector;

[7] S6

- a failure to acknowledge and address the "conflict of interest" position of the proponent in such a system; and
- providing fast-track assessment pathways.

Option 1: Activity Based Approach

The advantages of the Activity Based Approach are:

- The provision of certainty as to when, how and to what extent native vegetation ('NV") clearance will be permitted.
- Unqualified and inexperienced proponents are not required to identify NV species or assess their biodiversity value.
- NV clearance assessments/decisions are made independently of the proponent using objective "activity" criteria.
- Proponents are not placed in a "conflict of interest" situation where, under a *risk-based approach*, (a) they want to clear NV; (b) they are responsible for determining the risk-based pathway (low; medium; high), using extent and location risk criteria; and (c) either (i) the NVC uses that determination to decide the process to be used to assess the proponent's clearance permit application; or (ii) due to the determination, no clearance approval is required.
- Involves greater proponent and NVC transparency and accountability in regard to applications, exemptions and decisions.
- Enables comprehensive reporting and auditing of applications and decisions – prerequisites for maintaining the integrity of the system and maintaining community confidence in, and support for, the system.

Option 2: Risk Based Approach

The EDO is opposed to the risk-based approach.

In the Report, “improved efficiency”, “quick and efficient processing” and “rapid assessment and approval process (possibly automated)” appear to be the predominant reasons for the proposed shift from an activity based approach to a risk based approach.

This shift will require proponents to determine the risk-based pathway (low; medium; high), using extent and location risk criteria. That pathway determination will then be used to determine either the process for assessing the clearance application or that no clearance approval is required.

For example, the risk-based approach for “general clearance activities” (page 19, 1.1) places the emphasis upon the proponent to determine the appropriate risk-based pathway (low, medium, high) - using “extent” and “location” as risk criteria in a standard risk-assessment matrix. The proposed process amounts to “self- assessment” by the proponent in regard to the most appropriate pathway. The efficiency “rationale” is being given far too much weight, at the expense of, if not ignoring, then giving very little consideration to the objectives of the NV Act.

The EDO is concerned that:

- The evidence base to justify a risk-based approach is not provided.
- Evidence/assurances have not been (and cannot be) provided to guarantee that the same level of environmental protection will be maintained under the risk-based approach.
- The NVC is outsourcing its responsibilities to the proponent.
- The proponent is being asked to “self-assess” in circumstances where he/she has a clear personal and financial interest.
- The proponent will be required to use risk assessment skills that he/she is unlikely to possess. The effective implementation of the self-risk assessment requires a high degree of technical knowledge that many proponents will not possess. For example, species and vegetation community identification would be required; knowledge of best practice management approaches for invasive native species would be required; skills in the identification of habitat features in paddock trees would be required.
- Unless there is significant investment by the government in the ongoing provision of information and advice to, and the training of, proponents in the identification of NV

species and the risk-based approach, even the most conscientious proponents will struggle to meet the objectives of the NV Act and the risk-based approach requirements.

- Location risk assessment dependent upon (proposed) mapping, and not on site assessment, will result in incorrect assessments unless the mapping is up to date and accurate.
- By not having the threshold question of the application pathway independently and expertly determined, the risk of endangered/threatened species being cleared is greatly increased. How are threatened/endangered species going to be identified through self-assessment? Without a genetic analysis, many species can only be identified at certain times of year, for example when they are in flower, and many species consist of individuals with differing morphology.
- There will be very limited checks and balances to ensure the integrity of the pathway self- assessment system.
- Self-assessment processes are not capable of being effectively monitored or enforced. As a result they are not capable of adequately implementing the environmental objectives of the NV Act.
- The principles of clearance of native vegetation, contained in Schedule 1 of the NV Act, are the principles against which clearance proposals need to be tested. The proposed pathway self-assessment process is not capable of being effectively applied, monitored and enforced, and therefore will weaken the effectiveness of the principles.
- In a political environment of departmental resourcing cutbacks, there will be little opportunity for a proponent's pathway self-assessment to be properly examined and tested. The great advantage of activity based assessment is that the clearance criteria are objective and transparent.

The Victorian Risk-based Approach Experience

The concerns expressed above are confirmed by the experience in Victoria under the recently introduced risk-based approach, upon which the proposed SA approach is based. Only a little over a year after the introduction of a risk-based approach, the Victorian government is reviewing the system.

The identified defects in the Victorian system include the following:

- The reliance on inaccurate modelled datasets combined with the inability to contradict the result (unless you are a landowner);
- The inaccuracy of the specific maps that are generated by these datasets, resulting in significant valuable native vegetation not being recorded (and, as a consequence, cleared);
- Failure to confirm the accuracy of the maps through on-site assessments;
- Failure to specifically identify and value large old trees;
- Failure to properly identify the vegetation type being cleared and how depleted it is; and
- Facilitation of clearance permission through the reduction in the amount and type of information proponents need to supply, and a comparable reduction in the considerations a decision-maker is required to take into account in making decisions about clearance applications - both reductions achieved through reliance on (inaccurate) digital mapping.

EDO Recommendations

- The NVR must be robust, clearly principled and enforceable, science-based and evidence-driven and supported by good governance, resourcing and accountability.
- Changes to the NVR should not focus upon “improved efficiency”, “quick and efficient processing” and “rapid assessment and approval process (possibly automated)” at the expense of considered and effective protection of SA’s native vegetation.
- NVR should be designed to support a positive vision for long-term environmental stewardship in SA, consistent with the long-standing concept and principles of ecologically sustainable development.
- Cumulative impacts should be carefully examined
- Exemptions should be included in the NV Act
- Simplify exemptions but in that process ensure that any changes do not facilitate increased native vegetation clearance.

- Retain the activity-based approach but If the risk-based/self-assessment approach is to be adopted we recommend that:
    - Proposals to change from an activity-based approach to a risk-based approach must be evidence-based, explicitly include any value judgements applied and be guided by the concept of ecologically sustainable development (ESD).
    - Prior to the shift to the risk-based/self-assessment approach:
        - a comprehensive review of the current status of native vegetation across SA be undertaken. The review should examine the trends and drivers for retention and loss.
        - an independent audit of the current offset system be undertaken to determine whether it is delivering the required gains and if not to determine methods of ensuring this.
        - Simple but effective record keeping requirements should be imposed upon proponents. This is essential in order to determine if the revised scheme is actually meeting the objectives of the NVA. The information required should include: date, location, and type of clearing activity. It is in the interest of proponents to keep a basic record to assist them in responding to any compliance inquiries, and it is essential for the functioning and ongoing implementation and review of the NVA.
        - Natural Resources SA regional offices (and/or the NVMU/DEWNR Conservation & Land Management Branch) be properly resourced to maintain a clear compliance role, including a compliance presence in rural communities in order for the NV offence provisions to have a deterrence impact.

Compliance and Enforcement

There is a reasonable range of enforcement tools available to authorities. However to improve deterrence penalties could be increased with the Environment, Resources and Development Court (ERD Court) allowed to order penalties above $300 000 and remediation orders recorded on the title. In the interests of accountability we recommend as with the

NPW Act, that open standing provisions be inserted in the NV Act. Currently, officers can issue directions by way of an enforcement notice but may do so only if the breach has occurred within the previous twelve months. This time frame should be extended to two years to allow greater potential for prosecutions and to bring the system in line with contractual law.

EDO Recommendations

- Increase penalties
- Allow the ERD Court to impose penalties greater than $300 000
- Incorporate open standing provisions allowing third parties to enforce breaches
- Remediation orders should b;
    - recorded on the title;
    - provide that remediation take place on the cleared area;
    - be made for an adequate period of time and;
    - all details placed on a public register.
- Extend time frame for the application of section 31E to two years

Offsets

Many clearance activities currently require an offset (a Significant Environmental Benefit-SEB) to compensate for the loss of environmental values resulting from the clearance. SEB is not defined in the NV Act. We are concerned as to whether biodiversity offsetting is actually possible and if offsets are used , outcomes can be difficult to measure. In addition to the SEB scheme landholders can obtain credits for achieving additional environmental benefit. These are also determined by the Native Vegetation Council but there is little guidance in the NV Act as to how this scheme is to operate.

Our fundamental concern is that the SEB scheme is not sufficiently rigorous to guarantee the quantity and quality of native vegetation being preserved in the face of the threat posed by development and the profit opportunity it affords. There is a broad framework in the NV Act but further regulation is predominantly through guidelines which do not have legislative force. We

understand though that DEWNR is in the process of drafting new Regulations for third party offsets and credits.

The current Guidelines for SEB for Scattered trees purportedly has the goal of achieving environmental gains but in fact operate in the nature of a "lending bank". This means that where clearance of trees is approved for a purpose on site A that clearance approval is on the basis that site B, which already has trees on it, is preserved. This means that nothing additional is gained by the SEB. Rather, the SEB is simply stopping the trees on site B from being cleared, but no extra trees are planted. This is preserving the status quo, but not achieving an environmental gain as required by the Guidelines because the trees already existed. We are also concerned about instances we have heard of where the offset site has, in reality, no capacity or insufficient capacity for improvement when compared to the land cleared.

A different approach could be used where ecological assets are set aside or banked for the future and the block is managed over and above the standard set in a proposed duty of care. The block is only tradable once a mature stage (which is measureable) is reached, that is, once the gain has been achieved with the trader bearing the onus of proof to show a statutory body (which measures or audits the gain) that the gain has been achieved. Government incentives could be helpful as the gain could take some time to achieve. Further, the principle in based on fundamental "no go areas" which cannot be used for development and biomapping would inform this.

The objective of any offsets scheme should be to enhance environmental quality which recognises that the environment has been significantly degraded in the past and halting and reversing this decline is now a priority. The scheme must be appropriately rigorous to combat the threat of development. In other words, it is important that the scheme is not a simple economic exercise to "pay enough" in order to facilitate development. There must also be a rigorous system as to how funds paid in lieu of an actual offset are used for revegetation projects etc.

An important issue is the metric methodology to be used. We understand this is currently under review by DEWNR. There should be public consultation on this process and Information on the finalised methodology should be publicly available to improve transparency in the system.

Another important issue is monitoring and enforcement. Management plans should be used to cover such matters as the period over which monitoring will be required, funding for monitoring activities, circumstances in which remedial actions will be required, appropriate types of remedial actions, planning for unanticipated events such as bushfires, and responses to failed offsets.

EDO Recommendations

- An offsets scheme should;
    - Be set out in the Regulations;
    - Be drafted by an independent scientific committee with community input;
    - Operate according to the mitigation hierarchy;
    - Include "no go " areas informed by appropriate biomapping;
    - Only allow offsets to be approved if they provide a conservation benefit additional to what would otherwise occur which means that a net gain approach should be applied. Net gain is identified as 'where, over a specified area and period of time, losses of native vegetation and habitat, as measured by a combined quality-quantity measure[8] are reduced, minimised and more than offset by commensurate gains'[9];
    - Require that offsets be "like-for-like" which means that any impact on land of a particular environmental value must be offset through a site of the same environmental value**;**
    - Consider all direct and indirect impacts of proposed developments;
    - Consider cumulative impacts;
    - Allow for adaptive management supported by legal, financial and institutional arrangements including enforceability, monitoring and auditing;
    - Include publication of the finalized metric methodology;
    - Require offsets to be fully implemented and verified prior to clearance occurring;
    - Require offsets to be secured by a charge on the title to the land;

[8] Known as the habitat hectare measure
[9] Native Vegetation Management Framework for Action, 57

- Subject offsets to performance bonds to guarantee that those managing the land will deliver environmental outcomes in accordance with management plans;
- Have a rigorous methodology for calculating the SEB metric;
- Where money is to be paid in place of an offset this must be accompanied by a rigorous program to ensure appropriate pricing and;
- Be adequately resourced to ensure compliance.

C. Development Act 1993

It is not the primary biodiversity legislation that is having the most significant impact on biodiversity in South Australia. Planning laws and systems currently undermine legislated conservation objectives. The Development Act 1993 does not have specific conservation objectives. This section of our submission looks at the interaction of planning and biodiversity laws in South Australia. Development can have critical impacts on threatened wildlife, however these are not routinely considered. This issue has become more important in recent times as the Commonwealth government proceeds with its plans to hand over its decision making powers to the South Australian government in relation to development proposals likely to significantly impact matters of national environmental significance. If the Commonwealth Minister is no longer assessing and approving such projects the need for robust and transparent processes in the Development Act 1993 is even higher in order to protect, conserve and enhance South Australia's precious biodiversity.

This issue has been considered in the current review of South Australia's planning system. The Expert Panel in its publication "Our Ideas for Reform" noted that there is a particular lack of integration and fragmentation with respect to environmental law and policy and the planning system[10]. For example, there is a substantial lack of integration between the NPW Act and our planning system. Apart from the take provisions and the requirement for the Native Vegetation Council to consider threatened species status in a clearance application, there are no consequences which flow from the listing of species. Furthermore, the Panel

[10] Think Design Deliver August 2014

suggests adaptation of the precautionary principle to better enable interaction of environmental laws and policy with the planning system[11].

In its most recent Report the Panel has unfortunately made only token reference to integration and environmental objectives *("eliminate, minimise and mitigate adverse impacts on and contribute to the conservation, restoration and enhancement of (the environment) and promote sustainable use")* rather than a contemplation also of avoidance of such impacts and the promotion of ecologically sustainable development as the primary objectives of the planning system. This standard is not commensurate with the "avoid, mitigate, offset" hierarchy of principles which underpin the operation of the EPBC Act. In addition to strong environmental objectives there must be mandatory consideration of these in decision making.

However there are some proposals in this Report which we support provided there is adequate resourcing and appropriate community input. The Panel recommends that proposals should be assessed according to their level of risk and impact[12]. and in particular there is no routine environmental impact assessment (EIA) of proposals on threatened species.

EIA only occurs with major and Crown projects. The Planning Minister may declare a project 'major development', due to its 'major environmental, social or economic importance'. The Planning Minister has a high degree of discretion to declare a 'major development'. This takes it out of the normal planning process, and places key decisions in the hands of the Governor (i.e. the Cabinet). The Development Assessment Commission determines the level of environmental impact assessment to be undertaken for any major development.[13] It must undergo one of three levels of EIA before the Minister prepares an 'Assessment Report', and the Government makes a decision. Major mining and high impact petroleum activities most notably are assessed under these provisions through linkages with the Mining Act 1971 and the Petroleum and Geothermal Energy Act 2000.

[11] P125
[12] Reform 12.5
[13] S. 46 (7), (8).

The Panel also refers to the need for an increased use of Strategic Environmental Assessments. The EDO strongly supports the use of such assessments as they take a landscape view of biodiversity protection and are a very useful tool for long term planning. It is crucial that as with site specific assessment they are adequately resourced and there is comprehensive community consultation.

A final but critical issue is that Development plans often include broad conservation principles but lack the detailed provisions needed with respect to the protection of native animals and plants, critical habitat and ecosystems in addition to comprehensive biodiversity mapping. There is also little consideration as to impacts on biodiversity when plans are amended.

EDO Recommendations

Amend the Development Act 1993;

- To include ESD and mitigation hierarchy objectives;
- Decision makers must act consistently with these objectives and those in the NPW Act, NV Act etc;
- Include additional biodiversity protection objectives and principles in development plans;
- Allow refusal of Development plan amendments if they compromise biodiversity conservation to a significant degree;
- To incorporate a biodiversity impact assessment scheme with the following features;
    - Criteria as to when assessments are to be done and what level of assessment is to be done;
    - Process as to how impact assessment is to be done, for example by consultants who are selected and overseen by the Environment Protection Authority with funding from project developers , perhaps through a levy on development applications;

- Appropriate auditing or oversight framework including for example impact statement design and completed work needs to be peer-reviewed by independent scientists;
- Appropriate public consultation;
- Provision that decision makers can refuse consent for development proposals where an environmental assessment has shown that there will be an unacceptable impact on listed matters under the NPW Act.

- Strategic environmental assessment and accreditation should have the following features;
  - Mandatory required information standards which include verified site data and consideration of alternative development scenarios
  - Plans, policies or programmes for an area meet a "maintain or improve environmental outcomes" test as confirmed by the application of objective methodologies for biodiversity
  - Comprehensive requirements for public participation in both the assessment and accreditation process
  - Clear mechanisms (such as zoning) to provide for adaptive management and which deal with impacts at a fine scale that may not be foreseeable at the time of the assessment
  - Monitoring, auditing and reporting to ensure policy outcomes are being achieved.
  - Focusses on comprehensive mapping and addressing data gaps. Priority should be given to regions where there are known development pressures such as urban growth areas, environmentally sensitive coastal growth areas and resource development areas.
- Development Plans to include more objects and principles which seek to conserve biodiversity.
- Where it is proposed to amend a plan any change affecting biodiversity should be considered by an independent scientific committee. If impacts on biodiversity are likely to be to an unacceptable degree the consent authority has the power to refuse the amendment.

D. Natural Resources Management Act 2004 (NRM Act)

The NRM Act concerns the use of natural resources and the protection of natural resources so that they can be used, for example soil and water resources. It has some biodiversity protection provisions, however many aspects could be strengthened to improve biodiversity outcomes.

EDO Recommendations;

Amend NRM Act to;

- Broaden the criteria to be applied to interpreting the section 9 duty of care to include protection of biodiversity.
- Include a system of incentives for those who improve biodiversity outcomes
- Require State and Regional NRM Plans to set out the impacts on biodiversity of the use and management of natural resources and how these impacts can be remedied
- Require environmentally sustainable diversion limits to be included in Water Allocation Plans
- Provide that the Minister can refuse a water management authorisation if likely to significantly affect biodiversity
- Increase penalties generally
- Develop incentives to encourage compliance with the NRM Act

Please advise if you have any queries in relation to this submission. I would appreciate the opportunity to appear before the Committee.

Yours faithfully

Melissa Ballantyne
Coordinator/Principal Solicitor
Environmental Defenders Office (SA) Inc.