ENVIRONMENTAL DEFENDERS OFFICE (SA) INC.

A Community Legal Centre specialising in public interest environmental law

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PROTECTED AREAS ON PRIVATE LAND DISCUSSION PAPER

The Environmental Defenders Office of South Australia (EDO) is a community legal centre with over 15 years' experience specialising in public interest environmental and planning law. Engaging in law reform processes, including reviewing and proposing changes to environmental bills and legislation, forms an important part of our work and so we welcome the opportunity to make a submission with respect to this discussion paper.

We agree in principle that protected areas generally and on private land are an important part of efforts to protect, conserve and enhance biodiversity in South Australia in order to enable and enhance connectivity conservation; create biodiversity corridors which link core conservation areas and assist with adaptive management principles and techniques needed in the face of climate change.

Conservation on private land is particularly important given that in the agricultural region of South Australia, only 3.7% of remnant native vegetation (and the biodiversity inherent within it) remains[1].

However, there is insufficient evidence in the Discussion Paper supporting the reasons why Heritage Agreements **cannot** continue to operate as the only legally binding document covering reserves (or protected areas) on private land[2]. Even if the new proposed scheme is introduced, Heritage Agreements and Sanctuaries should remain in operation in order to capture those landholders who do not wish to be bound by the more stringent requirements of the proposed scheme.

[1] This is evidenced in the statistics in the State of the Environment Report which show that in the agricultural region of the State, (the part of the State where there is relatively reliable rain) 29.5% of the state remains uncleared (at page 174) and that 25.8% of the State is under protected areas (at page11). This appears to mean that in the agricultural region of the State 3.7% of the land remains uncleared. However, the Annual Report of the Native Vegetation Council 2009/2010 (at page 1) states to the contrary that, "the majority of remnant native vegetation is outside the formal National Parks and Wildlife parks and reserve system."

[2] The discussion paper provides at page 10 that "Heritage Agreements currently satisfy all of the establishment criteria for the National Reserve System", but suggests at page 11 that the voluntary nature of the obligations under Heritage Agreements means that "compliance with management criteria of the National reserve System is also voluntary".

There is concern that better enabling protected areas on private land will reduce the incentives for the State Government to continue to purchase private land as national parks and conservation areas and information should be provided to confirm that this will not occur.

We understand that better funding initiatives are available for protected areas on private land[3] and have heard anecdotally that this is a major driver for this Discussion Paper. If the Reserves on Private Land and Updated Heritage Agreements as proposed in the Discussion Paper are necessary for the purposes of obtaining funding then the issues set out below need to be considered.

Establishment of Reserves and Management Plans

The proposed Reserves on Private Land and Updated Heritage Agreements ("the proposed scheme") both require active management and reporting. This requirement is the fundamental difference with existing Heritage Agreements and Sanctuaries. There is concern that the requirement for management plans may become standard, that is, that the current heritage agreement will be phased out in future and that management plans will become a standard requirement for all Heritage Agreements. Whilst this should not impact current holders of Heritage Agreements, if this occurs it may result in onerous obligations on private landholders which potentially last in perpetuity and so may not encourage but rather may reduce support for protected areas on private land.

The National Parks and Wildlife Act (NPW Act)sets out management plan objectives and processes for public reserves which could have general application to protected areas on private land. It is important that the content of a plan strikes a balance between providing sufficient detail to further conservation objectives whilst minimizing the administrative burden on landowners.

Public input into plans and reporting on their effectiveness are important matters. The NPW Act provides for public input when a plan is being drawn up. Public input should also be called for whenever a plan is reviewed There should be a legislative requirement that plans be reviewed regularly, for example, every two to five years.

For both public and private protected areas the Minister for the Environment has an important role to play in monitoring the effectiveness of management. Reporting should occur regularly and be complemented by a well resourced compliance and enforcement team within the Department of Environment and Natural Resources.

To give appropriate recognition to the creation of reserved areas we suggest that this be done by way of proclamation. Further, in order to properly ensure the land is used as a private reserve, we agree that the reserve status would need to be in perpetuity. We recommend that the reserve status be noted on the title, rather than simply being recorded by way of a management agreement (which may have a limited term) so that the reserve

[3] Discussion Paper p4

status binds future purchasers of the land and so that the work undertaken on the land is not lost if a person uninterested in the conservation values of the reserve purchases the land.

Incentives

If the proposed scheme is to operate successfully, then appropriate measures (both encouragement and penalties) should be put in place in order to ensure compliance.

Financial incentives can include payments with respect to certified ecosystems services, carbon sequestration processes and tax and rate exemptions. Non-financial incentives include technical assistance, access to knowledge and advice, recognition amongst conservation community and the wider public and high levels of protection against threats to the conservation value of the land.

Of particular importance is the provision of substantial technical and financial support. Lack of such support has impacted the uptake of Heritage Agreements which can take up to 2-3 years to finalise. Trust for Nature in Victoria has facilitators to assist with the institution and operation of such agreements and equivalent positions (for example, along the lines of the previously existing Bush Management Advisors) should be provided for in South Australia to better enable the take up and management of the proposed scheme and the current schemes.

A variety of incentive schemes are used in Australia. The NSW Southern Rivers Bush Incentives Program[4] is run by the NSW Southern Rivers Catchment Management Authority (SRCMA) in partnership with the NSW Department of Environment and Heritage. The program currently employs an auction or tender approach to provide funding incentives for environmental activities. In practice, this involves:

- placing advertisements in local papers calling for expressions of interest and inviting landholders to contact named project officers;
- the landholder then consults with an officer for the purposes of assessing the site and developing a property management plan;
- when the plan is finalised, the landholder has 21 days to determine the cost of implementing it and how much money they will bid for. The landholder then lodges their bid with the SRCMA;
- when the funding round is closed, an independent panel assesses each bid and ranks them for funding on the basis of best biodiversity value for money;
- the successful landowners are notified and receive funding based on annual reporting and progress.

[4] http://www.southern.cma.nsw.gov.au/our_programs-projects_biodiversity.php

BushTender and EcoTender[5] in Victoria also use an auction or tender approach to improve the management of native vegetation on private land. These schemes are run by the Victorian Department of Sustainability and Environment. EcoTender is described as a more sophisticated version of BushTender, providing 'a more detailed way to evaluate tenders, based on potential improvements in salinity, biodiversity, carbon sequestration and water quality.'

The WA *Carbon Rights Act 2003* establishes a statutory basis for the ownership and protection of carbon rights, in order to facilitate trading. It enables a carbon right to be registered on the land title as a separate interest in that land.[6]

The Act also provides for the owner of a carbon right to enter into a covenant with any other person who may have an interest in the land (for example the owner or lessee of the land) for the purposes of protecting that right. This covenant may be in respect of any matter that may affect carbon sequestration or carbon release on the land[7]. Direct benefits from carbon sequestration will include income from the sale of carbon rights to parties who need to reduce their net emissions of greenhouse gases.

Additional financial incentives could be considered if a landowner exceeds a statutory duty of care[8] or any standards provided for in their management plan. Tasmania has a Private Land Conservation Program, pursuant to which, a landowner may enter into a Conservation Covenant which is legally binding under the Nature Conservation Act[9]. The landowner may apply for any compensation relating to compliance with the covenant[10]; however to qualify for this the Minister must be satisfied that the landowner exercised a higher duty of care for conservation of natural and cultural values on the land than is normally required[11]. The standard duty of care includes all measures that are necessary to protect soil and water values and the reservation of other significant natural and cultural values which is a level of up to 5% of the existing and proposed vegetation on the property for areas totally excluded from operations[12].

Compliance and Enforcement

There is concern that funding may be sought for commercial motives (such as tourism) and that the reserve may be inappropriately managed. As a result, breaches of the management plan should result in the downgrading of the reserve title and ultimately the removal of the reserve title.

Any enforcement should be managed by the Department of Environment and Natural Resources as it is removed from the day to day matters that, for example, the local Natural Resources Management Board undertake. There is also concern that the local Natural

5 http://www.dse.vic.gov.au (BushTender and EcoTender pages)

6 [7]*Carbon Rights Act, ss 5,6*

7 *Carbon Rights Act, s 10*

8 For example, section 9 Natural Resources Management Act 2004

9 Section

10 Section 41(1)

11 Section 41A(1)(a)

12 *Forest Practices Code 2000*, 52. Can be accessed at http://www.fpa.tas.gov.au/index.php?id=81, at 4 May 2011. Incentives are discussed further in the EPBC and the NRM Act sections of this Report.

Resources Management Boards are currently overloaded with management responsibilities and that landholders and other locals (who are members on Boards) may potentially be placed in the difficult position of sanctioning colleagues and fellow community members.

Termination

The Discussion Paper proposes that designated reserves and upgraded Heritage Agreements be terminated by agreement between the Minister and the landholder with an additional requirement with respect to Agreements that the Native Vegetation Council approve the termination**.** We support this proposal rather than the process of unilateral revocation which is currently used with respect to sanctuaries.

Pastoral Leases

The primary goal with respect to pastoral leases is the production of cattle in a sustainable fashion. This goal though can assist with enhancing biodiversity values, including the maintenance of native grasses and control of invasive weeds and feral animals. Therefore, pastoral managers can play an important stewardship role in maintaining the health of large areas of pastoral land.

In addition, the Pastoral Board has a statutory role of managing pastoral leases and is a decision maker on important issues such as change of land use. However, the Board's decision making lacks transparency as the *Pastoral Land Management and Conservation Act 1989* is silent as to any criteria to apply or process to follow including appropriate consultation. We recommend that consideration be given to making amendments to the Act setting out appropriate criteria and process.

As noted in the Discussion Paper the long term viability of pastoral lands is under threat due to the ever increasing impacts of climate change. Given this, pastoralists may be disinclined to pursue heritage agreements or protected area status with more stringent management and reporting requirements unless other incentives are provided.

If the proposed scheme is implemented on pastoral lands there needs to be a mechanism in place to ensure that the designation of protected areas is maintained when a lease is renewed or re-issued to another lessee.

Mining

The proposed model for determining land access for exploration on reserves on private land is based on the system used for Regional Reserves and mining activities under the National Parks and Wildlife Act.

It is proposed that the level of land access to a protected area be agreed to by the Minister for Environment and the Minister for Mineral Resources. This creates a conflict of interest for the Minister for Mineral Resources who has responsibility for both promoting mining and ensuring that it does not have adverse environmental impacts. This has the potential to compromise decision making by the Minister for Mineral Resources. As a result, the Minister for Mineral Resources should be consulted but not have decision making power. We agree

with the proposal that the Minister for the Environment seek the views of the landowner and stakeholders prior to proclamation.

With respect to the granting of an exploration licence it is proposed that the Minister for Mineral Resources consult with the Minister for Environment. The Minister for Mineral Resources then makes the decision as to whether or not to grant a licence and approve a Declaration of Environmental Factors. Given that mining presents as one of the greatest threats to biodiversity conservation, the Minister for the Environment should be required to give approval to these matters rather than simply having a consultation role. Additionally, consultation should occur with landowners and the general public.

Any approval for mining activity, including exploration should include stringent controls over the way in which mining activity is managed so that environmental impacts are minimized as far as possible. Mining companies should be required to engage in ongoing proactive conservation measures such as the planting of trees with the aim of leaving the site in better condition than when exploration and/or extraction activities were commenced. These measures should form part of the conditions for the granting of either exploration licences or mining leases.

With respect to pastoral lands the Pastoral Board decides on change of land use applications regarding both exploration and the development of actual mine sites. We have noted the deficiency in the Pastoral Act regarding these types of decisions.

Please contact either Ruth Beach or Melissa Ballantyne should you have any queries in relation to this submission.

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