



# Environmental Defenders Office

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## **RE: REVIEW OF THE NATIVE VEGETATION ACT 1991**

The Environmental Defenders Office (EDO) is the largest environmental legal centre in the Australia-Pacific, dedicated to protecting our climate, communities and shared environment by providing access to justice, running ground breaking litigation and leading law reform advocacy.

The EDO appreciates the opportunity to provide a submission to this review of the *Native Vegetation Act 1991* (the Act). South Australia's biodiversity including native vegetation is clearly a valuable asset and provides benefits to the landholder, the local community and the wider community. Professor Robert Hill, Director Environmental Institute, The University of Adelaide and Native Vegetation Council (NVC) Member, 2020 has expressed its value as follows:

"The living Australian vegetation is the end result of one of the great natural experiments. Forty million years ago, much of Australia was connected to Antarctica (as part of the supercontinent Gondwana) and it was largely covered in dense and diverse rainforest. However, Australia probably completed its separation from Gondwana by 30 million years ago and since then its biota evolved in isolation as the climate shifted from warm and ever-wet to the current, largely arid-dominated, climate. During this period the Australian vegetation evolved in response to changing climate to produce one of the most unique mosaics of vegetation types on the planet. At a fundamental level, Australian vegetation holds the key to many critical questions about the way vegetation responds to large scale, long term environmental change. The current Australian vegetation is also the result of 50,000 years of uninterrupted human interaction and again this is globally unique, but far from fully understood. Since European occupation, the vegetation has been cleared and altered in a way that is unprecedented throughout millions of years of prior history and that process continues at an alarming rate. We know far less about the vegetation, including its potential for human good, than most people realise – we have only unlocked a small fraction of the critical information that this unique vegetation holds. It is vital that we protect what remains of the vegetation, not just for current Australians, but so that future generations can appreciate and, in the most positive way, exploit what our vegetation has to offer."

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Our response focusses on the functioning of the Act and associated Native Vegetation Regulations (the Regulations) which provide the regulatory framework for the clearing of native vegetation in South Australia. The Act and the Regulations have been largely successful in preventing further widescale clearance particularly in South Australia's agricultural areas. However, unacceptable losses continue to occur as the Regulations allow clearance to occur in particular circumstances and in addition illegal clearing still happens. This is despite the Act's main object to "prevent further loss of the quantity and quality of native vegetation in the State"<sup>1</sup>.

The EDO understands around 500 000 hectares have been cleared since the Act commenced operation<sup>2</sup> and now only around 26 % of native vegetation remains across the agricultural districts of South Australia and about 10% in the Adelaide Hills area. In general, the vast majority of applications for clearance are approved particularly in relation to large infrastructure and resource projects such as roads, mining and solar power farms. There are many impacts of this loss which include pushing many State and federally listed threatened species to the brink of extinction and further decline to threatened ecological communities.

In our view there is an urgent need to improve protection of South Australia's native vegetation. We recommend a review of the efficacy of the entire system including the Act, Regulations and associated Policies and Guidelines<sup>3</sup>. This should be followed by reform to both legislative instruments and policy documents.

Currently applications are made under both the Act and the Regulations with most made under the Regulations. As a starting point there should be a detailed review of the changes made to the Regulations in 2017. The Regulations set out 39 clearance activities including 16 activities which require no approval or notice -these are self assessed. There are 14 activities which are in the risk assessment pathway which include major developments and projects, and mining and exploration activities for which approval is required. Problems with the assessment process include:

- a. Definition of native vegetation – limits the application of the Act to intact stratum . In our view all native vegetation should be covered even if degraded
- b. Developers have successfully advocated for two major exemptions in the Regulations namely the SA Motorsport Park at Tailem Bend and proposed developments in the Flinders Chase National Park on Kangaroo Island.
- c. The risk - based pathway includes simplistic and arbitrary criteria. To assess the level of risk of a proposal, the NVC considers the size of the clearance (area of clearance or number of trees to be cleared) and the presence of threatened species or communities (representing three of the 'Principles of Clearance' from the Act). However, listed threatened species or communities are not the only significant biodiversity matters and furthermore tree and patch size is not an adequate measure of ecological value. Arguably there needs to be a fuller consideration of "the likely impact to values of the native vegetation at the site". Assessments only consider the extent of risk and do not include location risk which would include consideration of the importance of vegetation for biodiversity conservation based on available data.

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<sup>1</sup> Native Vegetation Act 1991 s6(a)

<sup>2</sup> <https://data.environment.sa.gov.au/Content/Publications/SA-Land-Cover-Layers-1987-2015-Technical-Summary-pdf>

<sup>3</sup> Native Vegetation policies on SEB, Guidelines on roadside vegetation management

- d. Third party involvement in the application process is inadequate. Consultation with the public occurs with applications under section 28 of the Act and Level 4 applications under the Regulations. Comments can be made by any member of the public and anyone commenting can be invited to present to the Native Vegetation Council<sup>4</sup>. The consultation period is 28 calendar days. However, consultations do not occur for mining and petroleum activities. Consultations are not widely publicized as they appear only on the Department of Environment and Water website and not notified via platforms such as YourSAY or via a subscription service. The Council has a discretion to invite a submitter to attend in person, this is not automatic. There are no third party appeal rights nor enforcement rights which we would recommend be introduced especially for Level 4 applications.
- e. The operation of the offset (significant environmental benefit -SEB)scheme is problematic as permission for clearance can be gained in almost all circumstances provided an SEB is approved. It is difficult to obtain information on SEB monitoring and assessment. Compliance post-approval is reportedly low and in addition, the vast majority of SEBs are for “better management” of currently vegetated areas, meaning there is still extensive loss of vegetation. The current formula for calculating an SEB payment has we understand resulted in inadequate funding to undertake the required restoration work. This has been exacerbated by recent changes to the way in which the offset amount is calculated. There is also a lack of transparency regarding the use of funds collected under the scheme. The efficacy of the scheme needs, in our view, urgent examination.
- f. The compliance regime lacks rigour. The extent of illegal clearance, compliance action and adherence to approvals and offsetting decisions is unclear and the NVC and other agency reports indicate few prosecutions. In addition, penalties for illegal clearance are in our view too low and need to align with other contemporary legislation. The Act also lacks provisions that establish evidentiary presumptions and the use of evidentiary certificates. These are essential to ensure that prosecution action is successful, particularly when an online portal is used by proponents to provide information. Without them, it is difficult to prove the essential elements of the offence, such as the identity and intent of the provider of the false/misleading information.

Equally important as legislative reform is the urgent need to increase resourcing in this area. There is insufficient resourcing for compliance activities, public education, and assistance for applicants to properly identify possible threatened species or communities on their properties. In addition the Heritage Agreement program has suffered substantial cuts in recent times and this funding needs to be restored so that current landholders are supported in their valuable work and new landholders are brought into the program.

In summary, South Australia continues to lose an inappropriate amount of native vegetation despite controls on clearance. If this trend continues, more plants and animals will go extinct. Native vegetation is also severely impacted by overgrazing, weeds and climate change particularly rising temperatures. Despite these issues South Australia’s system should be retained and strengthened. Any weakening of existing protections should not

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<sup>4</sup> Native Vegetation Act 1991 s29(10)

occur, particularly in the context of the United Nations commitment of 30% of land area protected by 2030 and in the context of climate change. The EDO strongly opposes taking the same path as in New South Wales and Queensland where winding back of protections have resulted in widescale clearance to the extent that WWF has listed eastern Australian as a deforestation hotspot. The only regions with worse land-clearance records, ranked by the WWF as 'high' are Brazil, Bolivia, Madagascar and Borneo. For further information please refer to the EDO analysis of the NSW regime:

<https://www.edo.org.au/2020/04/02/native-veg-clearing-nsw-regulatory-failure/>

Should you have any questions on the above, please do not hesitate to contact Melissa Ballantyne via email [melissa.ballantyne@edo.org.au](mailto:melissa.ballantyne@edo.org.au)

Yours sincerely  
Environmental Defenders Office

A handwritten signature in cursive script, reading "mBallantyne", written in dark ink on a light background.

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