18 February 2025

Biodiversity Coordination Unit
Department for Environment and Water
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Dear Minister,

The Property Council of Australia and Urban Development Institute of Australia (SA) are making a joint submission to the consultation on the Draft Biodiversity Bill.

In consultation with our members, we have identified several key issues with the Draft Bill:

1. The Draft Bill has picked up helpful changes that were proposed to the *Native Vegetation Act 1991* last year via another draft Bill which would have streamlined the approval process for land division and residential developments proposing native vegetation clearance such that no 'second approval' was required under the NV Act.

2. The Draft Bill does not provide for a right of appeal to the Environment, Resources and Development Court against decisions of the 'Native Plants Clearance Assessment Committee' (being the new 'Native Vegetation Council') on a consent application for proposed removal of native vegetation clearance. This is out of step with all other similar environmental legislation in South Australia under which approvals are required.

3. The Draft Bill proposes to introduce the concept of a *Significant Environmental Benefit Scheme (SEB)*. This will be the scheme that determines the significant environmental benefit that needs to be paid for the clearance of native vegetation. Presently the SEB policy is complex (some would say close to impenetrable) and results in significant costs for clearance and it is unclear whether the Bill will establish a new SEB and whether the new scheme will increase cost.

We thank you for your consideration of this submission.

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General – Concerns with the Draft Biodiversity Bill

1. Exclusion of key impacted sectors, including the development sector, from consultation on important appointments and development of subordinate legislation.

2. No right of appeal of decisions on application for consent to clear native plants.

3. New general duty will potentially substantially extend obligations to assess the environmental impact of projects.

4. Query whether there are plans for new referral under the *Planning, Development and Infrastructure Act 2016* for assessment of impact to biodiversity (note that there is mapping of biodiversity required so spatial overlays could readily be incorporated into the Planning Atlas).

5. No certainty about composition of membership of the Native Plants Clearance Assessment Committee and the Scientific Committee – which is left to regulations. It is important to ensure there is a balanced representation of members on these committees.

6. Expanded protection of native plants from only South Australian indigenous plants to all plants indigenous to Australia (even Tasmanian Blue Gums).

7. Continuing duplication of approvals for land division, residential and infrastructure development – walking back on the proposal in the abandoned *Native Vegetation Miscellaneous Amendment Bill* from 2024.

8. Observed that a new *Significant Environmental Benefit Scheme* (SEB) is to be developed by the Minister under the Act with the potential for changes in cost and criteria which will be the subject of consultation. Inexplicably, there is no specific consultation with the development sector required under the Bill.

9. Clarification is required about the intended purpose of section 165 – concurrence under s73 of *Planning, Development and Infrastructure Act 2016*. It is unclear what this is referring to. There is no process requiring concurrence under s73. Is this meant to be a reference to a different section of the PDI Act? This requires clarification.

10. No transitional provisions have been prepared. This is critical to be able to make decisions about applications being made now under the existing legislation.

11. Having regard to the scope of the Bill, the number of sectors the Bill impacts, the identified deficiencies in the Draft, and the issues above, a four-week consultation period is considered wholly inadequate.

Detail of Bill and Issues

1. Given the list of issues identified, the period that has been allowed for consultation on the Draft Bill is wholly inadequate. Four weeks consultation on a Bill of this complexity is out of step with expectations of modern democratic government. Frankly, it is disrespectful to the public and sectors who stand to be most impacted by the proposed legislation.

2. A new general duty not to undertake an activity that harms or has the potential to harm ***biodiversity*** unless the entity takes all reasonable and practicable measures to prevent or minimise any resulting harm is established by s11 of the Bill. This duty relies on the broad definition of "Biodiversity".

3. ***Biodiversity*** or ***biological diversity*** *is* defined in the Bill as "*the variety of life forms represented by plants, animals and other organisms and micro-organisms, the genes that they contain and the ecosystems and ecosystem processes of which they form a part*". This is a very broad and almost nebulous definition. It might be appropriate to biologists but to form the foundation of a legal duty is problematic.

4. Because the definition of biodiversity is so broad, the general duty is a very substantial and nebulous expansion of environmental obligations.

5. One of the key objects of the Bill is the "*identification and prioritisation of biodiversity assets for conservation and restoration across the State to inform land use planning and decision-making frameworks*". We query whether there will be a new referral under the *PDI Act* to one or more of the new committees established under the Bill for the purposes of impact to biodiversity.

Consultation with Industry bodies – failure to incorporate consultation with either mining or development sectors

6. Section 13 of the Bill expressly prohibits the Minister responsible for the administration of a "*mining Act*" or the Planning Minister from assuming responsibility for the *Biodiversity Act*. This a clear recognition that these sectors will be most heavily regulated and impacted by this proposed legislation (i.e. regulation will apply most significantly to activities within these sectors). Those sectors ought to be consulted on the appointment of members of the peak body for the development of policy under the Bill, and, in the development of the policies and guidelines which will function as delegated legislation. The best outcomes and most effective guidelines and policies can only be achieved by meaningfully consulting with these sectors to understand the impacts of the proposed policies and regulation and obtain 'buy in' from those sectors.

7. Section 15 of the Bill requires consultation by the Minister on appointments to the Biodiversity Council with the Conservation Council, LGA, Primary Producers SA, Premiers Climate Change Council but **not** with either the development or mining sectors. Industry bodies from development and mining sectors should be included in the entities to be consulted on the appointments to the Biodiversity Council.

8. These industry bodies (i.e. development and mining sectors) should also be prescribed for the purposes of consultation on the Guidelines by the Council for the purposes of Biodiversity policies (s161(8)(b)). It is, of course, fundamental to understand the implications and consequences of proposed policies by those who will be affected (especially those most affected).

New Governance Committees

9. The Biodiversity Council is established by s14 as the peak body under the proposed Act with functions including advising the Minister on the administration of the Act and on the State Biodiversity Plan, to prepare and adopt guidelines for the purpose of native plant clearance and a host of other functions.

10. The following new Committees are established:

    a. Native Plants Clearance Assessment Committee (NPCAC) replaces the former Native Vegetation Council to administer the native plant regulatory scheme.

        i. Details about the required composition of the membership of the NPCAC is devolved to regulation. This detail should appear in the Act and be the subject of consultation on this Bill. The membership of this Committee will be important to ensure that there is a balanced approach to the functions of the NPCAC, particularly in its comprehension of the practicalities of undertaking projects and development. The required composition of membership should be included in the Bill and subject to this consultation process.

    b. Scientific Committee established primarily to advise the Minister in relation to the assessment, listing and recovery of threatened species, ecological communities and ecological entities.

        i. Details about the required composition of the membership of the Scientific committee is devolved to regulation. This detail should appear in the Act and be the subject of consultation on this Bill. The membership of this Committee will be important to ensure that there is a balanced approach to listing of threatened species, ecological communities and entities. These listings form the foundation for declarations of critical habitat and other consequences which will restrict the undertaking of projects and development. The required composition of membership should be included in the Bill and subject to this consultation process.

Native Vegetation clearance (Part 4 – now to be called Native Plants)

11. The requirement for consent under the proposed new Act walks back from the proposal under the *Native Vegetation (Miscellaneous) Amendment Bill* (which was consulted on in August 2024 but never passed by Parliament) to remove the duplication of approval requirements by prescribing clearance associated with residential dwelling, land division

and infrastructure development which had obtained development authorisation and was undertaken and an SEB achieved in accordance with a standard operating procedure as authorised under the Act (i.e. without need for a separate application for approval).

12. All applications for consent to undertake regulated activities must address the mitigation hierarchy which is enshrined in the Act – s3(3).

13. The SEB scheme is enshrined in the legislation.

    a. The Bill re-states in clear terms that an on-ground offset is required in accordance with the SEB scheme and a cash offset cannot be accepted unless the NPCAC is satisfied that it is not possible for an on-ground offset to be achieved. Whilst this has always been the position under the existing legislation, the provisions of the Bill are more emphatic in stating this position. An applicant may be required to demonstrate why it is not possible to achieve an on-ground offset before a cash offset is accepted – see s48(4)(c)(ii).

    b. The Bill looks to enshrine the SEB policies into the legislation. Section 161 requires the Minister to make a significant environmental benefit scheme (SEB Policy) which must be the subject of consultation (see comments about prescribed entities for consultation above).

    c. Possible implications of this may be increased cost and other potential changes to the way in which offsets are determined.

14. A new "stick" to deter unlawful clearance is introduced by s116 of the Bill which gives the Environment, Resources and Development Court power following criminal conviction to order that no development of the land in relation to which the offence was committed may be undertaken during a period of up to 10 years, other than works for the reestablishing, restoring native plants or otherwise 'making good'. This goes beyond mere punishment and has the effect of sterilising land. Controls over land use should not be a part of the penalty regime. Fines and imprisonment and 'make good' remedies are more appropriate.

No rights of review or appeal against decision of NPCAC on consent application

15. Of most concern is that no right of review or appeal against decisions of the NPCAC on clearance applications has been included in the Bill. This right has been a glaring omission from the current Act.

16. Rights of review or appeal provide a level of independent oversight of executive decision making which promotes public confidence in the decisions and leads to better administration of the legislation. In this way, there is greater assurance that native vegetation is protected in the way intended (and permitted) by the Parliament in enacting this legislation. It is all the more important when the policies that are applied in the assessment of native vegetation are complex, as often are the facts that may be relevant to a decision. Decision-makers are often time-poor when it comes to absorbing all the information. With no disrespect to those decision-makers, all of this means that the process does not always lead to the correct outcome.

17. These are some of the good reasons that all other environmental legislation in the State (e.g. *Environment Protection Act*, *Landscape South Australia Act*) affords rights of appeal from licence/permit/approval decisions, and the State has established and maintained for over 30 years a specialist Environment Resources and Development Court precisely for this purpose.

18. Rights of appeal to the Environment, Resources and Development Court on decisions by the NPCAC should plainly be included in this Bill. Any suggestion that this is not needed in circumstances where a specific right to resubmit an application has been included in the Bill or that judicial review is available to an applicant is misconceived. Submitting an application for the same or similar thing would likely just lead to the same outcome. Further, judicial review is limited to a review of the processing of the application and not the detailed merits of the decision to grant the planning consent.

19. A proper right of merits appeal is a fundamental issue of access to justice for applicants.

State Biodiversity Plan

20. We note that the Minister is required to prepare, publish and maintain a State Biodiversity Plan. This will be the overarching subordinate legislation.

21. The State Biodiversity Plan informs decision making under the Act, being a relevant consideration in all decision-making under the Act.

22. Consultation on the Policy should include targeted consultation of the development and resources sectors who will be significantly impacted by regulation under the Act. See comments generally on consultation above.

Miscellaneous

23. Section 165 – concurrence under s73 of PDI Act. It is unclear what this is referring to. There is no process requiring concurrence under s73. Is this meant to be a reference to a different section of the PDI Act? This requires clarification.

Transitional Provisions

24. There will be a need for substantial transitional provisions. These have not been included in the Bill at all. It is unacceptable to go out to consultation on a Bill that does not include the transitional arrangements.

25. We are concerned that the legislation is being rushed, and this will lead to a poor outcome. It is an important piece of legislation, and the government should not rush its preparation and should afford proper consultation with substantially more than four weeks to consider and respond.