



5 Milner Street,
Hindmarsh SA 5007

Phone: (08) 7127 4630

Fax: (08) 82319773

Website: www.ncssa.asn.au

Attn: Native Vegetation Branch - Amendments to the Native Vegetation Act
GPO Box 1047
ADELAIDE SA 5001

Via email: DEW.NVActAmendments@sa.gov.au

Wednesday 5 June 2024

Re: Proposed amendments to the *Native Vegetation Act 1991*

To whom it may concern,

The Nature Conservation Society of South Australia (NCSSA) appreciates the opportunity to comment on proposed amendments to the *Native Vegetation Act 1991* (the Act) and its associated *Native Vegetation Regulations 2017*, and the extension to time to do so.

Since 1962, the NCSSA has been a strong advocate for the protection of native vegetation and biodiversity in South Australia with particular attention being paid to nationally and state listed threatened plants, animals and ecological communities and the management of protected areas. NCSSA lobbied for the original native vegetation clearance controls introduced in 1980s¹ and has advocated to various governments regarding the content and implementation of the *Native Vegetation Act 1991* since its inception.

The NCSSA supports some of the changes put forward through this consultation, including expanding the range of compliance actions and options that would be available to enforce the Act and changes to better harmonise with the *Planning, Development and Infrastructure Act 2016*. However, the NCSSA considers that some of the changes may result in an increase in vegetation clearance, inappropriate spending of “offset” funds, and a weaker voice for the conservation sector within the key statutory body tasked with oversight of the Act, the Native Vegetation Council (NVC).

Specifically, the NCSSA does not support the proposals to:

- Sideline the Conservation Council of South Australia (CCSA) by removing the process whereby the CCSA nominates three experts, one of which is then selected by the Minister for appointment to the NVC. The proposed changes would allow only for direct appointment by the Minister, which the NCSSA believes would reduce conservation sector involvement in the Act and increase the risk of political stacking of the NVC,
- Insert a new loophole allowing for ‘minor’ clearance which is not currently permitted under the Act, effectively punching yet another hole in South Australia’s native vegetation protection regime, a change that would not be ‘policy neutral’ as these proposed changes have been described, and

¹ https://www.pir.sa.gov.au/aghistory/natural_resources/native_vegetation_conservation/national_parks

- Open up the ways in which money from the Native Vegetation Fund can be spent – although the current arrangements appear overly restrictive, funds should not be directed to the operation and administration of the Act.

More broadly, the NCSSA is concerned by the general lack of due process and transparency regarding Fund income and expenditure and believes a comprehensive review of the operation of the Fund to date is required before any amendments are made. As per the submission from the Biodiversity Council, the NCSSA also believes this should include examining whether the “offsetting” principles of South Australia’s Policy for Significant Environmental Benefit are being met and whether the costs paid by proponents are appropriately set to deliver significant environmental benefit.

Please see the following pages for further, more detailed comments on the proposed changes.

If you would like to clarify or discuss this submission please contact Julia Peacock, Nature Advocate, on 0400 277 423 or via email at julia.peacock@ncssa.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Patrick O'Connor', written in a cursive style.

Patrick O'Connor
President

NCSSA comments on proposed amendments to the *Native Vegetation Act 1991*

Opening statement

The NCSSA acknowledges that the following statement in the Discussion Paper for these proposed amendments is correct:

‘Given the age of the legislation and the history of amendments, parts of the Act have become outdated, confusing and at times administratively burdensome to implement’.

However, the NCSSA does not agree that all proposed changes put forward as part of this consultation are ‘policy neutral’, as claimed in the Discussion Paper, and rather contends that some of the proposed changes would weaken protection for native vegetation in our State.

Given that the best available evidence suggests that South Australia’s native vegetation cover is continuing to decline², with the Department for Environment and Water’s (DEW) own recent estimate that from 2015 to 2020, there was a reduction of approximately 29,400 hectares of native vegetation cover³, the focus should not be on tweaking the Act to make its administration ‘less burdensome’, but on addressing the far more important question of why do we continue to lose such enormous areas of biodiverse habitat when we have legislation purportedly to protect it, particularly given we are in the midst of an extinction crisis and climate emergency⁴.

Detailed comments

The NCSSA has provided a submission via the online, Your SAy survey portal. More detailed comments are provided on each of those survey questions below.

Meaning of substantially intact native vegetation

The NCSSA understands that the definition of ‘substantially intact native vegetation’ has been contested in the past, and therefore the desire to amend the definition. However, as per question 6 of the Your SAy survey, the NCSSA questions the insertion of the word ‘contiguous’ in the proposed revised definition of ‘intact stratum’. It is not clear what purpose this serves or how it would impact whether a particular patch of native vegetation would be protected under the Act.

Namely, it is not clear whether the vegetation itself would have to be one, contiguous patch to be considered ‘substantially intact’, so if there were any breaks or areas of degradation *within* the patch slated for clearance, it would not be considered contiguous and therefore not ‘substantially intact’ and therefore not protected, or whether it would have to be contiguous *with other* native vegetation to be considered ‘substantially intact’, and therefore if it was an isolated patch slated for complete clearance it would not be considered contiguous and therefore not ‘substantially intact’ and therefore not protected.

Either way, the NCSSA would not support this proposed change as it would weaken protection for native vegetation by inserting a new requirement of it being contiguous. This component of this proposed change therefore needs to be clarified before being progressed any further.

The NCSSA supports making the definition more precise by excluding degradation as a result of activities that would constitute a breach of the Act.

Mitigation hierarchy

The NCSSA supports the inclusion of the mitigation hierarchy in the Act, noting that the opportunity to ‘avoid’ native vegetation clearance (i.e. by siting a development elsewhere) has usually long since passed by the time a clearance

² https://data.environment.sa.gov.au/Content/Publications/SA_2023_ReportCards_OverviewReport.pdf

³ https://data.environment.sa.gov.au/Content/Publications/SA_2023_ReportCards_FullReport.pdf

⁴ <https://www.premier.sa.gov.au/media-releases/news-items/climate-emergency-declaration-passes-in-parliament>

application is being considered, which makes it difficult if not impossible to meaningfully apply the mitigation hierarchy in practice.

Significant environmental benefit (SEB)

The NCSSA supports the inclusion of the definition of a 'significant environmental benefit' in the Act rather than the Regulations to achieve consistency. The NCSSA supports the suggested changes of the CCSA to include 'significantly' in the definition where appropriate to better reflect the title, and desired outcome, of an SEB.

Expert based council

As per question 9, the NCSSA does not support this proposed change. It is not that the NCSSA does not support NVC members having expertise, but rather it is the proposed **removal of the process of the CCSA providing three suitable candidates for appointment** that the NCSSA objects to, as this would be a regressive step.

Whilst achieving a range of expertise in the final make-up of the NVC is important, removing the role of the CCSA (and other peak bodies) in providing nominees creates the serious risk of politicisation of appointments. The NVC inevitably must provide advice or make decisions that are not comfortable for Government from time-to-time, and it is essential that the NVC strive to implement the legislation as it was intended. Nominees from relevant peak bodies, including the conservation sector, is one way of supporting a robust NVC.

Having one member who maintains a strong relationship to the conservation sector is also extremely important for maintaining a flow of information and ultimately improves the NVC's functioning.

It is therefore critical that the nomination process by the CCSA, and other peak bodies, is maintained. A change that allows the Minister to appoint skilled people *should the peak bodies fail in their role of providing suitable nominees* could be a compromise solution.

It is also noted that whilst ensuring First Nations representation on the NVC is supported, the proposed change of requiring a member to have knowledge of 'Aboriginal traditional land management' does not necessarily ensure a First Nations candidate.

Native Vegetation Fund

As per question 11 of the survey, the NCSSA does not support this proposed change as currently drafted.

The NCSSA acknowledges that the current settings restrict Fund expenditure to an overly narrow set of circumstances and that change is required, however, the NCSSA is deeply concerned that Fund money could be used inappropriately if the proposed changes are passed.

Specifically, the NCSSA does not believe Fund money should be used for the operation or administration of the Act, as per proposed amendments to Section 21 of the Act. A case has not been made for why additional funds are needed to support the administration of the Act and, even if more money is required for administration, a case has not been made for why any additional funding should not be sought from general Government funds rather than being taken from the Native Vegetation Fund.

The NCSSA is also concerned that the proposed amendment to the Act to allow expanded use of "offset" and penalty money to fund 'a greater range of conservation related activities' is extremely broad and has not been appropriately defined or justified.

During an earlier round of consultation on potential changes to the Act in September 2023, Native Vegetation Branch staff indicated that 'a greater range of uses' of the Fund might include fauna conservation activities, and use of the Fund to manage the National Parks estate.

This could result in Departmental cost-shifting, as well as undermine the functions and expertise of other branches of DEW, including the National Parks and Wildlife Service, and is outside the expertise of the seven-person NVC. There is no reason that, say, park management should be governed by individuals on the NVC with a background in development, engineering or primary production.

The NCSSA acknowledges the attempt to constrain expenditure of funds collected for SEB “offsetting” in proposed clauses 21(6) and (7) to “offsetting” or ‘administration, monitoring and enforcement’ of “offsetting”, however, the caveat ‘as far as practicable’ is cause for further alarm regarding how Fund money could be spent.

Even under current settings, the NCSSA is concerned by the general lack of due process and transparency regarding Fund income and expenditure and believes a comprehensive review the operation of the Fund to date is required before any amendments are made. As per the submission from the Biodiversity Council, the NCSSA also believes this should include examining whether the “offsetting” principles of South Australia’s Policy for Significant Environmental Benefit are being met and whether the costs paid by proponents are appropriately set to deliver ‘significant environmental benefit’. Benchmarking payments levels against those levied in other States and Territories should form part of this review exercise.

Conservation Agreements

The NCSSA understands the desire to create a ‘conservation instrument’ that is more flexible and shorter term than a Heritage Agreement to support wary landowners who may not wish to commit to the (theoretically) in perpetuity protection of a Heritage Agreement. The NCSSA questions whether other agreement types already in existence, such as Management Agreements under the *Landscape South Australia Act 2019*⁵ or even a Land Management Agreement under the *Planning, Development and Infrastructure Act 2016*⁶ are already fulfilling this role or could if minor amendments were made.

The NCSSA further questions what role proposed ‘conservation agreements’ would play in third party accredited SEBs, as per the proposed Section 25C(5) and in provisions related to consent in Sections 29(11)iii(A) and 29(12)(ab). The destruction of native vegetation as sanctioned by the Act is a loss in perpetuity – i.e. that cleared habitat is gone forever – so instruments of ‘protection’ that have short timeframes should not be used as part of any “offsetting” arrangement. References to ‘conservation agreements’ should therefore be deleted from the aforementioned sections.

DEW’s own Policy Guide for SEBs states “Offsets need to secure outcomes for at least as long as the project’s impact. The impacts of most projects are permanent and therefore offsets usually need to be secured in perpetuity.”⁷

Assistance to Landowners

In principle, the NCSSA supports assistance to landowners to undertake conservation on their property, however, it is critical to understand that if this assistance is provided from SEB payments made into the Fund then disbursement should be in accordance with the SEB Policy if the purported ‘significant environmental benefit’ is to be achieved.

In relation to land acquisition using the Native Vegetation Fund, as envisioned by the proposed amended Section 24, the NCSSA is concerned that payments into the Fund are not calculated on the cost of acquisition, but rather on an estimated management cost for a period of 10 years (which is then adjusted for various factors, including reducing the cost of the payment proportionately to an increase in the size of the area to account for ‘economies of scale’). Consideration therefore needs to be given as to whether the requirements for a ‘significant environmental benefit’ that must be delivered for any payments to the Fund can, in fact, be met through land acquisition under those conditions, or whether the formula for payments into the Fund needs to be revised. This should form part of the comprehensive review that should be undertaken before any changes to Fund expenditure are made.

⁵ https://classic.austlii.edu.au/au/legis/sa/consol_act/ljaa2019258/s219.html

⁶ https://plan.sa.gov.au/__data/assets/pdf_file/0003/1126803/PlanSA-LMA-Factsheet.pdf

⁷

https://cdn.environment.sa.gov.au/environment/docs/native_vegetation_significant_environmental_benefit_policy_1_july_2020.pdf

Increase in fees and penalty provisions

The proposed increases to penalty provisions and expiation fees appear to be a marked improvement over current settings and are therefore supported.

Clearance of intact stratum

The NCSSA does not support the proposed change to allow for clearance of intact stratum, even in “limited circumstances”, as described in the Discussion Paper. If adopted, this proposed change would punch yet another hole in South Australia’s native vegetation protection regime, a change that would not be ‘policy neutral’ as these proposed changes have been described.

No definition of ‘minor’ is put forward as part of the changes, so this will inevitably become another “definition battleground” when developers (and others) seek to remove vegetation – what is ‘minor’ in one person’s eyes can have major consequences for biodiversity, such as putting in a track that allows pests and weeds to spread more easily.

Part of the justification for this proposed insertion seems to be that larger, more egregious clearances are allowed under circumstances outlined in Regulations. The perverse logic seems to be that we should also be saying ‘yes’ to smaller clearances, rather than winding back the larger ones.

This proposal may be a ‘hangover’ from the previous State Liberal Government’s development agenda that included ‘activating’ natural spaces, for example by building more campgrounds in parks and reserves. Such clearances can sound ‘minor’ but can escalate rapidly, as did the proposal for clearance for accommodation inside Flinders Chase National Park⁸.

The focus should be on *reducing clearance* – noting the best available evidence is that we’re continuing to lose native vegetation cover⁹.

Consistent application process for clearance applications

It would appear that this proposed change would provide for a clearer and more consistent application process, so the NCSSA supports it.

Clearing when seriously at variance with the principles of clearance

As per the NCSSA’s response to the Your SAY survey, consolidation in principle is supported, but allowing clearing that is seriously at variance with the Principles of Clearance goes against the purpose of having legislation to protect native vegetation. As this clearing is justified on the basis that a ‘significant environmental benefit’ will be achieved, and the vast majority of clearances now result in a payment to the Fund to acquit this requirement, it underscores the need for a comprehensive review the operation of the Fund before any changes are made.

Consistent offset requirements

As per questions 19 and 20 of the Your SAY survey, standardisation of the approach to SEBs in principle is supported, but it is more important to know that the SEB system actually works, especially as it used as justification for allowing clearances that are seriously at variance with the principles of clearance. At the moment, there is no evidence to demonstrate that either on-ground activities or Fund payments for SEBs actually deliver what they purport to.

"Long term protection" is only achieved if areas are then subsequently actually protected if threatened - the plan to build a rocket launching facility inside a Heritage Agreement at Whalers Way on the Eyre Peninsula¹⁰ shows that this form of "protection" does not deter developers.

⁸ <https://www.abc.net.au/news/2021-02-09/kangaroo-island-pods-find-common-ground-but-was-there-a-choice/13136516>

⁹ https://data.environment.sa.gov.au/Content/Publications/RC2023_RC_BIO_TER_NativeVegetationPercentageCover.pdf

¹⁰ https://plan.sa.gov.au/development_applications/state_development/impact-assessed-development/majors/major_projects/majors/sleaford_southern_launch

Aligned assessment provisions for PDI Act referrals

This change appears to be a sensible administrative improvement.

Expanded compliance actions and range of options

In principle, expanded compliance actions and range of options is supported. As per the Your SAY survey at question 24, the NCCSA supports the additional suggestions made by the CCSA of increasing expiation fees, strict liability for failure to comply with a compliance order, a 'no development order' as an option for civil enforcement proceedings and a requirement for standard operating procedures to not be seriously at variance with the principles of clearance.