

Legislative Council—No 129

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South Australia

**Native Vegetation (Miscellaneous) Amendment
Bill 2011**

A BILL FOR

An Act to amend the *Native Vegetation Act 1991*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Native Vegetation (Miscellaneous) Amendment Act 2011*.

2—Commencement

- 5 This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Native Vegetation Act 1991*

5 4—Amendment of section 3—Interpretation

- (1) Section 3(1), definition of *breach*—delete "and *breached* has a corresponding meaning" and substitute:

and includes a contravention of, or a failure to comply with, a term of a heritage agreement

- 10 (2) Section 3(1), definition of *native vegetation*, (b)—delete "unless the person was acting" and substitute:

unless the plant was sown or planted

- (3) Section 3(1), definition of *native vegetation*, (b)—after subparagraph (ii) insert:

- 15 (ia) in circumstances involving the use of money paid into the Fund for the purpose of achieving a significant environmental benefit; or

5—Amendment of section 4—Application of Act

- (1) Section 4(2)—delete "subsection (2a)" and substitute:

subsections (2a) and (2ab)

- (2) Section 4—after subsection (2a) insert:

- 20 (2ab) This Act applies in that part of the City of Mitcham consisting of the following suburbs:

- (a) Belair;
(b) Bellevue Heights;
(c) Blackwood;
25 (d) Coromandel Valley;
(e) Craighburn Farm;
(f) Eden Hills;
(g) Glenalta;
(h) Hawthorndene.

30 6—Amendment of section 7—Establishment of the Council

Section 7—after subsection (2) insert:

- 35 (3) The Council is subject to the general direction and control of the Minister (but the Minister cannot give any direction with respect to any advice or recommendation that the Council might give or make, or in relation to a particular application that is being assessed by, or that is to be, or has been, assessed by, the Council).

7—Amendment of section 8—Membership of the Council

Section 8(1)(f)—delete paragraph (f) and substitute:

- (f) 1 must be a person with extensive knowledge of, and experience in, planning or development nominated by the Minister; and

8—Amendment of section 9—Conditions of office

Section 9(2)—after paragraph (d) insert:

or

- (e) for breach of, or non-compliance with, a condition of appointment.

9—Amendment of section 14—Functions of the Council

Section 14(2)—delete subsection (2) and substitute:

- (2) The Council, in performing a function, or exercising a power, under this Act—

- (a) must take into account, and seek to further, the objects of this Act; and
- (b) must take into account, and seek to further, the principles of clearance of native vegetation (insofar as they are relevant in the particular circumstances); and
- (c) must take into account the provisions of the State NRM plan, and any other relevant NRM plan, under the *Natural Resources Management Act 2004*,

and, in any event, must not act in a manner that is seriously at variance with the principles of clearance of native vegetation.

10—Amendment of section 21—The Fund

(1) Section 21(3)—after paragraph (cb) insert:

- (cc) amounts paid into the Fund in accordance with an order under section 31EA; and
- (cd) amounts paid into the Fund in accordance with any provision made by the regulations; and

(2) Section 21(6)—delete subsection (6) and substitute:

- (6) Money paid into the Fund under subsection (3)(c), (ca), (cb), (cc) or (cd) must, as far as practicable, be used—

- (a) to preserve and maintain native vegetation on land that is within the same region of the State as the relevant land (including preserving and maintaining native vegetation referred to in paragraph (b)); or
- (b) to establish or regenerate native vegetation on land that is within the same region of the State as the relevant land and that has been selected by the Council for that purpose after having regard to the Regional Biodiversity Plan or Plans (if any) approved by the Minister that apply within that region.

(6a) However, the Council may use the money referred to in subsection (6) to establish, regenerate or maintain native vegetation in a region of the State other than the region where the relevant land is located if—

- 5
- (a) the Council is satisfied that the environmental benefit to be achieved in the other region will outweigh the value of achieving a significant environmental benefit within the region where the relevant land is located; and
- (b) the native vegetation includes or supports—
- 10
- (i) plants of a rare, vulnerable or endangered species; or
- (ii) plants that provide habitat for rare, vulnerable or endangered species of native animals; or
- 15
- (iii) the whole, or a part, of a plant community that is rare, vulnerable or endangered; or
- (iv) a significant remnant of vegetation in an area which has been extensively cleared; and
- (c) the establishment, regeneration or maintenance of the native vegetation is carried out in accordance with guidelines adopted under section 25 that apply to such establishment, regeneration or maintenance.
- 20

(6b) For the purposes of making an assessment under this section as to whether 2 or more places are within the same region of the State, the Council may take into account such matters as it thinks fit.

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(6c) To avoid doubt, nothing in this section prevents the Council from making a payment from the Fund to the person or body who paid the money into the Fund so that the person or body can establish, regenerate or maintain native vegetation in accordance with this Act.

(3) Section 21(7)—delete "subsection (6)" and substitute:

30 this section

(4) Section 21(7), definition of *relevant land*, (b)—delete "or (cb)" and substitute:

, (cb) or (cc)

(5) Section 21(7), definition of *relevant land*—after paragraph (b) insert:

- 35
- (c) in a case where subsection (3)(cd) applies—land on which the native vegetation that is relevant to the operation of the particular regulation was grown or was situated.

11—Amendment of section 25—Guidelines for the application of assistance and the management of native vegetation

(1) Section 25(1)—after paragraph (b) insert:

- 40
- (ba) the establishment, regeneration or maintenance of native vegetation under section 21(6a); and

(2) Section 25(1)—after paragraph (c) insert:

and

(d) any other matter required by the regulations.

(3) Section 25(2)—after paragraph (a) insert:

and

(ab) submit the guidelines to the Minister for comment; and

12—Amendment of section 26—Offence of clearing native vegetation contrary to this Part

(1) Section 26(1), penalty provision—delete "\$500" and substitute:

\$750

(2) Section 26(2), penalty provision—delete "\$500" and substitute:

\$750

(3) Section 26(3), definition of *the prescribed period*—delete "21 days" wherever occurring and substitute in each case:

6 months

13—Amendment of section 28—Application for consent

(1) Section 28(3)(b)(ii)(A)—delete "the planting and maintenance of native vegetation on the land after clearance or on adjacent land" and substitute:

subsequent establishment, regeneration or maintenance of native vegetation (whether on the land after the proposed clearance or on other land)

(2) Section 28(3)(b)(ii)—after subparagraph (A) insert:

(AB) information that establishes that—

- the applicant has been credited under section 28A with having achieved an environmental benefit of a particular value; and
- the environmental benefit the subject of the credit amounts, after allowing for the loss of the vegetation to be cleared, to a significant environmental benefit; or

Note—

Section 28A(1)(d) allows credits for environmental benefits to be taken into account and applied in relation to future applications for consent to clear native vegetation.

(3) Section 28(3)(b)(ii)(B)—after "subparagraph (A)" insert:

or (AB)

14—Insertion of section 28A

After section 28 insert:

28A—Credit for environmental benefits

(1) If—

(a) a person—

(i) has achieved an environmental benefit (not being a benefit required in relation to a consent to clear native vegetation or under any other requirement under this Act); or

(ii) has, in accordance with a consent to clear native vegetation, achieved an environmental benefit that exceeds the value of the minimum benefit needed to offset the loss of the cleared vegetation; and

(b) the Council is satisfied that the benefit or excess benefit (as the case requires) is of a significant value,

the Council may—

(c) for the purposes of section 28(3)(b)(ii)(AB), credit the person with having achieved an environmental benefit of a value (whether monetary or otherwise) determined by the Council; and

(d) in determining a subsequent application by the person for consent under section 28, take into account and apply the value of the credit (adjusted to reflect the value, in the Council's opinion, of the native vegetation the subject of the credit at the time the application is made) to the amount of environmental benefit the person must achieve, or the amount of compensation proposed to be paid under section 28(4), in order that the consent be granted in the circumstances.

(2) In determining the value of an environmental benefit under subsection (1)(c), the Council must have regard to the approximate difference between the value of the environmental benefit achieved by the person and the value of the environmental benefit that would, in the Council's opinion, have been the minimum requirement for consent under section 28 to have been granted in the circumstances.

15—Repeal of section 31

Section 31—delete the section

16—Amendment of section 31E—Enforcement notices

(1) Section 31E(3)—delete subsection (3) and substitute:

(3) A notice under subsection (2) must identify the authorised officer issuing the direction.

(2) Section 31E(4)—delete "If" and substitute:

Subject to section 31EA, if

(3) Section 31E(9)—delete "12 months" and substitute:

2 years

5 **17—Insertion of section 31EA**

After section 31E insert:

31EA—Substituted direction where compliance with enforcement notice not reasonably practicable

(1) If—

10 (a) an authorised officer gives a direction to a person under section 31E(1)(b); and

(b) it is not reasonably practicable for the person to comply with the direction,

15 the person may apply to the Council for a substituted direction under this section.

(2) An application for an order under this section must be made in a manner and form determined by the Council.

20 (3) The Council may, if satisfied that compliance with the direction under section 31E(1)(b) is not reasonably practicable, revoke the direction and instead direct the person—

(a) to take such action as may appear appropriate to the Council (whether on the person's land or otherwise), taking into account the nature and extent of the alleged breach forming the basis for the original direction; or

25 (b) to pay into the Fund an amount, determined by the Council to be appropriate in the circumstances, on account of any benefit that the person has gained, or can reasonably be expected to gain, by allegedly committing the breach; or

30 (c) to refrain from an act or course of action, or to undertake an act or course of action, to ensure that the person does not gain an ongoing benefit from the alleged breach.

(4) A direction under this section—

(a) must specify the period within which the direction must be complied with;

35 (b) must comply with any other requirement set out in the regulations.

(5) Without limiting this section, section 31E (other than subsection (9)) applies to a direction under this section as if it were a direction under section 31E(1)(b).

18—Substitution of section 33

Section 33—delete the section and substitute:

33—Commencement of proceedings

Proceedings under this Division must be commenced—

- 5
- (a) if the proceedings relate to an offence under this Act which the respondent has expiated or of which the respondent has been convicted or found guilty—within 6 months after the date on which the respondent so expiated, or was convicted or found guilty of, the offence (as the case requires); or
- 10
- (b) in any other case—within 5 years after the date of the alleged contravention of, or failure to comply with, a provision of this Act.

19—Amendment of section 33A—Appointment of authorised officers

- (1) Section 33A(2)(b)—delete paragraph (b)
- 15
- (2) Section 33A(3)(b), (c) and (d)—delete paragraphs (b), (c) and (d)

20—Amendment of section 33B—Powers of authorised officers

Section 33B(4), (5) and (6)—delete subsections (4), (5) and (6)

21—Amendment of section 33D—Provisions relating to seizure

Section 33D(2)—delete "six" and substitute:

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22—Substitution of section 33J

Delete section 33J and substitute:

33J—Constitution and criminal jurisdiction of ERD Court

- 25
- (1) Subject to this Act, the following provisions apply in respect of the constitution of the ERD Court when exercising jurisdiction under this Act:
- (a) the Court may be constituted in a manner provided by the *Environment, Resources and Development Court Act 1993* or may, if the Senior Judge of the Court so determines, be constituted of—
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- (i) in relation to proceedings for an offence against this Act—a magistrate and 1 commissioner; or
- (ii) in any case—a Judge and 1 commissioner;
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- (b) the provisions of the *Environment, Resources and Development Court Act 1993* apply in relation to the Court constituted of a Judge and 1 commissioner, or a magistrate and 1 commissioner, in the same way as in relation to a full bench of the Court;

- (c) the Court may not be constituted of or include a commissioner unless—
- (i) in a case where only 1 commissioner is to sit (whether alone or with another member or members of the Court)—the commissioner; or
 - (ii) in any other case—at least 1 commissioner, is a commissioner who has been specifically designated by the Governor as a person who has wide practical knowledge of, and experience in, the preservation and management of native vegetation.

- (2) Offences constituted by this Act lie within the criminal jurisdiction of the ERD Court.

33K—Applications during criminal proceedings

- (1) If, during the course of criminal proceedings before a court in respect of an offence against this Act, the prosecutor applies for an order under this Act relating to the offence, the court must deal with the application during the course of the criminal proceedings unless satisfied by the defendant that to do so would not be appropriate in the circumstances.
- (2) If an application for an order under this Act is made to a court before which a person was convicted of an offence against this Act—
- (a) the application may be dealt with by the court; and
 - (b) any power in relation to the relevant order may be exercised by the court,

whether or not the court is constituted in the same way as when the person was convicted of the offence.

23—Amendment of section 34—Evidentiary

Section 34—after subsection (4) insert:

- (5) In enforcement proceedings under Part 5 Division 2 or in proceedings for an offence against this Act, a document produced by the prosecution or plaintiff (as the case requires) and purporting to certify that a remotely sensed image specified in the document—
- (a) was captured by a specified device and is accurate to the extent indicated in the document; and
 - (b) was captured at a specified time on a specified date; and
 - (c) is an image of a specified place,
- constitutes, in the absence of proof to the contrary, proof of the facts so certified.
- (6) For the purposes of this section, a reference to an electronic, sonic, optical, mechanical or other device includes a reference to any software used by, or in relation to, such a device.

(7) In this section—

image includes—

- (a) a copy of an image; and
- (b) data from which an image can be produced;

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remotely sensed image means—

- (a) an image captured by a device (whether a camera or otherwise) mounted on or in a satellite or aircraft; and
- (b) any other image declared by the regulations to be included in the ambit of this definition.

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24—Amendment of section 35—Proceedings for an offence

(1) Section 35(1)—delete subsection (1) and substitute:

- (1) Proceedings for an offence against this Act must be commenced within 5 years after the date on which the offence is alleged to have been committed.

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(2) Section 35(3)—delete subsection (3)

25—Amendment of section 41—Regulations

(1) Section 41(2)(e)—delete "\$500" and substitute:

\$750

(2) Section 41(2)—after paragraph (e) insert:

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- (f) provide for amounts of money (whether or not specified by the regulations) to be paid into the Fund for the purposes of achieving a significant environmental benefit;
- (g) create offences punishable by a fine not exceeding \$10 000;
- (h) fix expiation fees for alleged offences against the regulations;
- (i) make provisions facilitating proof of the commission of offences against the regulations.

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