Environmental Defenders Office

Submission on the Nature Repair Market Bill

3 March 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

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EXECUTIVE SUMMARY

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide feedback on the proposed Nature Repair Market Bill 2023 (**the Bill**).

EDO strongly supports investment in restoration and conservation management and for funding to go to landholders across Australia for biodiversity stewardship.

The focus of any scheme established to galvanise investment in restoration and nature repair must be achievement of environmental outcomes. Objectives, principles, governance, rules, methodologies, monitoring, compliance and enforcement, transparency and accountability measures must all be designed to ensure that real environmental outcomes are being achieved on the ground.

We understand that the proposed Bill is designed to provide a framework for a new nature repair market, and much of the critical detail will be developed in later standards, rules and methodologies. It is essential that the original legislative architecture establishes a clear purpose, transparent and accountable governance, and clear parameters for the scheme. Australia must not repeat the mistakes of previous environmental markets (for example in water and carbon) that have developed complicated methodologies and rules, created compensable property rights, established conflicted governance structures, and in many circumstances have failed to deliver actual environmental outcomes.

EDO appreciates the briefings from the Department of Climate Change, Environment, Energy and Water (**DCCEEW**) on the proposed Bill. However, there are still some significant gaps and questions about the ability of the proposed scheme to repair Australia's nature.

Our key concerns are identified in this submission and relate to:

- **The use of the proposed market for biodiversity offsets**
- **The timing and sequencing of this Bill in the context of EPBC Act reform**
- **Ensuring integrity and longevity in environmental outcomes**
- **The use of the proposed market for biodiversity offsets**
- **The objectives of the scheme**
- **Administration of the nature repair market framework and governance by the Clean Energy Regulator (CER)**
- **Implementation and content of the integrity standards**
- **Accountability and transparency**
- **Compliance and enforcement**

SUMMARY OF RECOMMENDATIONS

1. **The use of the proposed market for biodiversity offsets in addition to biodiversity stewardship payments**

- **The nature repair framework should not include biodiversity offsetting as a component.**
- **The regulation of biodiversity offsets by the Commonwealth should be considered as part of the EPBC Act reform, including the development and implementation of a robust best practice national standard for biodiversity offsetting.**
- **Should any form of offsetting be permitted under the new market in the future there must be clear limits. For example, an avoidance mitigation hierarchy requirement before offsets are used, exempt entities that cannot be offset by purchase of a biodiversity certificate, a clear right for a landholder to prohibit sale of their certificate for the purpose of an offset, a transparent requirement on the certificate register on what certificates were purchased to offset impacts elsewhere, a prohibition on on-selling certificates used for offsetting, and very clear rules to require genuine additionality of environmental outcomes and to prevent double-dipping.**

2. **The timing and sequencing of this Bill in the context of EPBC Act reform**

The passing of the Bill should be delayed until:

- **Legally enforceable national standards for matters of national environmental significance and biodiversity offsetting are established under the EPBC Act reforms;**
- **The new independent EPA has been established; and**
- **The Chubb Review recommendations have been implemented in full.**

3. **Ensuring integrity and longevity in environmental outcomes**

- **Additionality and permanence of environmental outcomes should be reflected in the Bill.**
- **EDO recommends that the proposal of ALCA be adopted and the Bill refer to 'certificate period' instead of 'permanence period.' The Bill should clarify ongoing conservation and restoration requirements beyond the certificate period.**
- **The binding nature of legal obligations should be clarified in the Bill, for example by ensuring projects are noted on land titles.**
- **The Bill should provide further clarity on decision making regarding excluded biodiversity projects, and projects relating to critically endangered species or habitats must be excluded from use as offsets.**
- **Provisions relating to variation and cancellation of certificates must be clarified.**
- **Methodology determinations must be strongly linked to objects (net positive and/or stronger objects) and integrity standards.**
- **Reporting periods should be reduced to 3 years, with biodiversity outcomes publicly available. The Bill should contain greater clarity on the purpose of, and what is required in, reports.**

4. The objectives of the scheme

- **The objects should establish a threshold test that projects must 'protect, recover and enhance' biodiversity. The objects should additionally reference international commitments such as the Kunming-Montreal Global Biodiversity Framework.**
- **The term 'native species' should be removed from the Bill.**
- **The Bill should provide further detail on interaction with carbon credits and co-benefits, and framework for co-benefits expanded to include the social and cultural benefits of projects.**

5. Administration of the nature repair market framework

- **The new national EPA would be the appropriate regulator for a nature repair market, not the Clean Energy Regulator.**
- **The Chubb Review recommendations should implemented in full before consideration is given to adding new additional functions beyond the CER's current expertise.**
- **Chubb Recommendation 2 should be applied to the Nature Repair Committee, for example regarding resourcing, remuneration and support from an independent secretariat.**
- **Greater detail should be contained in the Bill regarding Nature Repair Committee function, and Committee should include First Nations membership.**

6. Implementation and content of the integrity standards

- **The integrity standards must be strengthened.**
- **The integrity standards must be a mandatory consideration in Ministerial decision making.**

7. Accountability and transparency

- **The Rules should be open for public consultation prior to implementation.**
- **A comprehensive range of information including decisions, project details, funding and pricing, precedents and certificate information should be available on a public register, with mandatory requirements for publication and mandatory details for publication determined in the primary legislation.**

8. Compliance and enforcement

- **Third party enforcement mechanisms should be provided for in the legislation.**
- **Greater clarity about appointment, skills and monitoring requirements should be provided for in the Bill.**

INTRODUCTION

The intention to reward landholders for genuine conservation outcomes is strongly supported. Traditionally, support for landholder stewardship has been government and community driven, with existing programs supporting conservation on private land established in most jurisdictions, for example, involving direct government grants or payments, or other support.[1] Market-based approaches are emerging as an alternative way to address a broad range of environmental challenges, including reducing greenhouse gas emissions, improving water quality and restoring and conserving biodiversity. Increasingly, markets are an attractive option for sourcing funding for conservation actions from private sector proponents, to supplement limited conservation and restoration funding by government.

EDO supports initiatives to direct more funding to conservation and restoration, but strongly supports increased direct funding for conservation and restoration as a core budget expenditure – the cost of this essential work cannot be completely shifted to unproven markets. In the first instance, EDO supports greater provision of public funds for environmental protection and restoration, rather than use of market mechanisms – particularly where such a mechanism relies on environmental offsetting to drive demand.

Generally, environmental markets operate by putting a price on environmental commodities or ecosystem services, and facilitating trading between market participants – for example, greenhouse gas emitters may seek to buy carbon credits created by landholders undertaking tree planting projects. Market-based mechanisms can provide an incentive for environmental stewardship by creating opportunities for landholders to benefit (e.g., from payments) from undertaking conservation and restoration action on their land.

Market-based stewardship mechanisms (both carbon and natural capital markets) present both an opportunity and a risk.[2] On the one hand, market-based mechanisms can drive an increased uptake in environmental stewardship in two ways: by providing additional pathways for landholders to benefit from setting aside land for carbon sequestration or conservation, and by providing access to new, private investment where government funds may be limited. On the other, significant concerns have been raised about the integrity of market mechanisms, particularly offsets-based mechanisms, and their ability to deliver genuine environmental outcomes (see our comments on biodiversity offsetting below).

The success or otherwise of environmental markets is highly dependent on whether the market conditions adequately reflect the limited nature of natural resources and properly price the costs of

[1] See, for example, Environmental Defenders Office, *Defending the Unburnt: A guide to private land conservation for landholders,* August 2021, available at https://www.edo.org.au/publication/a-guide-to-private-land-conservation-for-landholders/. We note this report covers east coast jurisdictions only, namely, Queensland, New South Wales and Victoria and the Commonwealth.

[2] See, for example, EDO, *Defending the Unburnt: A guide to carbon sequestration opportunities for private landholders*, 2022, op. cit.

environmental harm, including those costs that traditional economic models consider to be 'externalities'. Without necessary limits and safeguards in legislation, market-based mechanisms can undermine genuine conservation efforts by legitimising both scientifically unsound policies and facilitating the continuation of high-impact activities such as land clearing or fossil fuel usage. Importantly, market-based mechanisms should not replace broader environmental conservation frameworks and regulation, but rather, where appropriate, form a complementary part of the framework.

This submission identifies **eight** overarching areas of concern.

1. The use of the proposed market for biodiversity offsets in addition to biodiversity stewardship payments

A critical threshold issue is whether the proposed market will generate biodiversity stewardship certificates solely for conservation outcomes, or whether those certificates would also be able to be used as credits to offset impacts of development.

Nowhere in the consultation material does the Government explicitly confirm that the biodiversity certificates will be able to be used to meet offsets arrangements. However, we understand that it is expected that a driver for demand will be private sector companies who need to discharge a regulatory requirement such as a biodiversity offset, or wish to add a co-benefit on top of a required carbon credit.

We understand that a new National Environmental Standard on Biodiversity Offsetting, developed under concurrent EPBC Act reform, will establish the Government's offset policy, including the possible use of biodiversity certificates. However, given the crucial intersection between the Nature Repair Market and the Commonwealth's offset policy, and given that this is one of the key concerns of stakeholders engaged in the consultation process, the failure of the Government to clearly communicate its intention with regards to offsets is disappointing and disingenuous.

For the reasons set out below, EDO **does not support** offsets being part of the proposed market. There is a significant difference between a biodiversity certificate as envisaged and a verifiable biodiversity credit for the purpose of offsetting.

The proposed biodiversity certificates are not an appropriate tool for offsetting. Unlike Australian Carbon Credit Units (**ACCUs**), biodiversity certificates would not be directly equivalent (although they would present key project information in a standardised way). That is, the nature repair market framework does not create equivalent units that can be readily used to exchange loss for gains. As is currently the case for the use of offsets, the value of the loss and the value of the gain would need to be assessed on a case-by-case basis.

Biodiversity offsetting – key issues and concerns

Biodiversity offsetting aims to ameliorate negative environmental impacts, including from development, agriculture, and industrial and infrastructure projects. The premise behind biodiversity offsetting is to protect and improve biodiversity values in one area to compensate for impacting on biodiversity values in another area; improvement (i.e. gain) in the biodiversity values of the offset area is needed to ensure there is no net let loss in biodiversity values. Offset schemes therefore inherently involve an attempt to balance habitat loss with gains elsewhere, in contrast to stewardship schemes that focus on habitat gains.

All Australian jurisdictions have an established biodiversity offsetting framework for offsetting the impacts of development, industry and infrastructure. Landholders can elect to establish a biodiversity offset area on their land, and sell biodiversity credits to proponents looking to offset biodiversity impacts. This is different to landholders setting up conservation-based areas on their land (which are not used as offsets).

Demand for biodiversity offsets is driven by both offsetting rules (i.e. offsets must meet legislative requirements such as geographic location and the types of biodiversity) and the market (i.e. offsets are required to meet the needs of proponents) rather than broader conservation goals. Therefore, there may be limited opportunities to align the supply of biodiversity offsets with conservation outcomes. Allowing biodiversity certificates to be used as offsets may give the Government less ability to align the outcomes of the framework with its broader conservation outcomes. This is because the demand for offsets will be a driving factor, rather than conservation goals.

It is critical to note that experts have raised concerns about the effectiveness of biodiversity offsetting and its ability to deliver the anticipated environmental outcomes. Concerns relate to difficulties in quantifying biodiversity values for market purposes, and in establishing offset markets (i.e. supply and demand requirements), challenges in re-creating nature, time lags in restoring areas, failure to account for declining base lines, failures to effectively manage offsets sites and protect offset sites in perpetuity, and perverse outcomes.[3] The NSW Biodiversity Offsets Scheme is one of the more developed and complex schemes, and has been referred to as leading practice in Australia. However, we note the recent NSW Audit Office assessment of the scheme found significant flaws in terms of integrity, strategy, transparency, sustainability, implementation and delivery of gains.[4] Serious issues

[3] See, for example: M. Maron et al., *Faustian bargains? Restoration realities in the context of biodiversity offset policies'* (2012) *Biological Conservation* Vol. 155, Oct. 2012, pp 141-148; Bull, J.W., Blake Suttle, K., Gordon, A., Singh, N.J., and Milner-Gulland, E.J., *Biodiversity offsets in theory and practice* (2013) *Fauna and Flora International*, Oryx, 47(3) 369-380; Curren, M. et al., *Is there empirical support for biodiversity offset policy?* (2014) *Ecological Applications* 24(4) pp 617-632; Fallding, M., *Biodiversity Offsets: Practice and Promise* (2014) 31 *Environmental Planning & Law Journal* 33; Gordon, A., Bull, J.W., Wilcox, C., Maron, M., *Perverse incentives risk undermining biodiversity offset policies* (2015) *J. Appl. Ecol.* 52, 532–537; Gibbons, P., Macintosh, A., & Constable, A., and Hayashi, K., *Outcomes from 10 years of biodiversity offsetting* (2017) *Global Change Biology* 24. 10.1111/gcb.13977; Pope, J., Morrison-Saunders, A., Bond, A. et al., *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2021) *Environmental Management* 67, 424–435.

[4] The Audit Office found: The Department of Planning and Environment (DPE) has not effectively designed core elements of the NSW Biodiversity Offsets Scheme. DPE did not establish a clear strategy to develop the biodiversity credit market or

relating to the scheme have been raised during a NSW parliamentary inquiry, with the Committee reporting that almost every stakeholder group submitted significant concerns about the design, operation and efficacy of the scheme.[5]

There is a lack of evidence to show that offset schemes actually deliver the predicted biodiversity outcomes. Where outcomes are not achieved, the result of offset schemes is actually a net loss of impacted biodiversity.

Given the serious integrity issues and uncertain outcomes, biodiversity offsets should only be used in limited circumstances and only as a last resort, with clear guidance on what impacts are so unacceptable that they should not be allowed and cannot be offset. If used, biodiversity offsets must meet best-practice standards.[6] Even then, biodiversity offsets should not be seen as an equivalent stewardship mechanism to strictly conservation-based private land conservation agreements (such as conservation agreements in New South Wales and nature refuges in Queensland).

Offsetting under the EPBC Act

The Commonwealth already regulates biodiversity offsetting under its *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* (**Commonwealth Offsets Policy**). The Commonwealth Offsets Policy guides the use of offsets to ameliorate the impacts of controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). An offset requires strict like-for-like standards to be met under EPBC Act requirements, these are bespoke and site specific and cannot be captured under a standard protocol determination as proposed for the new market.

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determine whether the Scheme's operation and outcomes are consistent with the purposes of the Biodiversity Conservation Act 2016. The effectiveness of the Scheme's implementation by DPE and the Biodiversity Conservation Trust (BCT) has been limited. A market-based approach to biodiversity offsetting is central to the Scheme's operation but credit supply is lacking and poorly matched to growing demand: this includes a potential undersupply of in-demand credits for numerous endangered species. Key concerns around the Scheme's integrity, transparency, and sustainability are also yet to be fully resolved. As such, there is a risk that biodiversity gains made through the Scheme will not be sufficient to offset losses resulting from the impacts of development, and that DPE will not be able to assess the Scheme's overall effectiveness, see Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, August 2022, available at https://www.audit.nsw.gov.au/sites/default/files/documents/FINAL%20-%20Effectiveness%20of%20the%20Biodiversity%20Offsets%20Scheme.PDF

[5] See submissions available at: https://www.parliament.nsw.gov.au/committees/Pages/inquiryprofile/integrity-of-the-nsw-biodiversity-offsets-scheme.aspx#tab-submissions and final report is available at: https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf

[6] EDO's concerns with biodiversity offsetting, and recommendations for strengthening current frameworks in line with best-practice, are set out in more detail in previous work including, for example:
EDO, *Submission to the 10 year review of the EPBC Act*, April 2020, available at https://www.edo.org.au/publication/submission-10-year-review-epbc-act/
EDO *Submission to the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme*, September 2021, available at https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/
EDO *Submission on draft Northern Territory Offsets Policy,* February 2020, available at https://www.edo.org.au/publication/nt-offsets-policy/

The Commonwealth Offsets Policy was considered as part of the most recent Independent Review of the EPBC Act (**Samuel Review**).[7] The Samuel Review made clear recommendations for how the Commonwealth's regulation of offsets should be strengthened, including that:

- Immediate changes are required to the environmental offsets policy to ensure that offsets do not contribute to environmental decline.
- Offsets should only be acceptable:
    - when they are applied in accordance with the recommended National Environmental Standards for matters of national environmental significance;
    - where an offset plan demonstrates that they can be ecologically feasible; and
    - where outcomes from offsets can be properly monitored and measured.
- In the longer term, offsets should be enshrined in law. The EPBC Act should require:
    - offsets to be ecologically feasible and deliver genuine restoration in areas of highest priority;
    - a decision-maker accept offsets that encourage restoration offsets to enable a net gain for the environment to be delivered before the impact occurs
    - a public register of offsets for all Commonwealth, State or Territory offsets sites, designated as a national interest environmental dataset.

Throughout our engagement on the Samuel Review, EDO has outlined best practice offsetting principles that should underpin national environmental standards for offsetting.[8]

In our view, the regulation of offsets by the Commonwealth should continue to be considered as part of the broader EPBC Act reform process including the development of a robust, legally enforceable national standard for offsets.

Summary of recommendations

- **The nature repair framework should not include biodiversity offsetting as a component.**
- **The regulation of biodiversity offsets by the Commonwealth should be considered as part of the EPBC Act reform, including the development and implementation of a robust best practice national standard for biodiversity offsetting.**
- **Should any form of offsetting be permitted under the new market in the future there must be clear limits. For example, an avoidance mitigation hierarchy requirement before offsets are used, exempt entities that cannot be offset by purchase of a biodiversity certificate, a clear right for a landholder to prohibit sale of their certificate for the purpose of an offset, a transparent requirement on the certificate register on what certificates were purchased to offset impacts elsewhere, a**

[7] Professor Graeme Samuel AC, *Independent Review of the EPBC Act – Final Report*, October 2020, available at https://epbcactreview.environment.gov.au/resources/final-report

[8] EDO, *Submission to the 10 year review of the EPBC Act*, April 2020, available at https://www.edo.org.au/publication/submission-10-year-review-epbc-act/

prohibition on on-selling certificates used for offsetting, and very clear rules to require genuine additionality of environmental outcomes and to prevent double-dipping.

2. The timing and sequencing of this Bill in the context of EPBC Act reform

We understand that this Bill draws significantly on the carbon farming legislation - the *Carbon Credits (Carbon Farming Initiative) Act 2011*, and draws on a very similar Bill introduced by the former Government, albeit focussed on agricultural land.[9] This Bill repeats many provisions of the former Bill and mirrors provisions of the CFI legislation. We support some improvements in the latest version of the Bill including that the Minister for the Environment and Water will administer the new legislation rather than the Minister for Agriculture, and that the Bill extends to all land, not just agricultural land.

We are encouraged by the interest of the private sector to invest in natural capital and genuine environmental outcomes, but we question the haste for introducing and passing this legislation at this stage. There are significant design issues (discussed below) that are dependent on concurrent reform and review processes. For example:

- The broader reform of the EPBC Act is underway, including the development of legally enforceable national environment standards that will identify outcomes that new laws will be designed to achieve. A critical standard will relate to biodiversity offsets. It is expected that there will be draft standards and an Exposure Bill/s by the end of 2023. This means it is highly likely there will not be legislation introduced until 2024 (despite the commitment in the *Nature Positive Plan*). This means that a legally enforceable national standard for biodiversity offsetting will not legally exist until next year. Much of the assurance and protections for the proposed market refer back to a new standard, so it is high risk to establish a market before the relevant standard is made. As discussed above, given EPBC offsets appear likely to be a significant driver of demand for the NRM, it is concerning that priorities and safeguards of the EPBC offsets regime won't be set up for when the NRM Bill is being debated.

- The recent Chubb Review of ACCUs found significant problems with governance of the carbon market by the Clean Energy Regulator (**CER**). The recommendations of the Chubb Review have not been implemented yet. Again, it represents a significant risk to give the CER additional functions – in an area where they do not have specific expertise – before the significant governance and integrity issues have been addressed.

- There is also a reform process underway to establish a new national Environment Protection Authority (**EPA**). This new regulator will be equipped with environmental expertise, compliance and enforcement powers, and a role in assessments and approvals etc. Again, as this legislation has not been consulted upon and introduced it is unclear the role of this new

[9] Agriculture Biodiversity Stewardship Market Bill 2022

body in relation to environmental offsets. We submit that a newly established EPA is likely to be a better regulator of a nature repair market.

There are risks of the proposed Bill pre-empting critically important reforms that need to establish a strong foundation for new laws. The objectives of new nature laws to address the biodiversity crisis, achieve zero extinctions, conserve 30% of land and water by 2030, could be undermined by a poorly designed scheme being established in a hurry, and a flood of cheap and ineffective certificates being used as offsets to facilitate habitat clearing approvals elsewhere.

For these reasons, EDO recommends delaying this legislation until legally enforceable national standards for matters of national environmental significance and biodiversity offsetting are established, and carbon market reforms are implemented.

Summary of recommendations

The passing of the Bill should be delayed until:

- **Legally enforceable national standards for matters of national environmental significance and biodiversity offsetting are established under the EPBC Act reforms;**
- **The new independent national EPA has been established;**
- **The Chubb Review recommendations have been implemented in full.**

3. Ensuring integrity and longevity in environmental outcomes

A range of clear provisions are crucial for ensuring outcomes are delivered. We identify the following examples of key issues and questions relating to: additionality, permanence, excluded projects, variation and cancellation, and reporting. Provisions relating to each of these issues must be focussed on ensuring long-term outcomes are verified and delivered on ground.

Additionality

There are many provisions in the Bill that need to be tightened in relation to environmental outcomes. For example, proposed clause 101 regarding the issue of biodiversity certificates provides that:

- the project is sufficiently progressed to have resulted in, or be likely to result in:
  - (i) the biodiversity outcome for the project; or
  - (ii) enhancement or protection of biodiversity that would be unlikely to occur in the absence of the project;

EDO **recommends** that the project should be required to meet (i) **and** (ii), benefit that is unlikely to occur in the absence of the project should not be an optional requirement.

Permanence

The longevity of biodiversity outcomes under the scheme is critical. If the scheme is to be used to meet offsets requirements (which we do not support), then the development impacts requiring offsets

will be permanent. Anything less than an in-perpetuity offset will result in a net loss. Facilitating clearing elsewhere is inconsistent with the outcomes that need to be achieved and the objective of nature repair.

We note that proposed clause 15(7)(e) provides that a notice must 'identify the activity period and the permanence period for the project', and proposed clause 34 stipulates this as 25 years, or as per method. The question of what constitutes a reasonable period – particularly for measures that are meant to lock-in long-term reforestation – will vary and must be based on scientific considerations. In many cases, 25 years will not be adequate for most offsets. Under the proposed clause, it appears a method could stipulate a shorter period. It therefore is not clear what happens after 25 years and what ongoing obligations there are on new landholders. Concerningly, it is not clear if a certificate area could then be cleared or developed, for example.

There is a degree of confusion about the term 'permanence period' and it is potentially misleading. EDO **recommends** that the proposal of ALCA be adopted and the Bill refer to 'certificate period' instead of 'permanence period.' The Bill should clarify ongoing conservation and restoration requirements beyond the certificate period.

The Bill must make clear what obligations apply to new landholders – for example, whether they sign a new contract as a project proponent or consent to continuation of a project. EDO **recommends** the binding nature of legal obligations on future landholders could be clarified if projects were noted on land titles.

There are other provisions that relate to the permanence of outcomes. For example, proposed clauses 96-98 refer to reversal of biodiversity outcome. Part 13 refers to relinquishment requirements and Part 14 includes for example, provisions relating to biodiversity maintenance declarations which may be a safeguard if a relinquishment requirement is not complied with. We note, proposed s148 allows for the rules to provide further guidance as to what is meant by 'reversal of biodiversity outcome', but this detail is not yet available?

Excluded biodiversity projects

Proposed clause 33 refers to excluded biodiversity projects and states "For the purposes of this Act, a biodiversity project is an excluded biodiversity project if it is a project of a kind specified in the rules." The Bill requires that the Minister (when making rules about what would be an excluded project), must have regard to whether there is a material risk that that kind of project will have a material adverse impact on one or more of the following: the availability of water; biodiversity (other than the kinds of biodiversity to be addressed by the project); employment; the local community; land access for agricultural production.

This needs further explanation. It could mean that opportunities to enhance or protect biodiversity via this new framework may be limited if the Minister considers employment, land access etc. is more important (ie – function as a barrier to protecting biodiversity if that would impact on the economy or farmers). There needs to be transparency for how the Minister assesses and weighs up 'material risk' if trade-offs are made between differing impacts, noting the priority of the proposed scheme is on biodiversity gains.

More broadly, if the scheme is to be used for offsetting purposes (which we do not support), the Bill should establish power to exclude certain projects from the offsetting scheme. We **recommend** provisions addressing the fact that certificates relating to critically endangered species and communities should not be able to be used as offsets as those entities should be off limits and their habitat destruction should not be amenable to approval on the basis of offsetting. This requires a strong offset standard to be developed first as part of the EPBC Act reforms.

Variation and cancellation

There are issues that need to be clarified in relation to varying and cancelling certificates. These have obvious implications for delivery of actual biodiversity outcomes. For example:

- Division 4 provides for the registration of a registered biodiversity project to be cancelled, either: (a) voluntarily, with different procedures applying depending on whether a biodiversity certificate has been issued; or (b) unilaterally by the Regulator, if the project or the project proponent does not satisfy certain conditions and requirements. The Bill needs to make clear how cancellation affects the previous sale/issue of the certificate in terms of delivery of outcomes.
- The Bill provides for voluntary variation of registration of biodiversity project, including changes in project area, methodology, activity period and permanence period, with proponent consent for material changes. The Bill needs to make clear how actual outcomes will be tracked if there is significant variation to what was initially certified for delivery.
- The Bill provides for voluntary cancellation of registration of biodiversity project where a certificate is in effect. Unless clarified, this provision could allow a certificate to be issued, sold and relinquished before any biodiversity outcomes are delivered.
- The Bill provides that the Regulator can refuse an application to cancel registration of a biodiversity project, but it is less clear what power does the regulator have to ensure that the project goes ahead in that instance.
- The Bill provides for Unilateral cancellation of registration of biodiversity project, for example where eligibility requirements have not been met etc. It is essential that the scheme is established to make eligibility requirements (and integrity principles) clear at the outset so that ineligible projects would not be registered.

These issues are particularly important if certificates are being used to meet offset obligations.

Methodology determinations

EDO **recommends** that methodology determinations must be strongly linked to objects (net positive and/or stronger objects) and integrity standards. For example, the Bill should specify that the Minister must not make a methodology determination unless the specified kinds of biodiversity projects covered by the determination can be reasonably expected to result in a positive biodiversity outcome that is a real and additional gain.

In relation to methodology determinations, the Minister must have regard to integrity standards and Nature Repair Committee advice, and may consider a range of other impacts (eg, agricultural, social,

economic). The Minister may do this without seeking advice where variations are minor, however what constitutes a 'minor' variation is not defined.

Further, it is not clear what the effect on existing projects will be if the Nature Repair Market Committee advises the Minister that the Committee is satisfied that there is reasonable evidence that the methodology determination does not comply with one or more of the biodiversity integrity standards. The Bill suggests that rules could be made to determine that a variation to a methodology determination both does and does not apply to biodiversity projects covered by the determination that have already been registered. Rules should establish criteria to determine whether an existing project should or should not be affected by the variation, and the Rules should be subject to public consultation.

Reporting

The Bill sets out requirements for biodiversity project reports, however the detail of what will be required will be set out in the rules. EDO **recommends**:

- that there be more detail as to what information is required in the reports
- The purpose of the report should be articulated in the Bill (both for Category A and Category B reports)
- The proposed reporting period of 5 years be reduced to 3 years to allow for greater project oversight
- p116(130) 102 Category A biodiversity project reports—subsequent reports
- The Bill should ensure that detail on biodiversity outcomes in reports is publicly available (see further comments on the public register below).

Summary of recommendations

- **Additionality and permanence of environmental outcomes should be reflected in the Bill.**
- **EDO recommends that the proposal of ALCA be adopted and the Bill refer to 'certificate period' instead of 'permanence period.' The Bill should clarify ongoing conservation and restoration requirements beyond the certificate period.**
- **The binding nature of legal obligations should be clarified in the Bill, for example by ensuring projects are noted on land titles.**
- **The Bill should provide further clarity on decision making regarding excluded biodiversity projects, and projects relating to critically endangered species or habitats must be excluded from use as offsets.**
- **Provisions relating to variation and cancellation of certificates must be clarified.**
- **Methodology determinations must be strongly linked to objects (net positive and/or stronger objects) and integrity standards.**
- **Reporting periods should be reduced to 3 years, with biodiversity outcomes publicly available. The Bill should contain greater clarity on the purpose of, and what is required in, reports.**

4. The objectives of the scheme

The Bill proposes that 'protect or enhance' is the standard adopted by the framework. EDO is concerned that this standard is not strong enough, ie, that it is essentially applies a 'no net loss' standard that doesn't account for baseline decline. EDO **recommends** that the objects should establish a threshold test that projects must 'protect, **recover *and*** enhance' biodiversity.

The objects could also be strengthened to refer to the need to incentivise investment in biodiversity to meet international commitments such as the Kunming-Montreal Global Biodiversity Framework.

We also **recommend** removing 'in native species' from cl 3(a) (and elsewhere throughout the Bill – e.g. cl 4, cl 7 Definitions). While the Explanatory Memorandum explains the Bill is intended to focus on native species, not exotics, the qualification is not needed in the objects because:

- It is inconsistent with other environmental legislation (ie the phrase 'biodiversity in native species' is not used in other environmental legislation); and
- If based on best science, enhancing biodiversity would presumably exclude exotics.
- It would also exclude other biodiversity values such as soil quality etc. which could potentially limit the scope of protocol determinations and projects under the scheme. Other co-benefit models (e.g Qld LEF co-benefit protocols) do recognise soil condition.

Purpose, demand and co-benefits?

In discussions around the objectives for the scheme it has been suggested that the scheme will be attractive to investors who have a regulatory requirement for a carbon credit and may wish to also purchase an additional biodiversity benefit: described as "a carbon credit with a green halo". It is unclear what the demand for this will be and whether the private sector will be willing to pay a premium for credits with co-benefits if there is no regulatory driver requiring them to do so.

The Bill is silent on the interaction between carbon credits and biodiversity certificates – except for the proposal to have the CER regulate both. This needs to be explored further with more detail to interrogate to ensure that any co-benefit credits have absolute verifiable integrity from a carbon and biodiversity perspective.

Consistent with EDO draft recommendations elsewhere, and modelled off the Qld LRF co-benefit model, the scope of the framework could be expanded to recognise social and cultural benefits of projects.[10] This should be done in consultation with additional experts, and would require amendment to key parts of the legislation (e.g. objects etc.). The framework Bill could at least keep this open by including provisions that would allow the rules to make additional objects, standards etc.

Summary of recommendations

- **The objects should establish a threshold test that projects must 'protect, recover and enhance' biodiversity. The objects should additionally reference international commitments such as the Kunming-Montreal Global Biodiversity Framework.**

[10] See: https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Opportunities...-environmental-stewardship.pdf

- **The term 'native species' should be removed from the Bill.**
- **The Bill should provide further detail on interaction with carbon credits and co-benefits, and framework for co-benefits expanded to include the social and cultural benefits of projects.**

5. Administration of the nature repair market framework

Given intention of the Scheme is to drive improvement in biodiversity, we support the Minister for the Environment and Water administering the Scheme.

Our understanding is that the Clean Energy Regulator has been proposed to administer the nature repair framework, based on the (assumed) similarities between the proposed nature repair market framework and the carbon market framework established under the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

We have concerns with both:

- Basing the nature repair framework on the *Carbon Credits (Carbon Farming Initiative) Act 2011; and*
- The proposal that the Clean Energy Regulator (**CER**) administer the Scheme.

Using the Carbon Credits (Carbon Farming Initiative) Act 2011 framework

There are likely to be key differences in the carbon market framework established under the *Carbon Credits (Carbon Farming Initiative) Act 2011* and the nature repair framework. For example:

- The carbon market framework operates primarily as an offsets scheme, whereas it is unclear if the nature repair framework will have an offsetting component as noted; and,
- To date, the primary buyer of Australian Carbon Credit Units (**ACCUs**) issued under the *Carbon Credits (Carbon Farming Initiative) Act 2011* has been the Australian government.[11] It is unclear what role the Government will have in purchasing biodiversity certificates.

While the *Carbon Credits (Carbon Farming Initiative) Act 2011* model could provide a starting point for developing the nature repair framework, the legislative framework must be fit-for-purpose and meet the needs of the unique nature repair market.

[11] For example, in 2021, the largest buyer of ACCUs was the Australian Government through the Clean Energy Regulator's ERF, followed by voluntary corporate buyers and state and territory governments, and liable entities under the Australian Government's Safeguard Mechanism that have exceeded their emissions baselines, see Clean Energy Regulator, Quarterly Carbon Market Reports available at http://www.cleanenergyregulator.gov.au/Infohub/Markets/Pages/Quarterly-Carbon-Market-Reports.aspx

The Clean Energy Regulator

The CER was set up for the primary purpose of carrying out functions under climate change laws.[12] While the CER can exercise functions conferred on it by any other Commonwealth law,[13] its current expertise and day-to-day functions relate exclusively to the regulation of climate and energy laws.[14] We are concerned that the CER does not have the relevant expertise to administer the framework, which is intended to deliver biodiversity conservation and restoration outcomes. Again, our view is that the regulator must have expertise to administer a scheme specifically tailored to address the unique needs of the nature repair market; and the CER may not be the best agency to do this.

The integrity of the carbon offsets market has been brought into serious question, for example in terms of accountability, transparency, accuracy, value for money, and achievement of actual carbon abatement under certain methods. Earlier this year, experts raised concerns that particular methods established under the *Carbon Credits (Carbon Farming Initiative) Act 2011,* including the Human-induced Regeneration (**HIR**) method and Avoided Deforestation method, do not meet offsets integrity standards.[15]

As noted the Chubb Review makes a number of important recommendations to improve governance and integrity. These need to be implemented in full before consideration is given to adding new additional functions beyond the CER's current expertise.

EDO is concerned at the proposal to use Greenhouse gas auditors for the purposes of the nature repair market. These auditors have a different skill set and it is unclear that they would have the relevant expertise to audit biodiversity outcomes. Specific details of adviser accreditation are left to the rules so this remains unclear.

In light of these concerns EDO **recommends** that the appropriate regulator is the new national EPA. This is consistent with our concerns articulated in section 2, regarding the establishment of the nature repair scheme after implementation of broader EPBC Act reforms. This will be vital if the new market is linked with a reformed EPBC Act offsets market, as EDO understands is the intention. Further, the regulator of this scheme should have outcome focused considerations when approving a project, in addition to ticking off procedural adherence to methodology.

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[12] *Clean Energy Regulator Act 2011*, s 12(a).

[13] *Clean Energy Regulator Act 2011*, s 12(b).

[14] For example, the CER currently has functions conferred on it by or under the *Clean Energy Act 2011*; *Carbon Credits (Carbon Farming Initiative) Act 2011*; *National Greenhouse and Energy Reporting Act 2007*; *Renewable Energy (Electricity) Act 2000*; and *Australian National Registry of Emissions Units Act* 2011.

[15] See, for example, Macintosh, A., Butler, D., Evans, M.C., Larraondo, P.R., Ansell, D., Gibbons, P. *The ERF's Human-induced Regeneration (HIR): What the Beare and Chambers Report Really Found and a Critique of its Method,* The Australian National University, Canberra, 2022, available at https://law.anu.edu.au/sites/all/files/what_the_beare_and_chambers_report_really_found_and_a_critique_of_its_method_16_march_2022.pdf; see also Macintosh, A., Butler, D, Ansell, D., and Waschk, M., *The Emissions Reduction Fund (ERF): Problems and Solutions*, April 2022, available at https://law.anu.edu.au/sites/all/files/erf_-_problems_and_solutions_final_6_april_2022.pdf

Nature Repair Committee

The Bill also proposes to establish a Nature Repair Committee as part of the governance of the scheme. It is good that membership includes agricultural, biological/ecological or markets expertise, but the Bill could be strengthened to ensure these skills are all represented concurrently. We also support First Nations membership on the Committee. The use of a skills matrix to inform appointments, and having at least one First Nations Australian member with relevant expertise is consistent with Chubb Review Recommendation 2.

We support application of Chubb Recommendation 2 being applied to this Committee – for example regarding resourcing, remuneration and support from an independent secretariat.

Much of the detail is again left to the rules – for example, what will constitute a quorum for agreeing or giving advice. We support recommendations that the Committee needs to make unanimous decisions about methodology determinations advice and for advice on whether integrity standards have been met. There should also be public transparency on advice provided by the Committee to the Minister.

Commonwealth as purchaser

Finally in relation to the governance we note concerns about independence of the Commonwealth as a purchaser. We note that the Commonwealth is likely to be a key purchaser and source of demand for certificates. This may be essential for meeting strategic goals, commitments and targets such as the 30 x 30 commitments.

However, we note the Chubb Review Recommendation 1 relating to the risks of allowing the regulator to be a purchaser of certificates poses integrity issues and creates a conflict of interest. The delegation powers of the Secretary may need to be clarified in line with the Chubb recommendations.

Summary of recommendations

- **The new national EPA would be the appropriate regulator for a nature repair market, not the Clean Energy Regulator.**
- **The Chubb Review recommendations should implemented in full before consideration is given to adding new additional functions beyond the CER's current expertise.**
- **Chubb Recommendation 2 should be applied to the Nature Repair Committee, for example regarding resourcing, remuneration and support from an independent secretariat.**
- **Greater detail should be contained in the Bill regarding Nature Repair Committee function, and Committee should include First Nations membership.**

6. Implementation and content of the integrity standards

EDO supports the inclusion of integrity standards in the Bill but recommends they be strengthened.

We support a key enhance *and* protect standard as noted. This should be the articulated outcome for relevant species and ecological communities for each project, as well as broader identified outcomes. In practice this should mean projects involve all reasonable efforts to prevent negative impacts and actually demonstrate environmental gains and restoration. As noted above, permanence and longevity of outcomes is a key issue for the integrity of the whole market.

The principle of additionality – ie that a project "should result in enhancement or protection of biodiversity that would be unlikely to occur if the project was not carried out" must be mandatory. A project must deliver an outcome.

We support clear standards requiring that outcomes need to be identified and articulated to be able to be verified. Project outcomes must be supported by clear and convincing evidence; any estimate, projection or assumption must ecologically feasible, achievable and be reasonably certain. However, we note that currently it is unclear who has the onus (landholder or regulator) of verifying successful outcomes through the reporting auditing provisions. Monitoring requirements must be required for the length of the certificate period.

The integrity standards will inform biodiversity methodologies and Ministerial decision making, and are a key integrity measure to ensure effective (in terms of achieving positive biodiversity outcomes) operation of the scheme. As drafted the Bill requires the Minister to 'have regard to' these standards as one of several considerations. We **recommend** the integrity standards be strengthened by clarifying they are binding and not just a consideration to have regard to.

The integrity standards and principles must be drafted in such a way that they can be objectively applied at both the project level and also at a systems level to methodology determinations and, for example, decisions such as revocation of a biodiversity instrument.

Summary of recommendations

- **The integrity standards must be strengthened.**
- **The integrity standards must be a mandatory consideration in Ministerial decision making.**

7. Accountability and transparency

In order for the new market to have trust and integrity, there needs to be a high degree of transparency and accountability. For any market to operate effectively, issues of information asymmetry and trust must be addressed. Often commercial-in-confidence concerns are used as a reason to curtail published information, but in order to ensure accountability, EDO recommends a comprehensive range of information, decision, project details, certificate information be available on a public register.

Much of the detail about what will be made public will be determined by the Rules. Transparency is brought into question by not specifying the information to be included on the register within the legislation itself or the legislated methodology determinations and instead leaving it up to the rules to describe the nature of the information that will be publicly available – particularly as the rules are not subject to public consultation. EDO therefore **recommends** that there should be public consultation on the Rules.

Our **recommendations** include:

- It should be mandatory (not optional) to publish information on biodiversity certificates purchased by the Commonwealth.
- If biodiversity certificates are going to be issued to projects that are receiving other Government credits, funding etc., information about this should be mandatory rather than at the discretion of the proponent. This would allow for more accurate comparison of value and appropriate pricing of biodiversity certificates.
- For transparency purposes, information required to be published should be specified in the legislation itself not in "the rules". At a minimum, this should include information about the project area, the activities to be/being conducted, the permanence period for the project, the relevant methodology determination, the target outcomes etc. Noting most of this information will be captured in the Register entries for biodiversity certificates (section 164) but may not necessarily be listed on the Certificate itself (unless the rules require it). Achieved or anticipated biodiversity outcomes do not seem to be covered either. For equitable tradability a minimum set of information requirements should be prescribed.
- Taking Chubb Review Recommendation 3 into consideration, reporting requirements should also include: publishing of information on the impact of the scheme in the protection and enhancement of Australia's natural environment, and creating a public registry of precedents and rulings.
- As noted above, if certificates are to be used for offsets (which we do not support), this should be indicated on the public register.

Summary of recommendations

- **The Rules should be open for public consultation prior to implementation.**
- **A comprehensive range of information including decisions, project details, funding and pricing, precedents and certificate information should be available on a public register, with mandatory requirements for publication and mandatory details for publication determined in the primary legislation.**

8. Compliance and enforcement

As noted above, EDO has concerns about the CER being the regulator for the proposed market due to the lack of expertise and the significant differences between carbon and nature repair schemes.

There a number of concerns with the proposed auditing regime including:

- The Bill provides that an audit report required to be prepared by 'a registered greenhouse and energy auditor' – this seems to be modelled off section 13(1)(e)(ii) of the *Carbon Credits (Carbon Farming Initiative) Act 2011*, which requires an application to include an audit carried out by a registered greenhouse and energy auditor. Greenhouse gas auditors are not expert/specific in biodiversity outcomes – ecological experts are required with skills relevant to the methodology of the proposed project.
- The Bill provides that the Regulator can require an audit leader to be appointed, and a proponent can appoint themselves (self-select an auditor), and then review and potentially edit the audit report before it goes to regulator, and if no non-compliance found then proponent can get their money back. There also seem to be some discretion for proponents regarding information provided to audit leaders. These proposed arrangements lacks objectivity, rigour and are a potentially a perceived corruption risk.
- Where there is a suspected breach, we recommend that the regulator have power to appoint and pay for an independent auditor, and if non-compliance is identified the proponent should be charged a fee that is reasonably expected to cover the cost of audit activities. This would also allow better oversight and connection to the monitoring and investigation powers outlined in Divisions 2 and 3 of Part 18 (Enforcement).
- The idea that certificate relinquishment requirements may be met by relinquishing different certificates is of concern if the different certificates/projects relate to different ecological outcomes.
- In relation to monitoring, powers available to the Regulator, however there are no *minimum monitoring requirements* specified for the Regulator. Project proponents may be subject to monitoring requirements under section 182, however there is no corresponding provisions for how the Regulator responds to monitoring reports. To ensure scheme integrity, minimum monitoring requirements should be prescribed for the Regulator (e.g., the Regulator is to undertake monitoring of a representative subset of projects under a given methodology determination at x intervals. Taking Chubb Review recommendation 2 into consideration, the

regulator should be responsible for project monitoring, compliance and enforcement and their remit should explicitly include monitoring.

- All methodology determinations should be subject to routine monitoring within a specified period of entering into force.

Finally, we note that the Bill does not contain third party mechanisms for enforcing civil penalty provisions. Including these provisions increases accountability and is an important compliance and enforcement safeguard where a Regulator may fail to take action.

Summary of recommendations

- **Third party enforcement mechanisms should be provided for in the legislation.**
- **Greater clarity about appointment, skills and monitoring requirements should be provided for in the Bill.**