Environmental Defenders Office

Submission to the Senate Standing Committee on Environment and Communications on the Nature Repair Market Bill 2023

1 June 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.

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Acknowledgement of Country
The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

Executive Summary

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

EDO strongly supports investment in environmental restoration 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 the actual and timely delivery 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.

As drafted, EDO is concerned the Bill will not deliver positive outcomes for nature, secure restoration in the long-term, or deliver the investment which is critically needed to protect and restore the environment.

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.

We note that some amendments were made following public consultation on an exposure draft of the Bill, however, in the Bill as introduced, 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:

1. **Preventing the use of the proposed market for biodiversity offsets**
2. **The timing and sequencing of this Bill in the context of EPBC Act reform**
3. **The objectives of the scheme**
4. **Implementation and content of the integrity standards**
5. **Ensuring secure and long-term environmental outcomes**
6. **Administration of the nature repair market framework and governance by the Clean Energy Regulator (CER)**
7. **Accountability and transparency**
8. **Compliance and enforcement**

Summary of Recommendations

1. Preventing the use of the proposed market for biodiversity offsets

- Amend clause 7 (definitions) to define offsets as: 'measures that compensate for the residual significant impacts of an action on the environment, as required under Commonwealth, State or Territory law.'
- Amend clause 57 (biodiversity integrity standards) to specify that methodology will not comply with the biodiversity integrity standards if it has been created for the purpose of an offset project.
- Amend clause 33 (excluded biodiversity projects) to specify offset projects are excluded from being registered under the Act.
- Amend clause 73 (ownership of biodiversity certificates) to prevent the sale, transfer or trade of a biodiversity certificate for the purposes of an offset.

If certificates created under the nature repair market can be used as offsets:

- The government should be required to set a biodiversity investment strategy based on priority areas for investment.
- The market should not be operational until the new Offsets National Environment Standard is legally enforceable under the proposed new legislation.
- Landholders must have a clear right to prohibit the sale of their certificate for an offset.
- Certificates used for offsetting must be 'like for like' with the biodiversity loss.
- The Register must record whether a biodiversity certificate has been used as an offset.
- Any certificate used for offsetting must be deposited with the regulator to prevent further sale or transfer.

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; and,
    - the EPA has been established; and,
    - the Chubb Review recommendations have been implemented in full.

3. The objectives of the scheme

- Amend the Bill's objects to:
    - ensure the market operates to enhance, protect *and* maintain biodiversity, in the long-term.
    - refer to Australia's international commitments under the *Kunming-Montreal Global biodiversity framework*, and domestic goal of no new extinctions.
- The term 'in native species' should be removed from the Bill.
- The Bill should provide further detail on interaction with carbon credits and co-benefits, and leave open the opportunity for co-benefits expanded to include the social and cultural benefits of projects.

4. Implementation and content of the integrity standards

- Amend the biodiversity integrity standards to:
    - enhance *and* protect biodiversity (not "or");
    - ensure a project can't exacerbate a threat or create a perverse incentive;
    - exclude avoided loss projects.

- Ensure the standards include a clear requirement for projects to result in long-term achievement of biodiversity outcomes.
- Require that any varied methodology determination under Part 4 applies to all relevant registered projects, and that cancellation of a methodology leads to reassessment.

5. Ensuring secure and long-term environmental outcomes

Projects:

- Require that the default permanence period in Part 2 for registered biodiversity projects be a minimum of 100 years, with no option for shorter permanence periods in the methodology.
- Change the term 'permanence period' to 'certificate period'.
- Require that biodiversity projects should not be approved under part 2 unless they are likely to achieve positive biodiversity outcomes, and the proponents have the capacity and resources to achieve the stated biodiversity outcomes.
- Where the project is on leased land, require that lease terms must be for longer than proposed activity period.
- Registered projects which fail to commence demonstrable conservation actions, or fail to obtain landowner consent, should be cancelled well before 5 years have elapsed.

Certificates

- Mandate that the regulator be prohibited from issuing certificates under part 5 unless a project is beginning to deliver the intended biodiversity outcomes, and that the enhancement and protection of biodiversity would have been unlikely to occur in the absence of the project.
- Amend clause 151 (equivalent certificates) to clearly define equivalent certificates as only certificates which use the same methodology, and which relate to the same impacted matter (i.e. the same ecological community or species).
- Amend clause 151 so that equivalent certificates may only be relinquished where the original certificate is not available for relinquishment.
- Ensure biodiversity maintenance declarations made under part 14 can only be lifted once biodiversity outcomes have been secured, not at the discretion of the Regulator.
- Ensure rules for voluntary variation and cancellation of projects do not compromise the achievement of biodiversity outcomes.

6. Administration of the nature repair market framework and governance by the Clean Energy Regulator (CER)

- Establish the (proposed new) national Environmental Protection Agency as the regulator for the nature repair market, not the Clean Energy Regulator.
- The Nature Repair Market Committee must have First Nations membership.
- If the Clean Energy Regulator is to remain the regulator, the Bill should stipulate specific expertise requirements for membership of the CER.

7. Accountability and transparency

- Ensure the review of the operation of the market takes places within three years of operation, not five.
- Require that any rules created under the Act be open for public consultation prior to implementation.
- Require a comprehensive range of information including decisions, project details, funding and pricing, precedents and certificate information to be available on a public

register under part 15, with mandatory requirements for publication and mandatory details for publication determined in the primary legislation.
- Reporting should be mandatory where a project has been subject to relinquishment or maintenance declarations in the past.
- Exclusion from reporting or listing on the Register should not be at the full discretion of the regulator, but constrained by the legislation.
- Further detail should be provided about alternative assurance arrangements that the regulator and proponent can agree to instead of the audit process.

8. Compliance and enforcement

- Auditors should have specialist biodiversity expertise, not just greenhouse gas audit expertise
- Auditors must be able to enter land to undertake audits.
- Include provisions for third party enforcement under part 18.

Introduction

The intention to drive investment in restoration and 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, governments are proposing markets as an option for sourcing funding for conservation actions from private sector proponents, to supplement limited conservation and restoration funding provided by government.

EDO supports initiatives to direct more funding to conservation and restoration, but this must be *in addition to* 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 reliance on market mechanisms – particularly where such a mechanism relies on environmental offsetting to drive demand.

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.

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 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 addresses eight key areas of concern:

- **Preventing the use of the proposed market for biodiversity offsets**
- **The timing and sequencing of this Bill in the context of EPBC Act reform**
- **The objectives of the scheme**
- **Implementation and content of the integrity standards**

[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.

- **Ensuring secure and long-term environmental outcomes**
- **Administration of the nature repair market framework and governance by the Clean Energy Regulator (CER)**
- **Accountability and transparency**
- **Compliance and enforcement**

1. Preventing the use of biodiversity certificates as offsets to meet compliance obligations

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.

We understand that it is expected that a driver for demand will be private sector companies who need to discharge a regulatory biodiversity offsetting requirement and wish to purchase biodiversity certificates for that purpose. This was not explicit in the initial consultation or exposure draft process, and while there is no link in the legislation to environmental offsetting schemes, the use of certificates as offsets is contemplated in the Explanatory Memorandum.[3] It is not clear how significant demand for the certificates would be generated otherwise.[4]

We note that under the *Nature Positive Plan* reform process that is underway, a new National Environmental Standard on Biodiversity Offsetting is currently being developed under concurrent EPBC Act reform, and this will establish the Government's offset policy (in addition to potential legislative amendments in a new Act). 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 in the nature repair market is disappointing and disingenuous.

For the reasons set out below, EDO **does not support** offsets being part of the proposed market. There is a fundamental difference between creating a *biodiversity certificate* for a project that is solely designed to deliver an environmental benefit, compared to a *biodiversity credit* that is created for the purpose of offsetting a development impact elsewhere. A certificate may represent net gain, whereas a credit can actually represent net loss. If the proposed legislation is to actually achieve 'nature repair', EDO is of the view that the use of the certificates as offsets should be expressly excluded in the Bill.

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). Biodiversity certificates are not inherently equivalent, interchangeable units in the way that, for example, ACCUs are. The nature repair market, as proposed by the Bill, does not create innately 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.

[3] See Nature Repair Market Bill 2023, Explanatory Memorandum, [809], [959].
[4] See e.g. Lisa Cox, 'Labor plan for nature repair market rehashes old proposal and risks failure, experts say' (The Guardian, 6 February 2023) available at https://www.theguardian.com/australia-news/2023/feb/06/labor-plan-for-nature-repair-market-rehashes-old-proposal-and-risks-failure-experts-say.

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).

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.[5] Essentially, offset schemes are failing to protect and restore nature, or lead to positive outcomes.

For example, 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.[6] Serious issues relating to the scheme have been raised during a NSW parliamentary inquiry, with the Committee reporting that

[5] 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.

[6] 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 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

almost every stakeholder group submitted significant concerns about the design, operation and efficacy of the scheme.[7]

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.[8] 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 currently 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.

The Commonwealth Offsets Policy was considered as part of the most recent Independent Review of the EPBC Act (**Samuel Review**).[9] 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.

[7] 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

[8] 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/

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

- 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; and
  - 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.[10]
To achieve positive environmental outcomes, the Bill should be amended to clearly prevent biodiversity certificates issued through the market from being used to offset habitat loss approved through other environmental approval schemes.

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

Recommendations:

- **Amend clause 7 (definitions) to define offsets as: 'measures that compensate for the residual significant impacts of an action on the environment, as required under Commonwealth, State or Territory law.'**
- **Amend clause 57 (biodiversity integrity standards) to specify that methodology will not comply with the biodiversity integrity standards if it has been created for the purpose of an offset project.**
- **Amend clause 33 (excluded biodiversity projects) to specify offset projects are excluded from being registered under the Act.**
  Amend clause 73 (ownership of biodiversity certificates) to prevent the sale, transfer or trade of a biodiversity certificate for the purposes of an offset.

However, should any form of offsetting be permitted under the new market, clear limits must be included in the Bill. The use of certificates as offsets would significantly change the function of the market, and means that even higher integrity standards would need to apply to prevent the market not only just maintaining the status quo; but to prevent additional harm to biodiversity if certificates are not real, additional, and permanent. To be clear, EDO does not support the use of nature repair market biodiversity certificates as offsets, however makes the following recommendations to ensure that if certificates can be used as offsets, the Bill must clearly set out how this will be dealt with to avoid perverse environmental outcomes.

In the interests of transparency, the legislation must ensure that certificates clearly state when they have been used for offset purposes – this must be on the Register. Currently the legislation allows this information to be recorded (under Part 15), but the Bill should be amended so this *must* be recorded if relevant.[11] Similarly, they should not be available for sale to third parties (in the event a secondary market exists), nor available for further trade once they have been linked to an offset.

[10] 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/
[11] See Nature Repair Market Bill clause 167, Explanatory Memorandum at [959].

This could be achieved by requiring certificates used for offsets be deposited with the regulator under Part 12 of the Bill. Proponents must have the ability to choose if their projects, and the relevant certificates, will be used for environmental offsetting. For example, a proponent may not wish their project and associated certificate be used to allow destruction of environmental values elsewhere. This could be achieved by amending Part 5 of the Bill so certificate applications may specify this information; or similarly under Part 2 when biodiversity projects are first registered.

EDO is of the strong view these restrictions and requirements must be in the primary legislation, and not in the rules.[12]

If the government intends to allow certificates to be used for offsetting purposes, then the passage of the Bill must be delayed until the Offsets National Environmental Standard is legally enforceable, and the Standard should be directly referenced in the Bill.

Further, we note that 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.

The government should be required to set a clear strategy for priority areas for biodiversity projects, to incentivise investment in those areas, but also to ensure the value of priority areas remains high.[13] The process for preparing the strategy, including requirements for public consultation and regular reviews of the strategy, should be set out in the Bill. This would also protect against an influx of projects at the lowest common denominator, which can be used easily and quickly to generate a project certificate, but which do not have longstanding biodiversity outcomes in the areas which need the most restoration efforts.

Recommendations:

- **The government should be required to set a biodiversity investment strategy based on priority areas for investment.**
- **The market should not be operational until the new Offsets National Environment Standard is legally enforceable under the proposed new legislation.**
- **Landholders must have a clear right to prohibit the sale of their certificate for an offset.**
- **Certificates used for offsetting must be 'like for like' with the biodiversity loss.**

[12] Mark Tilley, 'Australia to deal with offsetting concerns in nature repair market through methodology work, govt official says' (Carbon Pulse, May 24 2023) available at https://carbon-pulse.com/204685/?utm_source=Biodiversity+Pulse&utm_campaign=e5a2c7f9d5-Biodiversity+Pulse+Weekly%3A+25052023&utm_medium=email&utm_term=0_e95c326d05-e5a2c7f9d5-110405158.

[13] We support the purpose as proposed by the Wentworth Group of Concerned Scientists, namely that: "The purpose of the Biodiversity Investment Strategy would be to provide guidance on intended Government policy priorities. This strategy would not bind market participants but would: a. define, in a clear and measurable way, the outcomes the Nature Repair Market is seeking to deliver and the baseline against which these outcomes would be measured b. provide clarity around public policy intentions and forward guidance regarding potential Government purchase of certificates c. send a clear signal to the market (buyers and sellers) about what projects the Government perceives as more/less valuable, or lower/higher priority d. give landholders an insight to the kind of projects that would be marketable."

- **The Register must record whether a biodiversity certificate has been used as an offset.**
- **Any certificate used for offsetting must be deposited with the regulator to prevent further sale or transfer.**

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

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.[14] This Bill repeats many provisions of the former Bill and mirrors provisions of the CFI legislation. We support some improvements made by this Government upon introducing the Nature Repair Market 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 also note some tweaks were made following public consultation on the exposure draft in relation to First Nations representation on the committee, providing statements of reasons, permanence periods and methodology compliance with integrity standards.

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 new national standard will relate to biodiversity offsets. It was initially expected that there would be draft standards and an Exposure Bill/s by the end of 2023. However, this timeframe is likely to extend to early 2024 for public consultation on draft legislation and initial standards. 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. The assurance and protections for the proposed market need to be clearly linked to the new national standard for biodiversity offsetting, so it is high risk to establish a market before the relevant standard is made. As discussed above, given offsets appear likely to be a significant driver of demand for certificates in the new market, it is concerning that priorities and safeguards of the new offsets regime won't be established until well-after this 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 fully 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

[14] Agriculture Biodiversity Stewardship Market Bill 2022 (Cth).

etc. Again, as this legislation has not been consulted upon and introduced it is unclear the role of this new 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, and conserve 30% of land and water by 2030, could be undermined by a poorly designed scheme being established in a hurry, creating 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.

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; and,**
  - **The EPA has been established; and,**
  - **The Chubb Review recommendations have been implemented in full.**

3. 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, i.e., 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 should 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, and explicitly reference our commitment to achieve the '30 by 30' conservation goal. The objects should also reference the government's commitment to no new extinctions.[15]

We also recommend removing 'in native species' from cl 3 (and elsewhere throughout the Bill – e.g. cl 4, cl 7 Definitions, cl 57). While the Explanatory Memorandum explains the Bill is intended to focus on native species, not non-native species, the qualification is not needed in the objects or elsewhere in the Bill because:

- It is inconsistent with other environmental legislation (i.e. 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.

[15] Department of Climate Change, Energy, the Environment and Water, The Threatened Species Action Plan 2022 – 2023, available at https://www.dcceew.gov.au/environment/biodiversity/threatened/action-plan.

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.[16] 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.

Recommendations:

- **Amend the Bill's objects to:**
  - **ensure the market operates to enhance, protect *and* maintain biodiversity, in the long-term.**
  - **refer to Australia's international commitments under the *Kunming-Montreal Global biodiversity framework*, and domestic goal of no new extinctions.**
- **The term 'in native species' should be removed from the Bill.**
- **The Bill should provide further detail on interaction with carbon credits and co-benefits, and leave open the opportunity for co-benefits expanded to include the social and cultural benefits of projects.**

4. Implementation and content of the integrity standards

The integrity standards will inform biodiversity methodologies and are a key integrity measure to ensure effective (in terms of achieving positive biodiversity outcomes) operation of the scheme. 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, and this should be reflected in the text of the standard. Permanence and longevity of outcomes is a key issue for the

[16] See: EDO, *Defending the Unburnt Discussion Paper - Opportunities to expand and enhance environmental stewardship*, October 2022, available at https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Opportunities...-environmental-stewardship.pdf

integrity of the whole market, and it is crucial these concepts are accurately captured in the biodiversity integrity standards. Additionally, projects must not be able to create a perverse incentive to degrade land before applying to register a project or exacerbate a key threating process identified under the EPBC Act. EDO submits that the language 'significant adverse impact' on a protected native species is too high a threshold, and that this term should be defined in the Bill.

It is crucial that projects are only approved if they are additional, and deliver outcomes that would not have been delivered but for the scheme. The integrity standards should make clear that avoided/averted loss projects should not be allowed under the methodology determination unless the site is under clear and imminent threat.

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.

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 assessment instrument. EDO supports the inclusion of a requirement that the Minister cannot make a methodology determination unless satisfied it complies with the integrity standards.

Methodology determinations

Methodology determinations must be strongly linked to objects (net positive and stronger objects) and integrity standards. As well as requiring the Minister to be satisfied that the determinations are consistent with the integrity standards, 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. EDO supports the input of the Nature Repair Committee being required, including a determinative statement on compatibility with the integrity standards.

In making and varying a determination, the Minister may consider other impacts, including whether significant adverse environmental, agricultural, cultural, economic or social impacts are likely to arise from the carrying out of the kind of project that would be covered by the determination. EDO recommends consideration of environmental impacts *must* be considered.

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 currently allows that a registered project may continue under its initial method, even if that method has been varied or even revoked. EDO is concerned that such projects could still issue certificates, even if a methodology has been found to be inconsistent with the integrity standards, or leading to poor outcomes. The Bill should tightly constrain any ongoing application of a methodology, and preference the varied version where relevant. This should not be allowed where the revoked or varied methodology has led to poor biodiversity outcomes.

Recommendations:

- **Amend the biodiversity integrity standards to:**
  - **enhance *and* protect biodiversity (not "or")**
  - **ensure a project can't exacerbate a threat or create a perverse incentive**
  - **exclude avoided loss projects**
- **Ensure the standards include a clear requirement for projects to result in long-term achievement of biodiversity outcomes.**
- **Require that any varied methodology determination under Part 4 applies to all relevant registered projects, and that cancellation of a methodology leads to reassessment.**

5. Ensuring secure and long-term environmental outcomes

A range of clear provisions are crucial for ensuring outcomes are delivered. This is particularly so if the market is to be used to generate certificates for offsets (which EDO does not support). This section makes several recommendations relating to project registration and issuing of certificates which are essential to ensure secure and permanence outcomes.

Projects

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.

The Bill currently sets 'default' permanence periods of 100 years or 25 years, or another period to be specified in the methodology. 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, and a method may stipulate an even shorter period. EDO recommends clause 34 be amended so that 100 years is the default permanence period, with no option for a shorter permanence period to be determined in the methodology.

It is also unclear what happens after this period 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 the Australian Land Conservation Alliance (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.

In terms of securing outcomes, the Bill must make clear that projects cannot be approved (under clause 12) unless the project is likely to achieve positive biodiversity outcomes, and the proponents have the capacity and resources to achieve the stated biodiversity outcomes for the project. If the project to take place on leased land, lease terms must be not only compatible with the proposed project plan, but lease duration should at least equivalent to the activity period. Projects which fail to obtain landowner consent, or fail to commence demonstrable conservation actions, should be cancelled by the regulator well before five years have elapsed. The Bill must

make clear that new landholders must consent for continuation of an existing project, and that a project will be cancelled if this is not obtained in a reasonable time.

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 (i.e. – 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.

Certificates

It is concerning that clauses ensuring additionality seem to have been removed from the version of the Bill as introduced. For example, under clause 70(2)(e) in the exposure draft, in issuing biodiversity certificates, a project would have had to be 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;

Clause (ii) appears to have been removed from clause 70. EDO recommends that this clause be re-instated, and that projects must be required to meet both (i) and (ii), to ensure that a benefit that is unlikely to occur in the absence of the project should not be an optional requirement. As discussed above, additionality must also be captured in the integrity standards. Moreover, certificates should not be issued under this Part unless a project is beginning to deliver the intended biodiversity outcomes (i.e. so that the outcomes to be achieved are not simply hypothetical).

Relinquishment of certificates is a significant concern, and EDO recommends greater clarity be built into the primary legislation (rather than relying on the rules). For example, where a reversal of biodiversity outcome has occurred, and a certificate has been sold to a third party, a proponent may choose to relinquish an 'equivalent' certificate, or two, instead. The Bill leaves open:

- When a proponent may choose to do this, even if they continue to hold the original certificate;
- Whether more than one equivalent certificate may be relinquished;
- What an equivalent certificate may be determined as.

As noted, the biodiversity certificate market is vastly different to the carbon market, and units are not inherently interchangeable. If there has been loss or reversal in biodiversity, this may be irreversible and not able to be 'offset' by another certificate, however similar the project.

To protect against overall biodiversity loss, Part 13 of the Bill should be amended to ensure that equivalent certificates may only be relinquished where the original certificate is not available for relinquishment (i.e. not as a discretionary choice of the proponent). Parameters of what 'equivalence' looks like should be determined in the Bill, with clear criteria stipulating this must be restricted to certificates which use the same methodology and have the same impacted matter (i.e. relate to the same ecological community or species). Additionally, the parameters of what constitutes a 'reversal of biodiversity outcome' for the purposes of relinquishment notices should be determined in the Bill.

Where a relinquishment notice is not complied with, the regulator may impose a biodiversity maintenance declaration (Part 14). This will restrict the activities which can take place in the project area, with an aim to addressing the reversal of biodiversity outcomes. It must be clear that such a declaration can create positive duties on proponents (not simply declaring prohibited activities), and that the declaration could only be lifted if biodiversity outcomes are beginning to be secured, not simply at the discretion of the regulator (clause 157).

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:

- The Bill provides for voluntary variation of registration of biodiversity project, including changes in project area, methodology, activity period and permanence period, with certificate holder 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 the regulator has 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.

Recommendations:

Projects:

- **Require that the default permanence period in Part 2 for registered biodiversity projects be a minimum of 100 years, with no option for shorter permanence periods in the methodology.**
- **Change the term 'permanence period' to 'certificate period'**
- **Require that biodiversity projects should not be approved under part 2 unless they are likely to achieve positive biodiversity outcomes, and the proponents have the capacity and resources to achieve the stated biodiversity outcomes.**
- **Where the project is on leased land, require that lease terms must be for longer than proposed activity period.**
- **Registered projects which fail to commence demonstrable conservation actions, or fail to obtain landowner consent, should be cancelled well before 5 years have elapsed.**

Certificates

- **Mandate that the regulator be prohibited from issuing certificates under part 5 unless a project is beginning to deliver the intended biodiversity outcomes, and that the enhancement and protection of biodiversity would have been unlikely to occur in the absence of the project.**
- **Amend clause 151 (equivalent certificates) to clearly define equivalent certificates as only certificates which use the same methodology, and which relate to the same impacted matter (i.e. the same ecological community or species).**
- **Amend clause 151 so that equivalent certificates may only be relinquished where the original certificate is not available for relinquishment.**
- **Ensure biodiversity maintenance declarations made under part 14 can only be lifted once biodiversity outcomes have been secured, not at the discretion of the Regulator.**
- **Ensure rules for voluntary variation and cancellation of projects do not compromise the achievement of biodiversity outcomes.**

6. Administration of the nature repair market framework and governance by the Clean Energy Regulator (CER)

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

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.[17] 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.

The Clean Energy Regulator

The CER was set up for the primary purpose of carrying out functions under climate change laws.[18] While the CER can exercise functions conferred on it by any other Commonwealth law,[19] its current expertise and day-to-day functions relate exclusively to the regulation of climate and energy laws.[20] 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.[21]

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[17] 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

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

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

[20] *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.

[21] 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

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 above, 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 (but opposes). Further, the regulator of this scheme should have outcome focused considerations when approving a project, in addition to ticking off procedural adherence to methodology.

However, we note that the governance framework will need further consideration if offsets are included in the market and the new EPA is the decision-maker for development approvals requiring offsets. This highlights the need for clarity on development of our new environmental laws, including the new EPA, before the nature repair market is established and running.

If the CER is to be the regulator, the *Nature Repair Market (Consequential Amendments) Bill 2023* should also be amended to ensure there is relevant expertise on the CER while it is undertaking nature repair market functions. The Consequential Amendments Bill proposes to amend subsection 18(2) of the CER Act to add two new fields – agriculture and biological or ecological science. However these amendments do not increase the number of members that may be appointed or require that at least one member of the Clean Energy Regulator must have substantial experience or knowledge and significant standing in the proposed new fields. This should be a requirement.

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. 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 also support First Nations membership on the Committee.

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 provisions in the Bill ensuring Committee advice about methodology determinations to the Minister is published, and explanations of reasons where a Committee advice is not unanimous.

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 to stipulate that purchasing ability cannot be delegated to the Clean Energy Regulator.

Recommendations:

- **Establish the (proposed new) national Environmental Protection Agency as the regulator for the nature repair market, not the Clean Energy Regulator.**
- **The Nature Repair Market Committee must have First Nations membership.**
- **If the Clean Energy Regulator is to remain the regulator, the Bill should stipulate specific expertise requirements for membership of the CER.**

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.

For greater transparency, the Act should be reviewed within three years of commencement, to assess function, efficacy, integrity and achievement against the objectives (as under Part 21).

Further, 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.

Biodiversity market register

Our recommendations relating to the Register 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 (clause 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.
- The Register must record when a relinquishment notice has been issued for a certificate and when a biodiversity maintenance declaration relates to a registered project for which a certificate has been issued.
- As noted above, if certificates are to be used for offsets (which we do not support), this should be indicated on the public register.

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

As proposed, the regulator may exempt proponents from some reporting requirements based on anything the regulator considers relevant. This is too vague and open ended. Reporting should be mandatory where a project has been subject to relinquishment or maintenance declarations in the past. There is also little detail about alternative assurance arrangements which the regulator may enter into with proponents, which effectively exempts them from regular reporting obligations. The criteria for granting such an agreement must be iterated in the legislation.

Additionally, exclusion from the Register on basis of cultural heritage should not be a balancing exercise made at the discretion of the Regulator. This needs to be decision made by First Nations communities or persons who apply for an exclusion, and should be granted on application.
The Bill should ensure that detail on biodiversity outcomes in reports is publicly available.

Recommendations:

- **Ensure the review of the operation of the market takes places within three years of operation, not five.**
- **Require that any rules created under the Act be open for public consultation prior to implementation.**
- **Require a comprehensive range of information including decisions, project details, funding and pricing, precedents and certificate information to be available on a public register under part 15, with mandatory requirements for publication and mandatory details for publication determined in the primary legislation.**
- **Reporting should be mandatory where a project has been subject to relinquishment or maintenance declarations in the past.**
- **Exclusion from reporting or listing on the Register should not be at the full discretion of the regulator, but constrained by the legislation.**
- **Further detail should be provided about alternative assurance arrangements that the regulator and proponent can agree to instead of the audit process.**

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).
- 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 clause 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.

Recommendations:

- **Auditors should have specialist biodiversity expertise, not just greenhouse gas audit expertise**
- **Auditors must be able to enter land to undertake audits.**
- **Include provisions for third party enforcement under part 18.**