

Submission in response to
A National Biodiversity Market

prepared by

Environmental Justice Australia

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Submitted to:

Biodiversity Market Policy and Design Team

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About Environmental Justice Australia

Environmental Justice Australia (**EJA**) is a national public interest legal centre. We use the law to empower communities, to protect and regenerate nature, to safeguard our climate and to achieve social and environmental justice.

We are proudly non-profit, non-government, and funded by donations from the community. Our legal team combines technical expertise and a practical understanding of the legal system to protect communities and our environment.

EJA has a long history in advocating for the protection of ecosystems, flora and fauna, and has worked closely with people, communities and organisations to do so. We have brought ground-breaking litigation on behalf of brave clients to protect key ecosystems and threatened and endangered species.

Executive Summary

1. EJA welcomes the opportunity to make a submission in relation to the Department of Climate Change, Energy, the Environment and Water's (the **Department**) proposed voluntary national biodiversity market (the **Biodiversity Market**).
2. EJA understands that, at present, submissions are sought in relation to the core elements of the proposed Biodiversity Market framework, as described in an August 2022 fact sheet produced by the Department (the **Fact Sheet**), and the value of the proposed market.
3. This submission addresses these two key areas in the following parts:
 - a. The Value of the Biodiversity Market
 - i. Relevant Context
 - ii. The Purpose of a Biodiversity Market
 - iii. The Timing of the Biodiversity Market
 - iv. The Beneficiaries of the Biodiversity Market
 - b. The Biodiversity Market Framework
 - i. The Proposed Framework
 - ii. Biodiversity Certificates
 - iii. Oversight - The Regulator and the Advisory Committee
 - iv. Compliance and Assurance
4. EJA's overarching submission is that:
 - a. Any Biodiversity Market must logically be preceded by the proposed substantive reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and the establishment of necessary foundations for ecological restoration and improving biodiversity in Australia.
 - b. EJA does not support the establishment of a Biodiversity Market if its purpose is the enabling of offsets for destruction of biodiversity. The Government must ensure that any system designed to facilitate conservation restoration has this goal at the forefront when designing all elements of the system.
5. EJA looks forward to the opportunity to engage in more detail on the Biodiversity Market, at the appropriate time, as the proposed legislation is developed.

A. The Value of the Biodiversity Market

i. Relevant Context

6. EJA welcomes a renewed focus by the Federal Government on improving biodiversity across Australia. Market measures, such as an appropriately designed Biodiversity Market, can play a role in improving biodiversity. However, EJA submits that such measures must be subsidiary to key foundational elements for improving biodiversity. The required foundations are preventing further habitat destruction, clear restoration models, strong regulatory standards, the gathering and disseminating of good quality data and effective compliance and enforcement mechanisms.
7. EJA notes the comments of Felicity Deane, Associate Professor at Queensland University of Technology:

[a] biodiversity market is not a silver bullet to our many serious and overlapping environmental problems. Improving the outlook for our many ailing species and ecosystems will require work on many fronts, such as funding protected areas, working to bring back threatened species, tackling land clearing, working on carbon banking and accelerating climate action.¹
8. Biodiversity market mechanisms have long been used in Australian jurisdictions with little or no discernible effect on arresting or reversing environmental decline. For example, in May 2022 the Victorian Auditor-General's Office considered the offsetting of native vegetation loss in Victoria and concluded that Victoria is not achieving its objective of no net biodiversity loss from native vegetation clearing on private land.²
9. The Fact Sheet commences with reference to the 2021 State of the Environment Report (the **SoE Report**)³ and its finding that a significant investment in conservation and restoration is needed to reverse the decline in Australia's environment.
10. The SoE Report also found:
 - a. Biodiversity is monitored 'very poorly' in Australia with most indicators showing fauna and flora are in decline and the number of threatened species increasing. Further extinctions are inevitable unless Australia "substantially increases" its biodiversity management efforts.⁴
 - b. Ecosystem pressures, including climate change, habitat modification and invasive species, have not improved since 2016 and interactions between

¹ Felicity Dean, 'Labor's biodiversity market scheme needs to be planned well – or it could lead to greenwashing', *The Conversation* (online, 31 August 2022) <<https://theconversation.com/labors-biodiversity-market-scheme-needs-to-be-planned-well-or-it-could-lead-to-greenwashing-189557>>.

² Victorian Auditor General's Office, *Offsetting Native Vegetation Loss on Private Land* (Interim assurance report, May 2022), 1.

³ *Australia State of the Environment* (Independent Report, 2021).

⁴ Helen Murphy and Steven van Leeuwen, 'Biodiversity' in *Australia State of the Environment* (Independent Report, 2021) 7 ('*State of the Environment Report: Biodiversity*').

those pressures are causing sudden ecosystem changes and amplifying threats to biodiversity.⁵

- i. At least 19 Australian ecosystems spanning the continent and Antarctica are reported to show signs of collapse or near-collapse. All of these ecosystems are experiencing multiple pressures, with several experiencing pressures unprecedented in severity or spatial scale.⁶
 - ii. Soil ecosystems which are central to ensuring human health, plant productivity, pathogen control and pollutant degradation are under increasing pressure, with 45% of Australia's soil used for agricultural purposes including grazing and cropping.⁷
 - iii. Most listed threatened ecological communities occur in areas heavily modified for agriculture and urban development.⁸
- c. The EPBC Act is “not effective in delivering improved outcomes for biodiversity, or in arresting biodiversity declines”.⁹

11. Under the Convention on Biological Diversity,¹⁰ Australia has committed to developing and implementing national biodiversity strategies and action plans (**NBSAPs**)¹¹ and building ecosystem resilience under Australia's NBSAPs including by:

- a. maintaining the extent of habitat;
- b. increasing the number, extent and condition of protected ecosystems;
- c. increasing private land use for biodiversity conservation;
- d. improving ecosystem connectivity;
- e. reducing the impact of invasive species and climate change;
- f. increasing the use of early intervention strategies;
- g. improving planning, regulation, environmental impact assessment and approval processes; and
- h. controlling pollution and greenhouse gas emissions.

12. The 2020 review of the EPBC Act by Professor Graeme Samuel AC (**Samuel Review**) found that Act has not enabled the Commonwealth Government to effectively manage Australia's environmental needs.¹²

⁵ Ibid 10; 55.

⁶ Ibid 55.

⁷ Ibid 58.

⁸ Ibid 57.

⁹ Ibid 9.

¹⁰ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

¹¹ This has been actioned in Australia in the form of the Biodiversity Conservation Strategy 2010-2030 and the Strategy for Nature 2019-2030.

¹² Graeme Samuel, *Independent Review of the EPBC Act – Final Report* (Commonwealth of Australia, 2020) viii.

13. The Samuel Review recommended that “governments should shift their focus from individual project approvals to a focus on clear outcomes”,¹³ finding that cumulative impacts of human activities are not adequately addressed due to a lack of coordination between State and Commonwealth jurisdictions and the case-by-case approach to assessing projects under the EPBC Act.¹⁴ The Samuel Review suggests it is necessary to instead take a broader approach in considering national and regional environmental outcomes, including by immediately adopting the National Environmental Standards proposed by the review.¹⁵
14. The Federal Government has committed to responding to the Samuel Review by the end of 2022.¹⁶

ii. The Purpose of a Biodiversity Market

15. EJA submits that a Biodiversity Market is unlikely to substantially improve biodiversity unless it is preceded by a scheme or policy framework for arresting habitat loss and enabling ecological restoration. In approaching the need for better conservation and restoration to reverse the decline in Australia’s environment, the Government must first settle the necessary policy and regulatory framework for preventing habitat destruction and ecological restoration, which may include market mechanisms. In addition, the Government should complete and provide statutory form to the National Reserve System and provide clear direction on regional planning.
16. A Biodiversity Market must not be created for the purpose of enabling offsets for the destruction of biodiversity. As the SoE Report found, “[t]he effectiveness of offsets is often not evaluated after they are implemented, and it is becoming clear that some types of impacts can be difficult to offset and that the underlying principle of ‘no net loss’ can often not be demonstrated.”¹⁷ Scientific and policy thinking on compensatory arrangements for loss or destruction of biodiversity is moving beyond offsetting transactions to ecosystem-based target-setting.¹⁸
17. Biodiversity market mechanisms are notoriously complex, often poorly or inadequately designed, subject to manipulation and ‘gaming’, and commonly achieve questionable environmental outcomes.¹⁹ The question of to whom biodiversity certificates should be available and on what terms and conditions is a key question and yet to be substantively addressed in the proposal. Comprehensive and candid

¹³ Ibid, ix.

¹⁴ Ibid, 1.

¹⁵ Ibid, ix.

¹⁶ Tanya Plibersek, ‘National Press Club Address, Minister for the Environment and Water Tanya Plibersek’ (Speech, National Press Club, 19 July 2022)

<<https://minister.dcceew.gov.au/plibersek/speeches/national-press-club-address-minister-environment-and-water-tanya-plibersek>>.

¹⁷ *State of the Environment Report: Biodiversity* (n 4) 142.

¹⁸ See, eg, Jeremy S Simmonds et al ‘Moving from biodiversity offsets to a target-based approach for ecological compensation’ (2020) 13(2) *Conservation Letters* e12695.

¹⁹ See, eg, zu Errmgassen et al ‘The hidden biodiversity risks of increasing flexibility in biodiversity offsets trades’ (2020) 252 *Biological Conservation*, 108861; Sonter et al ‘Local conditions and policy design determine whether ecological compensation can achieve No Net Loss goals’ (2020) 11 *Nature Communications*; zu Errmgassen et al ‘The ecological outcomes of biodiversity offsets under “no net loss” policies: a global review’ (2019) 12 *Conservation Letters* e12664.

analysis and assessment of comparable market schemes should be undertaken prior to this scheme being progressed.

18. If the Government's intention is that the Biodiversity Market is used as an offsetting mechanism, this should be stated upfront and be the subject of meaningful consultation about its appropriateness in light of statements such as those in the SoE Report.
19. The Fact Sheet proposes tradeable biodiversity certificates. Further detail, including supporting data, is needed on the value of, and demand for, biodiversity certificates, as this will no doubt inform the structure and potential success of the Biodiversity Market.

iii. The Timing of the Biodiversity Market

20. EJA submits that any Biodiversity Market architecture must logically be preceded by the substantive proposed reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). Further development of the Biodiversity Market proposal should not be progressed until after this reform process, and only at a time when the Biodiversity Market can be situated in a broader framework that will improve Australia's environmental performance.
21. The aims of the EPBC Act include protection of the environment and conservation of Australia's biodiversity.²⁰ The Minister for the Environment and Water has acknowledged that, '[t]he EPBC Act is outdated and requires fundamental reform.'²¹
22. In his review of the EPBC Act, Graeme Samuel AC recommended the inclusion of National Environmental Standards as "the centrepiece of fundamental reform" to the EPBC Act to ensure that "all decisions clearly track towards improved environmental and heritage outcomes" for "effective planning, regulation and investment."²²
23. Further, the Labor Government has committed to establishing an Environment Protection Agency, amongst other things, to "take a leadership role in environmental accounting in Australia".²³ Finalising the Biodiversity Market prior to establishing, and without contemplating the crucial importance of, such architecture would not be the best use of government resources or provide the best outcomes for the environment.

iv. The Beneficiaries of the Biodiversity Market

24. The Government is proposing that the Biodiversity Market be open to "all landholders". Whilst the Fact Sheet states that this would include First Nations people and conservation groups, EJA looks forward to receiving further detail explaining the logic of this system applying only to landholders.

²⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss (3)(1)(a) and (c).

²¹ Plibersek (n 16).

²² Samuel (n 12) 2.

²³ 'Environmental Law Reform and a National Environmental Protection Agency', *Labor* (Web Page) <<https://www.alp.org.au/policies/environmental-law-reform-and-a-national-environmental-protection-agency>>.

25. EJA is interested in how, in the establishment of this system, the Government will ensure appropriate value is ascribed to:
- a. the rights and actions of First Nations people as traditional custodians of land and waters across Australia, including in circumstances where, due to the impacts of colonisation, First Nations people may not hold private property rights in relation to their land; and
 - b. the public, for biodiversity values protected on public land under the scheme, whilst ensuring such value is not artificial by protection of areas the States may have already committed to.
 - c. the huge volume of work done to improve biodiversity on public land, for example by land care groups.
26. EJA welcomes the Government's commitment to a market open to First Nations people, and understands this to mean the Government will adequately resource appropriate consultation with First Nations people in the design of the Biodiversity Market.

B. The Biodiversity Market Framework

i. The Proposed Framework

27. EJA looks forward to further consultation on the detail of matters noted in the Fact Sheet including:
- a. biodiversity projects, with a keen interest in ensuring that the descriptions of projects covered by the Biodiversity Market will have a true, meaningful, beneficial impact upon biodiversity;
 - b. biodiversity protocols, including how protocols will interact with existing architecture for biodiversity protection including mechanisms such as recovery plans made under the EPBC Act;
 - c. biodiversity integrity standards; and
 - d. biodiversity certificates, discussed in more detail below.

ii. Biodiversity Certificates

28. The proposed Biodiversity Market includes biodiversity certificates, issued at the project level. EJA submits that rigorous process and accounting is required to ensure that certificates are only issued to legitimate, new projects and that double counting does not occur in the context of the Biodiversity Market.
29. For example, biodiversity certificates from native forest protection in Victoria (overwhelmingly on public land and often exceptionally high biodiversity value) could carry important value and be of real utility for areas *in fact planned* to be logged between now and 2030, when Victoria has committed to ending native forest logging. However, such certification must rigorously exclude areas not actually planned for

logging prior to 2030, even if those areas may be *available* for logging. That is, there is a difference between an area where biodiversity loss is actually planned and will be prevented, versus areas where biodiversity loss may be *permitted* but is not in fact planned, and where 'prevention' and its ascribed value is merely hypothetical. The latter is an example of artificiality introduced to the market with no actual biodiversity gain. Yet, there might be a net loss elsewhere from the certificate holder and, worse, likely continuation of actual planned habitat destruction in adjacent parts of the ecosystem subject of the certificate. Such issues would entrench and repeat the perverse outcomes plaguing offsets schemes.²⁴

30. The certificates are proposed to operate in "parallel" with, and in a similar way to, Australia's current carbon crediting legislation.²⁵

31. Recent papers published by the Australian National University (the **ANU Papers**)²⁶ indicate that the carbon offset crediting scheme is:

... suffering from a distinct lack of integrity. People are getting ACCUs for not clearing forests that were never going to be cleared; they are getting credits for growing trees that are already there; they are getting credits for growing forests in places that will never sustain permanent forests; and they are getting credits for operating electricity generators at large landfills that would have operated anyway.²⁷

32. In response to the concerns raised, the Government has commenced an Independent Review of Australian Carbon Credit Units (**ACCUs**), due to report by the end of the year (the **Chubb Review**).²⁸ The terms of reference for the review include questions such as:

- a. Whether the governance of the scheme is fit for purpose, including as it relates to the allocation and operation of roles and responsibilities;
- b. Whether the scheme has appropriate transparency and how reporting and publication of data could be improved; and
- c. Whether methods for generating ACCUs meet offsets integrity standards.²⁹

33. EJA submits that the Government cannot proceed with a Biodiversity Market modelled on the ACCUs and proposing functions for the Clean Energy Regulator, prior to receipt of, and response to, the Chubb Review.

²⁴ 'Australia's carbon market a fraud on the environment' *ANU College of Law* (Web Page, 24 March 2022) <<https://law.anu.edu.au/news-and-events/news/australia%E2%80%99s-carbon-market-fraud-environment>> ('*ANU College of Law article*').

²⁵ Anthony Albanese and Tanya Plibersek, 'Biodiversity Certificates to Increase Native Habitat and Support Australian Landholders' (Media Release, Prime Minister of Australia, 26 August 2022).

²⁶ The ANU Papers are accessible via a link contained at the end of *ANU College of Law article* (n 24).

²⁷ Andrew Macintosh et al, 'Fixing the Integrity Problems with Australia's Carbon Market' (Australian National University, 2022).

²⁸ Chris Bowen, 'Independent Review of ACCUs' (Media Release, Department of Climate Change, Energy, the Environment and Water, 1 July 2022) <<https://minister.dcceew.gov.au/bowen/media-releases/independent-review-accus>>.

²⁹ *Ibid.*

34. Finally, the Fact Sheet does not provide detail on how the proposed Biodiversity Market will interact, if at all, with existing state regimes.
35. It is noteworthy that, in August 2022, the Audit Office of New South Wales found that NSW biodiversity credits system has unresolved issues related to integrity and transparency and, “that there is a real risk that biodiversity gains made through the Scheme will not be sufficient to offset losses resulting from the impacts of development.”³⁰
36. It is crucial to rigorously address and plan for issues of artificiality, referred to by way of example at paragraph [29.] above.

iii. Oversight – The Regulator and the Advisory Committee

37. It is proposed that the Clean Energy Regulator “would administer many elements of the framework.”
38. The ANU Papers assert that, “the Clean Energy Regulator has too many roles and too much power... The Regulator’s powers and functions should be separated and distributed to other agencies.”³¹ The Chubb Review is due to report this year on governance of the ACCUs scheme and its allocation of roles and responsibilities.
39. In this context, the Clean Energy Regulator cannot presently be considered an appropriate administrator of the Biodiversity Market. The role of the Government’s proposed Environment Protection Agency (**EPA**) in relation to the Biodiversity Market should be considered.
40. It is proposed that the Department of Climate Change, Energy, the Environment and Water would be responsible for ongoing policy development and that the Minister will make protocols on the advice of an Advisory Committee. It is proposed that the Committee will also undertake monitoring of compliance with protocols concerning biodiversity integrity standards, review protocols and provide other advice.
41. EJA submits that there is, at a minimum, a need for auditing, integrity and scrutiny functions to be undertaken by a specialist environmental auditor or specialist branch within the Australian National Audit Office.
42. Any Advisory Committee must, as proposed, be independent of Government. It must be adequately resourced to endorse protocols based on the highest standard of current scientific evidence. Its advice to the Minister should be made public to ensure transparency and accountability.

iv. Compliance and Assurance

³⁰ Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (Report, 30 August 2022) 2.

³¹ MacIntosh et al, *Fixing the Integrity Problems with Australia’s Carbon Market* (Australian National University) <[https://law.anu.edu.au/sites/all/files/short - erf reform june 2022 final.pdf](https://law.anu.edu.au/sites/all/files/short_-_erf_reform_june_2022_final.pdf)>.

43. EJA welcomes the current overview of the compliance and assurance system proposed by the Fact Sheet.
44. More broadly, EJA submits that any Biodiversity Market must be designed cognisant of the findings of the SoE report in relation to the importance of reliable biodiversity data for effective resource allocation and the essential nature of monitoring for conservation management.³²

³² *State of the Environment Report: Biodiversity* (n 4) 155.