

Submission in response to
Nature Repair Market Exposure Draft

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.

Submission

1. EJA welcomes the opportunity to make a submission in relation to the exposure draft of the Nature Repair Market Bill 2023 (the **Bill**).
2. We note and reiterate the comments made by EJA in our 16 September 2022 Submission in response to a National Biodiversity Market (the **Biodiversity Market**), specifically:
 - a. 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.
 - b. 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.
 - c. 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.
 - d. 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.

- e. 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.
 - f. 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.
 - g. 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.
 - h. 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.
3. Specifically in relation to the Bill, EJA now also makes the following additional submissions:

Offsetting

- 4. A Biodiversity Market must not be created for the purpose of enabling offsets for the destruction of biodiversity. As the 2021 State of the Environment 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.”¹ Scientific and policy thinking on compensatory arrangements for loss or destruction of biodiversity is moving beyond offsetting transactions to ecosystem-based target-setting.²
- 5. Clear drafting must be included in the Bill to confirm that the Biodiversity Market is not able to be used for the purposes of offsetting unless permitted to be used in this way by the EPBC Act. Such an approach would enable appropriate consideration of this matter in the context of the broader framework of environmental standards and protection.
- 6. 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 State of the Environment Report.

¹ *Australia State of the Environment* (Independent Report, 2021) 142.

² 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.

Participation of First Nations People

7. It is not clear to EJA how the current drafting in the Bill will ensure “that First Nations people can negotiate a share of project benefits or to participate in implementation of projects on their land” or ensure “that Indigenous Knowledge and practice can be incorporated in the project as appropriate.”³
8. Section 15 of the Bill requires that projects must be consented to by any registered native title body corporate for the area. This drafting does not: (a) provide any structural requirements for how such consent should be appropriately obtained, for example by reference to the requirements of free, prior and informed consent as articulated in the United Nations Declaration on the Rights of Indigenous People;⁴ (b) deal in any way with areas for which there are First Nations Traditional Owners but where there is not determined native title; or (c) *ensure* Traditional Owners can negotiate a share of project benefits or incorporation of Indigenous Knowledge.

Biodiversity certificates, methodology determinations and integrity standards

9. In circumstances where the current federal environmental law reform contemplates the introduction of National Environmental Standards,⁵ the EPBC Act’s requirements must be properly reflected throughout the Bill. As one example, in making methodology determinations the Bill should require that the Minister must have regard to the standards and requirements of the EPBC Act (or such legislation that subsequently replaces this Act).
10. EJA has had the benefit of reading the March 2023 submission of the Wentworth Group of Concerned Scientists in relation to the Bill. EJA supports the Wentworth Group’s submissions in relation to biodiversity projects, integrity standards and certificates.
11. The Bill must more clearly detail what biodiversity certificates will represent, or risk allowing the broad nature of the legislation to undermine its ability to achieve meaningful improvements for nature. The Bill must clearly confirm that certificates can only be issued for gains that would not otherwise have occurred.
12. Methodology determinations should be subject to regular review to confirm their ongoing compliance with the biodiversity integrity standards, the EPBC Act and updated scientific information. The Minister should then be required to vary methodology determinations that do not meet these requirements.
13. Proper monitoring and compliance procedures must be drafted into the Bill.

³ Department of Climate Change, Energy, the Environment and Water, *Nature Repair Market Draft Bill – Supporting the participation of First Nations people* (Fact Sheet, December 2022) 2.

⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) Art 19.

⁵ Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: better for the environment, better for business* (December 2022) 1-2.

The Nature Repair Market Committee

14. Section 198(2) of the Bill must be redrafted to prevent against the perverse outcome where all members appointed to the Committee have substantial experience or knowledge and significant standing in, for example, agriculture, and none of the other skill sets identified in section 198(2) are appropriately represented in the Committee. Section 198(2) as currently drafted has the potential to drastically undermine the functions of the Committee specified elsewhere in the Bill.