

Submission in response to

Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023

prepared by

Environmental Justice Australia

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Committee Secretary

Senate Standing Committees on Environment and Communications

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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 Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) 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**) and our 3 March 2023 Submission in response to the Nature Repair Market Exposure Draft, 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. 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 makes the following 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.

Participation of First Nations People

6. 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

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.

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.

7. 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.

Structural requirements

8. The Clean Energy Regulator cannot presently be considered an appropriate administrator of the Biodiversity Market. The Government's proposed Environment Protection Australia (**EPA**) is the appropriate regulator, and the Bill should be amended accordingly.
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).

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.