

# Biodiversity Council response to the Nature Repair Market Bill before Parliament

## Summary for decision-makers

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Orange-bellied parrot. Image: JJ Harrison CC BY-SA 3.0 Wikimedia Commons

The Nature Repair Market bill which is before Parliament has the potential to provide a positive channel for investment for landholders, land managers, communities and First Peoples to care for and restore biodiversity. However, in its current form as tabled, and in the wider context of environmental legislative and regulatory reform, it risks exacerbating Australia's already world-leading record of biodiversity loss and extinctions.

Key problems with the Bill as tabled are:

- It does not preclude the market being used to provide compensation for damage through provision of compliance offsets required under the EPBC Act (or superseding legislation and standards). This is a significant problem because:
  - By definition, compensation for damage cannot be nature positive;
  - The market and its associated instruments (biodiversity certificates) are not designed to deliver specific outcomes for Matters of National Environmental Significance (such as threatened species) currently required for compliance offsets under legislation;
  - The market will likely drive ongoing biodiversity decline through facilitating offsets that are not like-for-like and that do not guarantee no net loss, including potentially facilitating 'offsets' for damage to matters that cannot be offset;
  - This will be greatly exacerbated if compensation payments are used when like-for-like offsets cannot be found by a proponent (generally because those matters are so threatened that there are few remaining populations or habitat).
- The market is being progressed in a wider context of legislative and regulatory reform where regulatory provisions preventing environmental damage are at risk of being watered down, and is not being bolstered by additional government spending. The voluntary market will be largely dependent on community and First Peoples-led projects, funded by investments from businesses that are already seeking to become nature positive. If the market does not rule out, or is used to facilitate, environmental damage, the overall effect will be to shift the cost of protecting and improving our biodiversity away from the businesses and sectors causing the most damage to those groups already leading on biodiversity protection.
- The bill as it currently stands does not sufficiently promote benefit-sharing or recognise and protect the unique rights and interests of all First Peoples in caring for their Country.



- The integrity provisions in the bill are not sufficiently robust to ensure positive benefits for biodiversity, do not require accountability for overall outcomes, do not require reference to appropriate biodiversity expertise, do not allow sufficient time frames for adequate consultation (e.g. on methodologies), including with First Peoples, and do not allow for complaints or concerns about projects, methodologies or the impacts of the bill to be raised by civil society organisation or members of the public.
- Government commitments to being 'nature positive', including in language surrounding the bill, are frequently not defined, or do not follow the accepted definition of an increase in the health and abundance of populations, species and ecosystems against a 2020 baseline.

## What is required?

Key improvements in the legislation needed to deliver an effective Nature Repair Market and avoid further damage and cost-shifting are:

1. Ensure that in legislation and related policy the term 'nature positive' is defined in a measurable and accountable way and that progress toward becoming nature positive is measured against a fixed baseline, not against a trajectory of decline
2. Explicitly rule out compliance biodiversity offsetting in the legislation (recommended) OR ensure that any use of the market to deliver biodiversity offsetting is founded on integrity, improves or maintains current provisions under the EPBC Act, and specifically disallows using

the market to receive payments for the loss of matters that cannot be feasibly offset

3. Ensure First Peoples are recognised as rights holders in their Country and strengthen how governance by First Peoples is embedded
4. Substantially tighten integrity and accountability mechanisms, ensure these are expert-driven and subject to public scrutiny, and align all components of the legislation towards achieving robust environmental integrity standards and nature positive outcomes

## Detail

The Australian Government has introduced the Nature Repair Market bill before Parliament as a signature piece of biodiversity legislation to support Australia becoming 'nature positive'. This commitment to being nature positive has been announced by the Australian Government and affirmed in the Global Biodiversity Framework agreed in December 2022.

The Nature Repair Market bill and enabling policy provisions will need to be strengthened substantially to achieve nature positive results for Australia's biodiversity. Most critically, changes will be needed to avoid perpetuating the loss of biodiversity that is the consequence of current environmental legislative settings and the low enforcement and compliance context surrounding these settings.



Golden Tailed Gecko. Image: Dave Flemming  
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## Context and concerns surrounding the proposed Nature Repair Market legislation

Australia has a well-known record of biodiversity loss, which damages our culture, harms our wellbeing, tarnishes our reputation and risks reducing our prosperity. Our national environmental laws are failing to prevent these losses<sup>1</sup>, and indeed have presided over ongoing declines in biodiversity<sup>2</sup>, including in the Matters of National Environmental Significance (MNES) – threatened and migratory species, threatened ecological communities, protected wetlands and heritage sites – that these laws are designed to protect.<sup>3</sup>

In this light, the current context of legislative reform has a critical role to play in turning this situation around, to ensure that we really do protect our precious biodiversity, and that we recover the species, ecosystems and places that are particularly threatened.

Unfortunately, the direction of current legislative and regulatory reform risks worsening the situation. There is a concerning emphasis on further reducing the regulatory requirements placed on proponents of development projects that impact upon biodiversity, through streamlining and speeding up processes, and through enabling impacting projects to pay for damage caused rather than find effective, like-for-like compensatory offsets. The Nature Repair Market legislation appears to provide a key mechanism for facilitating this less robust protection

by enabling these payments to go to general biodiversity recovery rather than targeted projects designed to offset specific losses, and by shifting the emphasis from preventing losses toward a broad ‘regeneration’ agenda.

There are a number of problems with this approach. Firstly, it is much harder to restore something than it is to protect it in the first place.

Secondly, the Nature Repair Market as currently defined is designed to be flexible, supporting a wide diversity of actions and outcomes that are not sharply defined. This is appropriate for a voluntary market. But it is not appropriate as a mechanism to deliver regulatory outcomes for specific MNES to compensate for damage done elsewhere, nor for specifically improving the trajectory of MNES, for which the Commonwealth bears overall responsibility. Without robust provisions in the Nature Repair Market legislation (and in wider environmental legislation currently under review) to limit environmental harm and to assure specific outcomes for MNES, the use of the market as a mechanism to counter damage incurred elsewhere in the system will drive further declines.

In addition, the Nature Repair Market appears to be the key Australian Government policy response to the need to rapidly increase the scale of investment in regenerating biodiversity. Recovering biodiversity requires a level of investment in nature repair approximately tenfold what it is now<sup>4</sup>. Even more will be required if our current protection mechanisms are further eroded through legislative reform. The

1 Samuel, G., 2020. Independent Review of the EPBC Act – Final Report. Department of Agriculture, Water and the Environment, Canberra. <https://epbactreview.environment.gov.au/sites/default/files/2021-01/EPBC%20Act%20Review%20Final%20Report%20October%202020.pdf>

2 Murphy, Helen, and Stephen van Leeuwen. “Biodiversity.” In *Australia State of the Environment 2021*, edited by Cresswell Ian, Janke Terri, and Johnston Emma. Commonwealth of Australia, 2021.

3 TSX, “The Australian Threatened Species Index 2022”, <https://tsx.org.au/tsx2022/>

4 Wintle et al “Spending to save: what will it take to end extinction?” Biodiversity Council Fact Sheet, 2022. <https://biodiversitycouncil.org.au/>



Australian Government has not begun to increase investment in recovering biodiversity even close to the levels required.<sup>5</sup>

Positive investment in the Nature Repair Market (investment designed to increase the overall extent and condition of healthy biodiversity, not compensate for damage being done) is welcome. In the Nature Repair Market, this will be driven primarily by businesses already committed to nature positive outcomes. Much of the load for delivering quality projects on the market will also be carried by community groups, landholders and First Peoples as project proponents, many of whom will be willing to invest extra time and effort to recover ecosystems and biodiversity in their local patch. Encouraging these actions is welcome, and should be the focus of the market. However, if the market is broadly aiming to compensate for lack of robust regulation and low overall government investment, the overall effect across the economy will be of cost-shifting: shifting the burden of protecting biodiversity and becoming nature positive away from those sectors and businesses causing the biggest impacts (which will be able to accelerate the harm they are doing), and towards those businesses (and communities) already committed to becoming nature positive.

An additional risk of any market is that, without the right protections and provisions, it may deliver perverse outcomes, undermining First Peoples' rights and responsibilities in Country or the ability of diverse communities in different parts of Australia to benefit from biodiversity. There has been considerable strengthening of First Peoples' recognition and rights through the course of the development of the Nature Repair Market legislation, including between the exposure draft and the bill as tabled in Parliament, which is welcome. But, without additional measures and adequate time

for consultation, many First Peoples and local communities will find themselves once again locked out of decisions about their Country and local places.

The key ways to avoid accelerating biodiversity loss, minimise this burden-shifting across sectors, and avoid doing harm to First Peoples and local communities, is to ensure that the Nature Repair Market legislation is designed with strong integrity and accountability provisions, and a significant emphasis on both engagement and expertise. It is also important that the Nature Repair Market legislation include measures that mandate effective, meaningful involvement and leadership from First Peoples and community groups through every step of the process, from the finalisation of amendments to the legislation, through to the processes for developing and applying integrity standards, methodologies, projects and accountability mechanisms. If the market is used for biodiversity offsetting, which seems likely, this will require stronger provisions still. Related legislation and policy instruments being developed through the reformed EPBC Act will need to be similarly robust.

#### **4. Ensure in legislation and related policy that 'nature positive' is defined in a measurable and accountable way and that progress toward becoming nature positive is measured against a fixed baseline, not against a trajectory of decline**

Nature positive is defined as a pathway "to halt and reverse nature loss measured from a baseline of 2020, through increasing the health, abundance, diversity and resilience of species, populations and

5 Bekessy, Sarah, Brendan Wintle and Rachel Morgain, "If the budget ditched the stage 3 tax cuts Australia could save every threatened species – and lots more", The Conversation 10 May 2023 <https://theconversation.com/if-the-budget-ditched-the-stage-3-tax-cuts-australia-could-save-every-threatened-species-and-lots-more-205305>



ecosystems so that by 2030 nature is visibly and measurably on the path of recovery.”<sup>6</sup> However, the concept is not consistently being used this way in the Australian legislative review context, and is frequently undefined or watered down in current policy discussions, including on the Nature Repair Market.

In order to address this the legislation and surrounding policy settings should be amended to:

- Commit to achieving nature positive outcomes in its objects, defined in a robust and measurable way
- Require comprehensive baseline setting on the overall extent, condition, diversity and resilience of Australia’s biodiversity against which a regular statutory outcomes review of the market would report (see point 4 below)

## **2. Explicitly rule out compliance biodiversity offsetting in the legislation (recommended) OR ensure that any use of the market to deliver biodiversity offsetting is founded on integrity, improves or maintains current provisions under the EPBC Act, and specifically disallows using the market to receive payments for the loss of matters that cannot be feasibly offset**

The Australian Government has not ruled out using the Nature Repair Market as a core mechanism for biodiversity offsetting. The tabled bill in its current form seems reasonably likely to facilitate this process, including the Government’s proposal for development proponents to be able to pay

for environmental damage rather than being responsible for offsetting the losses they cause.

The Biodiversity Council continues to hold that use of the Nature Repair Market for biodiversity offsetting is inappropriate, risks damaging the reputation of the market, and will likely drive further biodiversity declines.

In particular, the tabled bill does not include any provisions to ensure the market can deliver effective, appropriate biodiversity offsets. Using the market as it stands to deliver biodiversity offsets will fail to even maintain the level of protection of current legislation, let alone deliver the improvements needed to recover our threatened species and ecosystems, and prevent further declines.

Current legislative provisions under the Environment Protection and Biodiversity Conservation (EPBC) Act aimed at protecting MNES are reasonably strong, though not as widely enforced as they would need to be to prevent the ongoing declines we see. In order to at least maintain this current level of protection while using the Nature Repair Market for compliance biodiversity offsetting under the EPBC Act, the bill would need to be amended to provide for robust, measurable, specific biodiversity credits within the legislation itself. These credits, which are distinct from more loosely-defined and less accountable certificates allowed for under the current bill, will need to precisely define and be accountable for outcomes delivered for particular, specified MNES, and the timeframes under which these will be delivered. This is the only way to ensure any project sought as a compliance offset under the market can deliver like-for-like and no net loss against impacts incurred.



Australian blenny. Image: Nick Hobgood  
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Specifically, to deliver this, the Nature Repair Market legislation must either:

- Ensure that the market is entirely voluntary and explicitly rule out the use of the market for compliance biodiversity offsetting in the legislation (this is the Biodiversity Council's recommended position)

OR

- Encode in legislation that any use of the market for biodiversity offsetting must meet requirements for like-for-like replacement and maintaining or improving the condition and extent of the affected MNES (no net loss)

- If the latter, add provisions for 'biodiversity credits' (not certificates as per current provisions) that require projects to have robust, measurable and specific outcomes for MNES, which can be used to ensure any use of the market for biodiversity offsetting adheres to like-for-like and no net loss requirements and delivers specific benefits for the impacted matters

- Add provisions specifying a period of public consultation on the use of specific credits for biodiversity offsetting, with adequate timeframes for consultation with rights and knowledge holders, including experts and First Peoples

- Add provisions ensuring project proponents can exclude the use of their project for biodiversity offsetting (this may be done through distinguishing the biodiversity credit system in the legislation stipulating separate and more robust registration requirements, which distinguish these projects from those registered under the certificate system)
- Specify that the loss of matters that cannot be feasibly offset (as defined by biodiversity experts), cannot be compensated through payments into the market

### 3. Ensure First Peoples are recognised as rights holders in their Country and strengthen how governance by First Peoples is embedded

First Peoples have unique cultural, spiritual and economic connections to Country and its biodiversity. There is strong evidence globally and in Australia that biodiversity flourishes and is less subject to decline across Indigenous-managed land and sea territory.<sup>7</sup> There are strong precedents for recognising these rights and interests in the preamble to legislation in various jurisdictions, for example in the Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017.<sup>8</sup>

7 The United Nations Permanent Forum on Indigenous Issues. "Indigenous Peoples' Collective Rights to Lands, Territories and Resources." UN Department of Public Information, n.d. <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Peoples-Collective-Rights-to-Lands-Territories-Resources.pdf>; Recio, Eugenia, and Dina Hestad. "Indigenous Peoples: Defending an Environment for All." International Institute for Sustainable Development, April 2022 <https://www.iisd.org/system/files/2022-04/still-one-earth-Indigenous-Peoples.pdf>; DPMC. "Consolidated Report on Indigenous Protected Areas Following Social Return on Investment Analyses." Social Ventures Australia, February 2016 [https://www.niaa.gov.au/sites/default/files/publications/SROI-Consolidated-Report-IPA\\_1.pdf](https://www.niaa.gov.au/sites/default/files/publications/SROI-Consolidated-Report-IPA_1.pdf)

8 Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017 <https://www.legislation.vic.gov.au/in-force/acts/yarra-river-protection-wilip-gin-birrarung-murrn-act-2017/008>



While significant work has been done to improve the provisions for recognising First Peoples rights and responsibilities in the tabled legislation, there remain some key outstanding issues. Addressing these would increase recognition of the unique roles, responsibilities and rights for First Peoples, help ensure First Peoples across tenures benefit from the market and from projects under the markets, and ensure First Peoples have a voice in decision-making for their Country.

To address these issues, the legislation should:

- Explicitly recognise First Peoples as rights holders in their Country, with obligations to care for Country under lore, through including a preamble acknowledging First Peoples' unique cultural connections to and responsibilities for Country, and through amending the current objects to read that the legislation is intended: "to ensure recognition of First Peoples as rights holders in their Country and its biodiversity; and protect and promote the unique rights and interests and acknowledge the obligations of First Peoples to protect biodiversity in Australia"
- Add provisions encouraging project proponents (outside of Registered Native Title Bodies and managers of Indigenous Protected Areas where none already exist) to consult with First Peoples with interests in the Country on which the project is taking place
- Ensure a fully funded, broad process for engaging First Peoples in the drafting of these provisions
- Ensure fully funded mechanisms for ongoing engagement with decision-making under the legislation (see point 4 below)

#### **4. Substantially tighten integrity and accountability mechanisms, ensure these are expert-driven and subject to public scrutiny, and align all components of the legislation towards achieving robust environmental integrity standards and nature positive outcomes**

Stronger integrity provisions are essential to ensure that the legislation delivers on its objects and contributes to benefiting biodiversity. Delivering outcomes for biodiversity is extremely complex, and requires specific expertise to understand and assess. Ensuring decisions are based on expert advice and subject to public scrutiny is a key mechanism for preventing politicisation of the market.

As it stands, the tabled bill does not specify mechanisms for ensuring the Biodiversity Integrity Standards are founded on expertise, does not tightly align methodology development and project assessments to the standards, and does not mandate transparent outcomes-based reporting for projects, methodologies or for the market as a whole against these integrity standards. The mechanisms for establishing the Nature Repair Market committee do not rule out obvious vested interests, an issue which has caused considerable damage to integrity in the clean energy market. There is no provision in the legislation for accessing the broad biodiversity expertise required to understand the complexity of biodiversity outcomes or assess impacts of provisions and decisions under the legislation. Finally, the legislation assigns responsibility for auditing projects to registered greenhouse and energy auditors, and makes no reference to the specific biodiversity expertise required to effectively audit projects and ensure biodiversity outcomes are being achieved.



In order to ensure the market meets its objects, the legislation should:

- Ensure the integrity of the Nature Repair Market Committee by prohibiting membership from individuals with direct interests in the market (including through their employed positions)
- Require a statutory interdisciplinary panel of experts (including First Peoples experts, social and economic experts alongside biodiversity scientists) whose role is to draft and review the environmental integrity standards, assess and review methodology development, assess outcomes-based assessments and reporting data, and make recommendations to changes in policy, legislation or instruments based on that monitoring and reporting data
- Specify robust, independent, expert-driven mechanisms for setting and reviewing the Biodiversity Integrity Standards
- Substantially tighten alignment of provisions methodology development and review, and for project assessments, with provisions for the Biodiversity Integrity Standards, to ensure

that all elements of the market are designed to deliver on these standards

- Require project auditors to be accredited as having specific, relevant, local biodiversity expertise
- Require statutory annual outcomes-based reporting on projects and methodologies, and 5-year outcomes-based review of the program as a whole to ensure it delivers upon its objects
- Ensure adequate mechanisms for engagement, funding and timeframes to enable First Peoples groups, communities, NGOs and other civil society groups to inform the development of integrity standards, methodologies and accountability mechanisms
- Ensure members of the public, communities, non-government organisations and First Peoples organisations can contribute meaningfully to decisions and accountability through including provisions for third party standing



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The Biodiversity Council brings together leading experts including Indigenous Knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. It was founded by 11 universities including its host the University of Melbourne, with support from The Ian Potter Foundation, The Ross Trust, Trawalla Foundation, The Rendere Trust, Isaacson Davis Foundation, Coniston Charitable Trust and Angela Whitbread.