



**Biodiversity
Council**

Biodiversity Council submission in response to the exposure draft of the Nature Repair Market Bill

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Dr Rachel Morgain, Professor Brendan Wintle, Dr Megan Evans, Dr Jack Pascoe, Associate Professor Patrick O'Connor, Dr James Fitzsimons, Professor Jan McDonald, Professor Ross Thompson, Professor Sarah Bekessy, Professor Hugh Possingham

The Biodiversity Council brings together leading experts including Indigenous knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. The Council was founded by 11 universities with the support of Australian philanthropists.

The co-authors of this submission include Biodiversity Councillors and external experts on environmental policy, law, markets, economics, ecology, landscape management and decision science.

Executive Summary

The Biodiversity Council welcomes the opportunity to provide a response to the exposure draft of the Nature Repair Market Bill. We recognise the importance of providing mechanisms to facilitate greater investment in biodiversity conservation by a diversity of buyers, including private businesses.

Our submission largely concerns areas where we believe the existing Bill (and in some cases related instruments and policy settings) must be strengthened to deliver on the Australian Government's policy goals and ensure the design of an effective, trusted Nature Repair Market.

The key opportunities we outline in this submission are designed to:

- Tighten the objectives, align with globally accepted definitions of nature-positive, make the object for net biodiversity gain explicit and fundamental
- Ensure First Peoples are recognised as rights holders in their Country through making this an explicit object of the Bill and preamble
- Ensure sound underpinnings to strengthen a voluntary nature repair market
- Ensure integrity, strategic outcomes, transparency and accountability through:
 - Tightening adherence of methodologies to biodiversity integrity standards
 - Tighter provisions regarding projects aimed at avoided loss and degradation
 - Stronger mechanisms to ensure projects deliver on claims
 - Mechanisms to cross-link to other programs and avoid double dipping
 - Mechanisms for ensuring public accountability
 - Mechanisms for strengthening and extending provisions for expert advice
 - Making regulation and auditing of the market and its projects the responsibility of recognised biodiversity authorities
 - Mechanisms for ensuring strategic investment and climate resilience of projects
 - Provisions to protect Indigenous Cultural and Intellectual Property
 - Mechanisms to ensure integrity of public claims
- Strengthen how governance by First Peoples is embedded and how First Peoples' interests in and obligations to Country are protected
- Facilitate participation in the market by diverse and under-resourced project proponents
- Do not use the Nature Repair Market as a mechanism to facilitate or encourage biodiversity offsetting

Headline recommendation include:

Recommendation 1. Align objective 1 with widely endorsed definition of 'nature positive' by amending the first object of the Act to read "to halt and reverse nature loss through increasing the health, abundance, diversity and resilience of species, populations and ecosystems"

Recommendation 2. That an additional object of the Act be added as follows: "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."

Recommendation 3. That a preamble be included to the Bill acknowledging First Peoples' unique cultural connections to and responsibilities for Country.

Recommendation 4. Mitigate risks to the market reputation and perceived integrity by strengthening outcomes reporting and integrity provisions (section 3 of this submission) and expressly prohibiting the use of the market for EPBC Act (or equivalent) compliance offsetting (section 7 of this submission).

Recommendation 40. That the Australian Government establish provisions in this Bill prohibiting the use of biodiversity certificates for compliance offsetting (for the purposes of the EPBC Act and relevant laws of states and territories), and circumscribing how parties (including other jurisdictions) can trade or make claims around the use of these certificates for compliance offsetting purposes.

An outline of how key issues are addressed in our remaining recommendations is as follows:

Recommendations 5-7. Strengthen the foundations of a high-integrity market by committing to upfront government investment, implementing paired legislation to require company disclosure of nature impacts and dependencies, and establishing a cross-sector interim panel prior to finalising the Bill, to advise on the design of the market and its mechanisms, market viability and First Peoples rights and access.

Recommendations 8-13. Strengthen integrity through tightening provisions for biodiversity integrity standards, methodologies and project design

Recommendations 14-17. Establish a range of open standing and public complaints mechanisms to strengthen public accountability, and strengthen rights of all First Peoples as Eligible Interest Holders

Recommendations 18-20. Establish a diverse expert panel to provide direct input on design of the market and methodologies and strengthen the integrity of the Nature Repair Market Committee

Recommendations 21-23. Ensure strategic outcomes and climate resilience

Recommendations 24-28. Ensure outcomes-based assessment and reporting by credible biodiversity authorities

Recommendations 29-30. Protect Indigenous Cultural and Intellectual Property

Recommendations 31-32. Strengthen provisions for integrity of public claims

Recommendations 33-36. Strengthen provisions for First Peoples' governance, rights and involvement in the market

Recommendations 37-40. Enable participation of small and mid-sized organisations and ground-up methodology development

Recommendations 41-42. Substantially strengthen the Bill and wider regulatory framework before any consideration is given to using the market for compliance offsetting.

1. Tighten the objectives, align with globally accepted definitions of nature-positive, make the object for net biodiversity gain explicit and fundamental

The primary object of the Act should be framed within a clear commitment of the Australian Government to ensure gains in native species populations and ecosystems by 2030. It should align with a globally accepted and reputable definition of nature-positive, for example “to halt and reverse nature loss measured from a baseline of 2020, through increasing the health, abundance, diversity and resilience of species, populations and ecosystems so that by 2030 nature is visibly and measurably on the path of recovery.”¹ We consider that the first object of the Act as stated in the exposure draft of the Nature Repair Market Bill – “to facilitate the enhancement or protection of biodiversity in native species in Australia” – is not sufficiently clear or strongly worded to prevent (much less reverse) the ongoing pattern of biodiversity loss and degradation², of which Australia’s record is one of the worst in the world.³ As stated, these objects fail to deliver on the Australian Government’s policy commitment to become ‘Nature Positive’ and are not consistent with the commitment to zero new extinctions.

Recommendation 1. Align objective 1 with widely endorsed definition of ‘nature positive’ by amending the first object of the Act to read “to halt and reverse nature loss through increasing the health, abundance, diversity and resilience of species, populations and ecosystems”

2. Ensure First Peoples are recognised as rights holders in their Country through making this an explicit object of the Bill and including a preamble

First Peoples have unique cultural, spiritual and economic connections to Country and its biodiversity. The Bill should explicitly recognise that First Peoples are rights holders in their Country, with obligations to care for Country under lore. This is not currently covered by the objects, where object (c) simply refers to encouraging more engagement between all parties, and does not recognise the specific role, responsibilities and rights for First Peoples. There is strong evidence globally and in Australia that biodiversity flourishes and is less subject to

¹ Milner-Gulland, E. J. *Nat Ecol Evol* 6, 1243–1244 (2022) <https://doi.org/10.1038/s41559-022-01845-5>

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. <https://soe.dcceew.gov.au/overview/environment/biodiversity>

³ OECD. “Chapter 4. Threatened Species Protection and the Sustainable Use of Biodiversity.” In *OECD Environmental Performance Reviews: Australia*, 2019.

<https://www-oecd-ilibrary-org.eu1.proxy.openathens.net/sites/9789264310452-10-en/index.html?itemd=/content/component/9789264310452-10-en>; Commonwealth of Australia. “Australia’s Faunal Extinction Crisis Interim Report.” Text, April 3, 2019. Australia. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Faunalextinction/Interim_report

decline across Indigenous-managed land and sea territory.⁴ 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 murrong) Act 2017*.⁵

Recommendation 2. That an additional object of the Act be added as follows: “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.”

Recommendation 3. That a preamble be included to the Bill acknowledging First Peoples’ unique cultural connections to and responsibilities for Country. (This could be included alongside more general text, for example recognising the importance of biodiversity and commitment to its flourishing for the health and benefit of future generations to enjoy).

3. Ensure sound underpinnings to strengthen a voluntary nature repair market

Purchase of certificates in a voluntary nature repair market should be limited to those seeking to create positive reputational benefit. The purchase of certificates should not be available as a means of compensating for harm to the environment.

To be successful, the market would need to be ‘clean’ and high integrity, with strong measurement and reporting processes in order to be reputable and economically viable. A ‘clean’ nature repair market will provide a desirable place for investment by purchasers seeking to compensate for supply-chain biodiversity impacts (analogous to scope 3 damages that are out of the immediate control of the purchaser). Purchasers could emerge as a result of nature-related risk disclosures under voluntary or mandatory disclosure programmes.⁶ However, the reputational, regulatory, or litigation risks that arise if the market includes compliance offsets that are currently of low integrity,⁷ would likely serve as a disincentive for potential purchasers seeking to compensate for supply chain impacts.

Those firms most likely to be investing in the market are looking to derive positive reputational benefit through the purchase of certificates, since certificates essentially certify that they have

⁴ 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

⁵ *Yarra River Protection (Wilip-gin Birrarung murrong) Act 2017*

<https://www.legislation.vic.gov.au/in-force/acts/yarra-river-protection-wilip-gin-birrarung-murrong-act-2017/008>

⁶ TNFD. “Taskforce on Nature-Related Financial Disclosures.” Accessed September 23, 2021.

<https://tnfd.global/>

⁷ NSW Auditor-General. “Effectiveness of the Biodiversity Offsets Scheme.” Audit Office of New South Wales, August 30, 2022.

<https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

invested in 'something good'. That 'something' is, by virtue of the Bill's drafting and the nature project-based certificates, not specific to particular species, ecosystems or Matters of National Environmental Significance. Certificates are therefore not fungible. However, firms who purchase certificates can demonstrate to their customers that they have invested in biodiversity conservation. When attached to an Australian Carbon Credit Unit (ACCU), a biodiversity certificate essentially provides greater detail and assurance to purchasers of ACCUs that the carbon has been sequestered in a way that supports biodiversity conservation. The certificate therefore certifies the biodiversity co-benefit of the ACCU.

On the other hand, allowing a Nature Repair Market certificate to be used to offset environmental harm in Australia - which we do not support - is highly likely to fail to deliver like for like compensation to guarantee no net loss, which contravenes globally recognised scientific principles of biodiversity offsetting.⁸ As such, the use of certificates to offset biodiversity losses presents material risks both to biodiversity and to the integrity and reputation of the Nature Repair Market, as the net outcome would be to lock in biodiversity decline. Firms or jurisdictions who use certificates as offsets or a form of compensation may also bear reputational and possibly legal risks in claiming that their operations are net-neutral or net-positive, when they are not.⁹ The use of certificates to compensate or offset biodiversity losses would therefore diminish their monetary value in a nature-positive market. This matter is discussed further in section 7 of this submission.

Lack of confidence or questions about the viability of the market as it is established, represents a substantial barrier for project proponents, who must decide whether to bear the upfront costs of developing a project before it can be registered and certified. This is particularly a barrier for First Peoples-led projects that require purchase of land (e.g. with support from entities such as the Indigenous Land and Sea Corporation (ILSC)), which carry the risk that no purchase will happen to offset these significant upfront costs incurred. In other words, questions or concerns about the integrity of the market and the potential pool of buyers will also have substantial impacts on the supply side.

An option to encourage participation of small and medium-sized entities in the market is to initiate the market with a government grant scheme, along the lines of the Queensland Land Restoration Fund (LRF). The Australian Government could provide an initial start-up grant in exchange for a portion of biodiversity certificates that it may either retain or on-sell to the private sector. We note that the Bill (Part 6) contains provisions for the Secretary, on behalf of the Commonwealth, to enter into contracts to purchase biodiversity certificates and that "it is immaterial whether the biodiversity certificates are in existence when the contract is entered into." (Section 79(1)).¹⁰

⁸ Specifically, 'like for 'like', 'no net loss' and 'additionality', as adopted and encoded in the EPBC Act Environmental Offsets Policy 2012. See pg 3 in: Miller, K.L., Trezise, J.A., Kraus, S., Dripps, K., Evans, M.C., Gibbons, P., Possingham, H.P., Maron, M., 2015. The development of the Australian environmental offsets policy: from theory to practice. *Environmental Conservation* 42, 306–314. <https://doi.org/10.1017/S037689291400040X>

⁹ Hannam, Peter. "ACCC to Crack down on 'Greenwashing' after Survey Reveals Spike in Misleading Claims." *The Guardian*, March 1, 2023. <https://www.theguardian.com/australia-news/2023/mar/01/accc-to-crack-down-on-greenwashing-after-survey-reveals-spike-in-misleading-claims>.

¹⁰ Early Australian Government investment would provide crucial insights into project costs and the market value of biodiversity certificates (or credits if such a mechanism ends up being included). In the case of the LRF, applicants were asked to provide details on the project plan, deliverables (both carbon and other co-benefits), and to name the price they were seeking – which presumably, would cover the

Recommendation 4. Mitigate risks to the market reputation and perceived integrity by strengthening outcomes reporting and integrity provisions (section 3 of this submission) and expressly prohibiting the use of the market for EPBC Act (or equivalent) compliance offsetting (section 7 of this submission).

Recommendation 5. Commit to government investment upfront in the market to create trust and generate a supplier base to encourage private investment.

Recommendation 6. Swiftly and effectively implement paired legislation, working with the business sector and other stakeholders, to realise Target 15 of the new Global Biodiversity Framework¹¹ to “ensure that large and transnational companies and financial institutions regularly monitor, assess, and transparently disclose their risks, dependencies and impacts on biodiversity” and to “encourage and enable” small to medium enterprises to do the same.

Given the uncertainties of the market underpinnings and the clarification of many issues that will be required to establish it as a trusted entity, the immediate establishment of a reference panel with appropriate breadth of expertise would help work through these matters and greatly boost confidence in the market.

Recommendation 7. Establish a cross-sector, multidisciplinary expert panel as an interim measure, prior to finalising the Bill, to advise on the scope, objectives, integrity, transparency and methods for assessing and reporting on outcomes of the market, with particular consideration to mechanisms that will enable market viability while ensuring the market delivers net benefits to biodiversity and protects First Peoples rights and access.

4. Ensure integrity, strategic outcomes, transparency and accountability

Mechanisms for ensuring high integrity in the market through tightening of adherence of methodologies to biodiversity integrity standards

The integrity of the market will largely be determined by whether the legislation encodes the objective of halting and reversing biodiversity loss in line with Australia’s CBD commitment under the Kunming-Montreal Global Biodiversity Framework. A core element in ensuring this integrity will necessitate tightening the link between biodiversity integrity standards, the methodologies, and their determination, variation and application.

The Bill as drafted currently only requires the Minister to ‘have regard’ to the advice of the Nature Repair Market Committee on whether a methodology determination or variation

cost of implementing the project plus a profit margin. These applications were judged based on value for money relative to a set of government priorities. Once funded, successful applicants were contracted to provide the Queensland Government with a portion of the Australian Carbon Credit Units (ACCUs) issued from the project – thus providing a commercial return to the State.

¹¹ Convention on Biological Diversity. “COP15: Nations Adopt Four Goals, 23 Targets for 2030 In Landmark UN Biodiversity Agreement.” Convention on Biological Diversity, December 19, 2022. <https://www.cbd.int/article/cop15-cbd-press-release-final-19dec2022>

complies with integrity standards (47 (1) (a)); along with the ambiguity that remains in mentions of 'such other standards... as are prescribed by the rules' under 'provisions for biodiversity integrity standards (57 (1) (i)).

The Bill as written currently does not protect or prevent harm to First Peoples rights and interests. Such protection is essential to prevent further ongoing harm to First Peoples and to support and enable better outcomes for Country and its biodiversity. Achieving this protection will require strengthening of provisions regarding methodology determinations and biodiversity integrity standards to require reference to First Peoples values, rights and obligations in Country.

Recommendation 8. Split 47(1)(a) and all related subsequent clauses regarding variation or revocation of methodology (under 48 and 51) into two parts and amend to read:

- (1) In deciding whether to make a methodology [determination][variation][revocation], the Minister:
 - (a) must ensure a methodology [determination][variation][revocation] complies with the biodiversity integrity standards
 - (b) must have regard to:
 - (i) any advice that the Nature Repair Market Committee has given to the Minister under subsection 54(2) in relation to the making of the determination
 - (ii) whether significant adverse impacts to First Peoples values, rights or obligations in Country are likely to arise from carrying out the kind of project that the determination covers;

[the Bill should retain current references to other significant adverse impacts and other such matters]

Recommendation 9. Delete 57(1)(i).

Mechanisms for ensuring high integrity in the market through ensuring tighter provisions regarding projects aimed at avoided loss and degradation

We recognise and support the benefits of issuing certificates for maintenance of biodiversity (such as that often found under First Peoples management and management of smallholders and local communities) in order to fund ongoing management that would not occur in absence of the certificate issuance, and without which the biodiversity would decline. At the same time, clearer and more decisive measures must be taken in the Bill to ensure that the market retains its integrity, that it does not precipitate new or exacerbate existing declines, and that it is not swamped with low quality 'on paper' projects that achieve no net benefit for biodiversity, or make unsubstantiated claims for avoided loss or degradation.

Maseyk et al. (2017 and 2021)¹² describe the risks of conflating protection and enhancement, and particularly the risk of overestimating the benefit of protection (where biodiversity benefit is derived through future avoided loss). Risk of loss values for biodiversity offsets that deliver benefits via protection (avoided loss) exceeding 70-100% are routinely accepted by the Department of Climate Change, Energy, the Environment and Water, when their true value is more like 5-10%. This reliance on implausible, untestable and unverifiable counterfactual scenarios pervades not just biodiversity offsets but also carbon markets in Australia (specifically, the now revoked avoided deforestation methodology under the ERF) and internationally. The Australian National Audit Office¹³ and the Samuel Review¹⁴ has also warned of the risks of so-called avoided loss projects. The current Australian Government's Nature Positive Plan¹⁵ has largely ruled out the use of avoided loss offsets in recognition of their minimal benefit for biodiversity.

Firstly, to maintain market integrity, it is essential:

- (a) that certificates issued for protection of biodiversity (including certificates funding ongoing management that would not otherwise be able to be maintained) are not ever used to compensate for loss elsewhere (i.e. for biodiversity offsetting, see section 7);
- (b) that distinctions between 'enhancement' and 'protection' not be conflated or treated as equivalent in the Bill;
- (c) that all communications regarding certificates issued and/or purchased for these 'enhancement' or 'protection' purposes be clear and transparent, including communications and claims made by certificate holders; and
- (d) that claims made of avoided loss or degradation are credible, evidence-based, conservative and substantiated.

Recommendation 10. Amend references to "enhancement or protection of biodiversity" in section 57 to refer instead to "biodiversity outcomes", and add an item under section 57 requiring that each project must clearly identify whether the associated biodiversity outcome will be delivered by protection, enhancement, or a combination of both (see also Recommendation 32 regarding certificate holder declarations).

Recommendation 11. Improve the biodiversity integrity standards such that estimates, projections and assumptions must be **conservative** rather than just "reasonably certain", as follows:

¹² Maseyk, F.J.F., Maron, M., Gordon, A., Bull, J.W., Evans, M.C., 2021. Improving averted loss estimates for better biodiversity outcomes from offset exchanges. *Oryx* 55, 393–403.

<https://doi.org/10.1017/S0030605319000528>

Maseyk, F., Evans, M.C., Maron, M., 2017. Guidance for deriving 'risk of loss' estimates when evaluation biodiversity offset proposals under the EPBC Act. Threatened Species Recovery Hub, Brisbane.

<https://www.nespthreatenedspecies.edu.au/publications-and-tools/guidance-for-deriving-risk-of-loss-estimates-when-evaluating-biodiversity-offset-proposals-under-the-epbc-act>

¹³ See Sections 4.35 to 4.38 and Case Study 4 in Australian National Audit Office (ANAO), 2020.

Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999 (No. Auditor-General Report No.47 of 2019–20).

<https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act>

¹⁴ See Box 27 and 28 in Samuel, G., 2020. Independent Review of the EPBC Act – Final Report. Department of Agriculture, Water and the Environment, Canberra.

¹⁵ See Page 21 in Department of Climate Change, Energy, the Environment and Water, 2022. Nature Positive Plan: better for the environment, better for business. Commonwealth of Australia, Canberra.

Amend 57(1)(f) to read: “if any condition set out in, or requirement imposed by, the methodology determination in accordance with subsection 45(4) or (5) involves an estimate, projection, or assumption –the condition or requirement must require:

- (i) the estimate, projection or assumption to be conservative,
- (ii) the estimate, projection or assumption to be disclosed

Amend 57(1)(h) to read: “to the extent to which any statements or information referred to in paragraph (g) would involve an estimate, projection or assumption—the estimate, projection or assumption *should be conservative*; and”

Stronger mechanisms to ensure projects deliver on claims

Recent reviews of carbon markets globally and in Australia have highlighted the necessity of mechanisms to ensure projects deliver on claims to ensure trust in the market. On certificate issuance, we recommend that section 70(2)(e) is deleted, as this introduces ambiguity, and potential conflict over whether the Regulator is ‘satisfied’ a project has resulted in, or likely to result in, biodiversity outcome relative to whether the project has resulted in, or likely to result in biodiversity outcome as prescribed by the relevant part of the methodology determination.

Additional provisions under 70(2) should instead be added, such as:

the reporting period and certificate issuance timepoint for the project;

This additional provision would come into effect when specific methodology determinations outline their reporting and certificate issuance timepoint. Such reporting and certificate issuance timepoints will vary depending on whether a methodology delivers biodiversity outcomes via protection, enhancement or a combination of both. Noting that certificates by their nature can only be issued *once* per project; unlike credits under the CFI Act. This is because credits quantify measurable outcomes, whereas certificates simply certify a set of activities that are likely to deliver biodiversity outcomes. This is also why certificates cannot and should not be used as offsets (see section 7 of this submission).

Recommendation 12. Delete 70(2)(e) to remove ambiguity, and instead add a provision that refers to the reporting period and certificate issuance timepoint relevant to the methodology used in the biodiversity project.

Mechanisms to cross-link to other programs and avoid double dipping

The Bill does not currently effectively cross-link to the legislation underpinning other programs, notably the carbon and water markets (particularly environmental and Indigenous water allocations). Provisions explicitly cross-linking these and

As currently worded, this Bill does not prevent the project being issued a certificate from also receiving a price premium for biodiversity and/or cultural co-benefits from any Australian Carbon Credit Units (ACCU) being issued to the same project. This scope for ‘double dipping’ will lead to an *overall net reduction* of investment in biodiversity conservation (contrary to the

purpose of the Bill), damage the integrity of the Nature Repair Market, and artificially inflate (greenwash) publicly-reported figures on biodiversity benefits and outcomes across Australia.

Recommendation 13. Include specific clauses and cross reference to the Carbon Farming Initiative (CFI) Act 2011 to avoid “double dipping” so that carbon, biodiversity and cultural outcomes delivered by overlapping project activities cannot be sold separately on both markets.

Mechanisms for ensuring integrity and delivery on objects through public accountability

Environmental markets are complex and characterised by asymmetries of information, where sellers and regulators have substantially more information on what is being purchased than buyers. Environmental markets are also unique in that all market participants are incentivised for less environmental outcomes to occur than what appears on paper (or in a certificate). For sellers and buyers, this is the financial dividend to either do less or pay a lower price in return for certification of artificially-inflated outcomes. For regulators, there is the incentive to show program effectiveness and to have a large supply of low-cost certificates.

These inherent asymmetries of information and incentives systemically de-prioritise real and additional outcomes. They mean that environmental markets are highly vulnerable to fraud, manipulation and maladministration. This scope for regulatory failure and market manipulation can be reduced by mechanisms that:

- (a) Allow complaints or concerns to be lodged by Eligible Interest Holders and other parties negatively affected by projects, methodologies or other mechanisms under the Market, and to have shortcomings redressed where complaints or concerns are upheld
- (b) Allow for third parties to play a role in upholding the law to seek redress through open standing provisions.

The draft bill does not contain open standing provisions. This is a major omission that will undermine integrity and accountability of the Nature Repair Market, unless revisions to the Bill are made.

Open standing provisions¹⁶ allow third parties to seek relief in courts without demonstrating that they are directly affected, a person aggrieved or a person with a special interest.

The EPBC Act contains provisions that enable environmentalists and environmental organisations to initiate enforcement actions to restrain contraventions of the Act and judicial review of administrative decisions made under the Act. These open standing provisions have been critical in bringing many of the cases that have resulted in landmark judgments in relation to decisions by the courts in relation to Matters of National Environmental Significance.¹⁷

In addition to third party enforcement and judicial review rights, the Bill should also include mechanisms that allow affected parties to make representations to the regulator. This would

¹⁶ Standing in Public Interest Litigation. ALRC Report No 27. Commonwealth of Australia, Canberra; Australian Law Reform Commission (1996)

<https://www.alrc.gov.au/inquiry/standing-in-public-interest-litigation/>

¹⁷ See, for example the Tasmanian Dam Case (Franklin Dam Case), Flying Fox Case, Nathan Dam Case <http://envlaw.com.au/top-5-landmark-environmental-legal-cases-in-australia/>

strengthen outcomes and benefits for First Peoples, engage other stakeholders, and avoid harm to other values.

Recommendation 14. That the Bill is amended to include open standing provisions to allow third parties to seek judicial review of administrative decisions made under the Act and to seek injunctions to restrain breaches of the Act.

Recommendation 15. That additional clauses be included to create mechanisms for Eligible Interest Holders and other members of the community negatively impacted by methodologies, issuance of certificates or other mechanisms under the legislation, including First Peoples, in a manner that involves violation of the objects and provisions contained within the legislation, including 'no harm' clauses, to raise concerns or complaints to the Regulator

Recommendation 16. That additional clauses be included to specifically allow for First Peoples, including those not named in project proposals but who can reasonably show they are impacted by those proposals in their values, rights and obligations to Country, to raise complaints to the Registering body regarding the project proposal, the veracity of project claims to do no harm to First Peoples, and/or the veracity of claims regarding the inclusion and/or benefits for First Peoples.

Recommendation 17. That provisions be made to ensure concerns raised by First Peoples under the above two recommendations or any other mechanism regarding violation or impact upon their values, rights and obligations to Country may be heard by a First Peoples-led panel or committee (see next section).

Mechanisms for ensuring integrity and delivery on objects through strengthening and extending provisions for expert advice

We recognise that the size of the Nature Repair Market Committee has been constrained to ensure that it is viable, can meet with full representation, and is not unwieldy. However, input from a much greater diversity of expertise in informing decisions on methodologies, outcomes, and the impacts of projects and certificates than this committee allows, is necessary to address the complexity of biodiversity and actions needed to ensure the most beneficial outcomes across Australia's diverse biomes and the diversity of First Peoples Country. Statutory access to and consultation with this diversity of expertise is needed to enable the Committee, and through it the Minister, to ensure net-positive biodiversity outcomes are delivered, that the legislation overall protects and benefits First Peoples in their values, rights and obligations in Country, and that the provisions of the biodiversity integrity standards are met, including those that methodology determinations deliver projects that are 'appropriate to the project area' (57(1)(c)).

This could be solved by establishing a diverse, multidisciplinary, independent panel of experts, including biodiversity and ecological scientists and First Peoples knowledge holders, and that the Bill be amended to ensure that this panel be consulted as part of the business of the Nature Repair Market Committee, including in creating, varying or revoking methodology determinations. The membership of this panel must be diverse and not dominated by

particular group or perspective to reduce the risk of regulatory capture.¹⁸ The role of the Nature Repair Market Committee, including the panel or subsections of the panel (e.g. representing First Peoples experts), could then be reasonably extended to (a) parsing and making recommendations on prioritisation of community and First Peoples-led methodology proposals (see below); (b) reviewing reporting on outcomes and related investigations (see next section); and (c) where viable or appropriate, review or provide advice on referrals of complaints made to the regulator, for example where significant harm may be suggested by the operation of a methodology or project (see section above).

The membership of the Nature Repair Market Committee must also be diverse and not dominated by a particular group or perspective, to reduce the risk of regulatory capture. In order to ensure cultural appropriateness, the Committee must also make provisions for a minimum of 2 First Peoples members (different genders).

Recommendation 18. That additional provisions under section 210 (assistance to the Nature Repair Market committee), to allow for establishment of a diverse, multidisciplinary, independent panel of experts to be established, including biodiversity and ecological scientists and First Peoples knowledge holders, and that the Bill be amended to require that this panel be consulted as part of the business of the Nature Repair Market Committee (including subsections of the panel, such as First Peoples experts, as appropriate), and that reports or advice from the panel be made public (with the exception of protected information).

Recommendation 19. That the remit of the Nature Repair Market Committee be extended to allow it, with reference to the expert panel, to (a) parse and make recommendations on prioritisation of community and First Peoples-led methodology proposals (see below); (b) reviewing reporting on outcomes and related investigations (see next section); and (c) where viable or appropriate, review or provide advice on referrals of complaints made to the regulator, for example where significant harm may be suggested by the operation of a methodology or project (see section above).

Recommendation 20. That the provisions be amended to ensure the Nature Repair Market Committee has at least two First Peoples representatives (different genders), and specifying that the membership of the Committee must be diverse and not dominated by a particular group or perspective to reduce the risk of regulatory capture.

Mechanisms for ensuring strategic outcomes and climate resilience

Biodiversity losses in Australia are widely driven by the costs of management to effectively mitigate threats and by destruction and losses arising from conflicts with other land uses. Market mechanisms alone will tend to drive biodiversity gains in areas where these are more readily achieved at lowest cost (including a lowest opportunity cost), and therefore where the management is easier and/or where these benefits are least in conflict with other land uses.

¹⁸ Laffont, J.-J., Tirole, J., 1991. The Politics of Government Decision-Making: A Theory of Regulatory Capture*. The Quarterly Journal of Economics 106, 1089–1127. <https://doi.org/10.2307/2937958>
Mitnick, B.M., 2011. Capturing 'Capture': Definition and Mechanisms, in: Levi-Faur, D. (Ed.), Handbook on the Politics of Regulation. Edward Elgar Publishing.

Without strategic mechanisms to the contrary, the general tendencies of the market will therefore drive towards biodiversity outcomes that are often less of a priority than those most needed. Overarching mechanisms to ensure that the market delivers strategic objectives, rooted in rigorous, tested and properly resourced data collection and maintenance, will therefore substantially strengthen the outcomes from the Nature Repair Market legislation.

The Bill does not include provisions to ensure that projects remain viable under changing climate. This is a substantial oversight (common to much existing legislation, including the CFI Act), which is likely to lead to substantial mis-investment and accelerated losses over coming decades.

Recommendation 21. That the Bill include provisions to require the creation and regular updating of an instrument under the objects defining strategic outcomes and priorities for biodiversity restoration, including consideration of climate resilience and reference to related matters including First Peoples values and priorities, and that the prioritisation of creation and review of methodologies under the Act be tied to these strategic provisions.

Recommendation 22. That project certificates be required to include information detailing the measures taken in projects to ensure resilience under climate change scenarios.

Recommendation 23. That the market to be underpinned by rigorous, tested and properly-resourced data collection and maintenance.

Making regulation and auditing of the market and its projects the responsibility of recognised biodiversity authorities

Assessing and assuring outcomes for biodiversity is significantly more complex than climate change mitigation, and requires specific specialist expertise. It is essential that regulatory and auditing responsibilities be managed by those with specialised focus on and expertise in biodiversity.

Recommendation 24. That the Nature Repair Market be regulated by a body with expertise and integrated strategic responsibility for biodiversity outcomes (i.e. a well-resourced, independent Environmental Protection Authority).

Recommendation 25. That a specific program and strong set of standards be established under the EPA to accredit biodiversity auditors (including allowing for registered greenhouse and energy auditors to gain accreditation as biodiversity auditors *where they have the required expertise*); and that all references in the Bill to 'registered greenhouse and energy auditor' in the draft bill be replaced by 'registered biodiversity auditor'.

Mechanisms to ensure outcomes reporting and accountability

A consistent finding of reviews of existing environmental protection legislation in the EPBC Act, over more than two decades, has been that the overall objectives and outcomes of the Act have not been achieved as a result, in part, of the lack of strategic decision making that addresses cumulative impacts and hence piecemeal regulatory decisions producing

producing 'death by a thousand cuts'.¹⁹ This includes a failure to undertake or require outcomes-based reporting, for example of compliance offsets under the Act.²⁰

Significantly enhancing provisions for disclosure and reporting, both of background information and of outcomes from the scheme, would allow public assessment, accountability, and ongoing adaptive reviews of the operations of the legislation and its instruments, to better ensure it meets its objectives for biodiversity benefit and provisions for avoiding harm.

The design of the data collection and outcomes reporting should be grounded in the strong current evidence base for effective biodiversity monitoring, indicators and outcomes-based reporting, and feed into the overall availability of data in an integrated way, to inform national assessments of biodiversity (such as current State of the Environment reports, environmental accounting, and other reporting and assessment to be undertaken by the EPA).

Adding provisions in the Bill for outcomes reporting, and underpinning this with a strong evidence-based approach, would also ensure the legislation delivers on its current object (d) 'to contribute to the reporting and dissemination of information related to the enhancement or protection of biodiversity in native species in Australia'.

There are reasonable provisions for non-disclosure of information throughout the Bill. However, these should not be taken to limit necessary reporting on outcomes from the legislation or individual methodologies or projects under the legislation.

Recommendation 26. That provisions be added to the Bill, for example under Division 2 of Part 16, that require the regulator (which should be the EPA) to disclose information regularly on the extent to which each project has delivered on outcomes, including reports of significant reversals in biodiversity outcomes under provision 148; and findings from audits and reports required under methodologies or mandated as compliance audits under Part 11 Division 3 Subdivision C.

Recommendation 27. That additional provisions be included in the legislation that:

- (a) mandate the Regulator (EPA) to provide ongoing disclosure, within a set timeframe, of project/certificate reports, outcomes from audit reports, biodiversity project areas, any data submitted to evidence for compliance with eligibility requirements; and all data relied on by the proposed Nature Repair Integrity Committee in evaluating and endorsing methods;
- (b) require that the registry include details of the crediting and permanence periods for registered projects;

¹⁹ Samuel, G., 2020. Independent Review of the EPBC Act – Final Report. Department of Agriculture, Water and the Environment, Canberra.

<https://epbcactreview.environment.gov.au/sites/default/files/2021-01/EPBC%20Act%20Review%20Final%20Report%20October%202020.pdf>

²⁰ Simmonds, Jeremy S., Laura J. Sontter, James E.M. Watson, Leon Bennun, Hugo M. Costa, Guy Dutson, Stephen Edwards, et al. "Moving from Biodiversity Offsets to a Target-Based Approach for Ecological Compensation." *Conservation Letters* 13, no. 2 (2020): e12695.

<https://doi.org/10.1111/conl.12695>.

(c) specify that the Regulator (EPA) is required to provide annual public transparency outcomes updates and frequent (e.g. 5-year) integrated public reports on the outcomes of the Nature Repair Market for biodiversity, including information on:

- condition and outcomes for Matters of National Environmental Significance
- condition and outcomes for First Peoples' values and governance

(d) draw on the existing strong evidence-base on effective biodiversity monitoring including cross-referencing to legislation for Environmental Standards to ensure this outcomes reporting is undertaken in concert with reporting on overall biodiversity outcomes (including outcomes under biodiversity offsetting Environmental Standard).

Recommendation 28. That the Bill specify that the EPA conduct investigative reviews, with recommendations, in the event of outcomes reporting demonstrating that the legislation is falling short of its objects, and that the findings of those investigative reviews be made public along with any response (or non-response) to the review recommendations.

Provisions to protect Indigenous Cultural and Intellectual Property

Clear protection of Indigenous Cultural and Intellectual Property (ICIP) must be added to the Bill to prevent further harm to First Peoples, ensure information can be safely shared as desired by knowledge-holders for purposes of certification, reporting and auditing, to support First Peoples knowledge holders to safely register of complaints, and to deliver information to support methodology determination, reporting on co-benefits, First Peoples involvement in management activities, tenure and land claims, and many other matters. This includes provisions under the Bill regarding secrecy and non-disclosure of information, and provisions related to the use of information publicly shared.

Recommendation 29. That Section 168 and all related sections on use and disclosure of information be amended explicitly to prevent any use of information marked as Indigenous Cultural and Intellectual Property (on the register or in any other public information related to projects, certificates or methodologies) by any other party than the knowledge holders of that Indigenous Cultural and Intellectual Property. This should be mandated in the Bill, not referred to provisions that may be made under rules to be developed.

Recommendation 30. That Indigenous Cultural and Intellectual Property, including non-disclosure of sites of cultural significance, be included in the definition of protected information provisions and references to non-disclosure, 'projected audit information' and 'secrecy', throughout the Bill, including in sections 125 and 126, and any other relevant sections.

Mechanisms to ensure integrity of public claims

We recognise the benefits of the market offering a diversity of project provisions, permanence periods, opportunities and outcomes. However, this runs the risk that lower-premium certificates may be purchased by businesses seeking to make net neutral or nature-positive claims. The overall integrity of the market will be greatly enhanced by provisions in the Bill that

prevent accidental, deliberate or implied inflation of the outcomes from certificates purchased when holders make claims in relation to their nature impacts and benefits through reporting, or in general communications.

The recent referral of the Climate Active certification scheme to the ACCC²¹, and the ACCC's broader "crackdown" on greenwashing²² is likely to have ramifications for biodiversity certification under the Nature Repair Market. In short, false and misleading "greenwashing" claims present material risks to both the Government, project proponents, firms and investors.

Recommendation 31. Clearly distinguish certificates in the register according to methodology, including the extent to which biodiversity outcomes are to be delivered by enhancement, avoided loss or degradation (protection), or a combination; permanence periods; extent (where relevant); and degree of First Nations inclusion and consultation undertaken in establishing and managing the project.

Recommendation 32. That provisions be added in the Bill that require certificate holders (purchasers), when making claims about certificates, to fully disclose key provisions and constraints associated with their certificates purchased, including mandating disclosure of which biodiversity outcomes claimed are to be delivered by enhancement, avoided loss or degradation (protection), or a combination; permanence periods; extent (where relevant); and degree of First Nations inclusion and consultation undertaken in establishing and managing the project; extent to which each project has delivered on outcomes (including reports of significant reversals in biodiversity outcomes under clause 148; and findings from mandated and compliance audits).

5. Strengthen how governance by First Peoples is embedded and how First Peoples' interests in and obligations to Country are protected

The accompanying fact sheet to the exposure draft of the Bill specifies that the "nature repair market is designed to enable participation by First Nations people and ensure free, prior and informed consent to projects on their land. Projects could include traditional land management to protect and improve biodiversity as well as land restoration." Outcomes from the carbon market under the CFI Act demonstrate that there are significant barriers to First Peoples being meaningfully including in or gaining benefits from projects where they are not the proponents and landholders. In order to achieve these stated goals, the Bill must include provisions to:

- Widen provisions for First Peoples to be recognised as Eligible Interest Holders, provisions to allow First Peoples to initiate and register projects, including in

²¹ Williamson, R., 2023. Carbon market confusion as offsets take another hit. RenewEconomy. <https://reneweconomy.com.au/carbon-market-confusion-as-offsets-take-another-hit/>

²² Hannam, P., 2023. ACCC to crack down on 'greenwashing' after survey reveals spike in misleading claims. The Guardian. <https://www.theguardian.com/australia-news/2023/mar/01/accc-to-crack-down-on-greenwashing-after-survey-reveals-spike-in-misleading-claims>

Indigenous Protected Areas, and provisions ensuring the right to withhold Indigenous Cultural and Intellectual Property

- Extend provisions requiring genuine, resourced Free Prior and Informed Consent, and ensure that there is sufficient time and resourcing provided to obtain this consent, so that these requirements do not place undue burdens upon First Peoples to accredit projects not established by them
- Ensure the Bill allows for sustainable use of resources by First Peoples
- Commit to a fully resourced First Peoples engagement strategy at all levels

Recommendation 33. That the Bill require Free Prior and Informed Consent (FPIC) before registration of projects by parties that are not First Peoples organisations, including:

- Only allow provisions for consent of eligible interest holders via being set out in a registered indigenous land use agreement under Section 18 if the proponent is the holder of that land use agreement.
- Where the proponent is not a First Peoples organisation, set out requirements (e.g. in Section 18) that proponents resource and allow adequate time for consultation with First Peoples who are Eligible Interest Holders to ensure FPIC is achieved.
- Where the Bill sets out provisions for cancellation of certificates, including in the case of failure to obtain consent from Eligible Interest Holders who are First Peoples, include provisions specifying that the regulator must consult with these Eligible Interest Holders before cancelling the certificate (Part 2, Division 2, Subdivision B).

Recommendation 34. That the Bill widen provisions and opportunities for First Peoples to access the market, and the ability for First Peoples to have a say over the use of their Country to ensure the protection of rights, values, obligations and ICIP knowledge, including:

- Extend provisions for Eligible Interest Holders who are First Peoples to include parks and conservation estate, IPAs and any other land managed by or with rights recognised to First Peoples
- Add provisions to ensure and clarify the eligibility of First Peoples who are managers of Indigenous Protected Area (IPA) to register projects and act as Eligible Interest Holders under the scheme
- Specify the right of First Peoples where they are Eligible Interest Holders to protect their Indigenous Cultural and Intellectual Property and determine its appropriate use within projects and methodologies, including the right to withhold consent
- Amend the Bill (sections 89-92) to specify that Prescribed Body Corporates or other entities incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 are potential Eligible Interest Holders in their Country across any tenure
- Add provisions to extend the definition of Eligible Interest Holders to allow the capacity for First Peoples to register rights and interests in Country, where they are not a Prescribed Body Corporate or other entities incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006, and which:
 - record these interests and their associated territory in the register

- allow the interests of these groups to be accounted for in 'no harm' clauses in methods developments
- encourage project proponents who are not these First Peoples to engage with these voluntarily registered Eligible Interest Holders
- and provide opportunities for these groups to fully access other mechanisms (such as complaints provisions) as may be developed under the Bill.

Recommendation 35. Modify provisions in the Bill pertaining to non-harm to biodiversity, to specify that these allow for the sustainable collection of bush foods and materials by First Peoples.

Recommendation 36. That the Australian Government commit to full adequate resourced engagement with First Peoples in the development of the Nature Repair Market and co-design of methods, including:

- That the government develop now a comprehensive First Peoples engagement strategy for the Nature Repair Market as a whole and its core components, including consideration of issues of representation, language and geographical inclusion, adequate timeframes, and resourcing, and include First Peoples who are not registered
- That the co-design of priority methodology determinations be fully resourced and given appropriately long timeframes
- That the government commit to capacity building and resourcing for First Peoples organisations, so that they can appropriately access and evaluate opportunities arising from this legislation.

6. Facilitate participation in the market by diverse and under-resourced project proponents

There is significant benefit in the Bill making provisions for flexibility in methodology development, which will help provide pathways for smaller, less well-resourced and more cautious potential suppliers to enter the market. Providing flexibility, for example in permanence periods and outcomes derived, can help ensure the market is attractive to proponents. To maintain integrity, provisions must be included in the Bill to ensure that these flexible provisions that allow for potentially 'lower benefit' are transparent (see section 4).

Removal of additional barriers to participation will help the Nature Repair Market achieve the aims announced by the Minister to ensure access to the market by smaller and under-resourced players, including small landholders and First Peoples. These barriers include upfront risks and costs of project development, and lack of access to expertise to navigate the rules and provisions of complex legislation. The benefits of investing in trusted, independent enablers, such as Indigenous-led carbon brokers, the Indigenous Land and Sea Corporation (ILSC), and Natural Resource Management organisations, can be seen in current carbon markets, and should be extended to and expanded upon in the Nature Repair Market.

The barriers to access by First Peoples organisations who have values, rights and interests in Country but who do not have tenure over their Country are extremely high. This is

demonstrated by the dearth of Indigenous-led projects in the carbon market where these groups have not yet managed to achieve Native Title, tenure or sole or joint management. Provisions that remove barriers for First Peoples to lead and/or participate substantively in projects would also support the Minister's stated goal of enhancing access to funding to support First Peoples to actively care for Country.

A key mechanism for unlocking community and First Peoples participation in the carbon market has been provisions allowing for public submissions to develop methodologies. This was crucial, for example, in enabling the ground-up Indigenous-led development of the now highly successful savanna burning methodology under the CFI Act. In the wording of this Bill, the Minister must ask the Nature Repair Market Committee to look at a methodology before it is developed. The Bill is currently silent on how methods are prioritised and who should develop this prioritisation. Having the Minister alone determine priorities is likely to limit opportunities for ground-up, public, community and First Peoples-led initiatives on methodology development, thereby curtailing the potential of the market to enable a diversity of smaller proponents, including First Peoples organisations, from finding means to participate. Whether the Minister or the Nature Repair Market Committee recommend priorities risks methodology development being caught up in political debates, particularly if the Nature Repair Market Committee members have perceived or actual conflicts of interest.²³ Another way to approach this is to have the trusted, independent standing panel of experts (who must be free of perceived or actual conflicts of interest) review proposals for methodology development and make recommendations on prioritisation, which are then published (refer to Recommendations 18 and 19).

First Peoples' management of Country frequently involves sustainable use of resources in that Country. Sustainable use has been recognised as legitimate under a range of Commonwealth legislation, as well as under global agreements including the Kunming-Montreal Global Biodiversity Framework. Consistent evidence shows that such sustainable use is not harmful to the biodiversity values in Country, but rather contributes to their flourishing.

Recommendation 37. Create supporting policy to provide resourcing to enable and support under-resourced players to develop projects for the market, including:

- capacity-building and up front investment in project development to support small and under-resourced entities to bring projects to the market, including funding earmarked for First Peoples organisations, including but not limited to Prescribed Body Corporates and other entities incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006
- adequately resourcing trusted, independent brokers to support and enable project development, including specific Indigenous-led organisations (ILSC and not-for-profit Indigenous-led brokers)

Recommendation 38. Create mechanisms within the Bill to require the expert panel (see Recommendations 18 and 19), either directly via the Minister, via the Regulator or via the

²³ Slezak, M. 2022. Labor to remake carbon credit committee after three controversial Coalition appointments resign. ABC News <https://www.abc.net.au/news/2022-07-14/emissions-reduction-assurance-committee-members-resign/101238956>

Nature Repair Market Committee, to receive public proposals for methods development, and provide the Minister with advice on prioritisation of methods development.

Recommendation 39. As a matter of priority, provide opportunities and resourcing for ground-up proposals for methodology development, to prioritise First Peoples-led, culturally appropriate and community-led methodology development.

Recommendation 40. As a matter of priority, create enabling opportunities, with resourcing, to co-develop methods to catalyse and/or encourage access to opportunities for First Peoples organisations and groups in circumstances where they do not currently hold tenure over their Country.

7. Do not use the Nature Repair Market as it currently stands to facilitate or encourage biodiversity offsetting

Any use of the Nature Repair Market to offset damage caused by development projects would represent significant risks to biodiversity, and would almost certainly lead to accelerated loss of biodiversity. Such use would generate reputational risks to the market and potentially to buyers and proponents under the market.

A core issue is that, as it stands, the Bill is concerned with issuance of biodiversity **certificates** rather than biodiversity **credits**. Certificates represent project-based activities that are anticipated to provide general benefits to biodiversity. Credits on the other hand represent a real, additional and measurable outcome for a specific component of biodiversity. This means that the biodiversity benefits certified under such certificates are *not fungible*, and should not be traded and used to compensate or offset biodiversity losses elsewhere. In short, a certificate is essentially a non-fungible token (NFT) - whose markets operate more like an artwork sale, rather than a liquid commodity market. No provision is currently made within the Bill for issuance of biodiversity credits that would have the integrity, measurability, robust requirements for outcomes, and consequences for non-delivery of outcomes required to function as effective offsets for losses elsewhere.

There also remain significant, unresolved problems with Federal environmental offset policy as outlined by the Samuel Review, the NSW Auditor-General review of the NSW BOS and existing research.²⁴ These risks can only be mitigated through reform (tightening) of compliance offsetting rules under the Commonwealth EPBC Act or other state/territory laws and policy.

The stated goal of the Australian Government to drive nature positive outcomes, and the object of this Bill to deliver net biodiversity gain, cannot be met via biodiversity offsetting, which by definition is intended to “maintain or improve” biodiversity outcomes *relative to a*

²⁴ Evans, M.C., In press. Backloading to extinction: coping with values conflict in the administration of Australia’s federal biodiversity offset policy. *Australian Journal of Public Administration*; Reynolds, A., 2023. Conservation after the fact: The prevalence of post-approval condition-setting in environmental impact assessment processes in Australia and its implications for achieving ecologically sustainable development outcomes. *Environmental Impact Assessment Review* 99, 107032.

<https://doi.org/10.1016/j.eiar.2022.107032>

counterfactual of decline.²⁵ To be clear - biodiversity offsetting as a compliance mechanism can at best maintain existing biodiversity decline - and in practice has actually worsened biodiversity loss.²⁶ Any inclusion of offsets in the market will undermine the ability of the market to deliver absolute biodiversity gain and would likely drive further losses. Furthermore, offsets markets already exist, and a new market that allows the purchase of credits for use as compliance would represent a duplication of administrative and regulatory effort.

Because of the potential for overall, likely accelerated harm to biodiversity, and for reputational compromise arising from the use of the market as a compliance offsetting tool, the Biodiversity Council does not support the use of the Nature Repair Market for compliance offsetting under current federal, state, territory or local offsetting arrangements.

Recommendation 41. That the Australian Government establish provisions in this Bill prohibiting the use of biodiversity certificates for compliance offsetting (for the purposes of the EPBC Act and relevant laws of states and territories), and circumscribing how parties (including other jurisdictions) can trade or make claims around the use of these certificates for compliance offsetting purposes.

Recommendation 42. That no consideration or work to establish methodologies or other mechanisms under the Nature Repair Market to allow for biodiversity compliance offsetting be undertaken prior to:

- (a) Substantial, reputable work being finalised to strengthen existing compliance offsetting rules under the Commonwealth EPBC Act and other state/territory laws and policy - building on existing advice (including that provided to the Samuel review by some of the co-authors to this submission) and adhering to further expert advice that must be openly sought, with appropriate time for deliberation, and further time allowed for public consultation - including:
- Substantially strengthened use of the mitigation hierarchy
 - Only demonstrably offsettable impacts can be offset
 - The definition of offsettable requires that a like-for-like trade can be achieved (and evidence exists for past recreation or restoration and recolonisation of the relevant species habitats, or recreation of the like ecological community)
 - Time delays of offsets are taken into account
 - Endangered and critically endangered species habitat or ecological communities are not offset

And

- (b) Robust, reputable provisions being made within the Nature Repair Market legislation, consistent with expert advice that must be openly sought, with appropriate time for deliberation, and further time allowed for public consultation, for issuance of biodiversity

²⁵ Maron, M., Brownlie, S., Bull, J.W., Evans, M.C., von Hase, A., Quétier, F., Watson, J.E.M., Gordon, A., 2018. The many meanings of no net loss in environmental policy. *Nature Sustainability* 1, 19–27. <https://doi.org/10.1038/s41893-017-0007-7>

²⁶ Maron, M., Bull, J.W., Evans, M.C., Gordon, A., 2015. Locking in loss: Baselines of decline in Australian biodiversity offset policies. *Biological Conservation* 192, 504–512. <https://doi.org/10.1016/j.biocon.2015.05.017>

credits, which are clearly distinguished from biodiversity certificates currently provided for under this Bill, and which:

- Are able to demonstrate real and additional gains for all species and ecosystems, including their condition, that more than compensate for the losses which are the subject of the compliance offset, over an area more than sufficient to offset the loss, including accounting for fragmentation and other landscape-level losses
- Rule out the use of averted loss projects for biodiversity offset credits
- Are subject to multipliers that compensate for both uncertainties and time delays in project realisation
- Are subject to public review and scrutiny at least to the levels of existing biodiversity offsetting legislation and policy (see Recommendation 14)
- Are subject to full disclosure, including outcome progress reporting on a public register
- Are subject to accountability mechanisms that fall upon proponents seeking to offset losses, to ensure that outcomes are achieved (including requirements to purchase additional credits where original credits fail to achieve outcomes).
- Are subject to regular, frequent assessment and reporting by the EPA, at individual and whole-of-program levels, tied to Commonwealth reporting on outcomes from compliance offsetting programs under the newly tightened Commonwealth EPBC Act legislation.

The use of credits for biodiversity compliance offsetting under any of these provisions, or their related methodologies, should not overrule or replace the need to protect and avoid harm to First Peoples values, priorities and obligations to Country and biodiversity, as outlined elsewhere in this submission.