



Biodiversity Market Team
Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
Canberra ACT 2601
By Online Submission

3 March 2023

Dear Biodiversity Market Team

RE: Nature Repair Market Bill 2023 (Exposure Draft) – Consultation

The National Environmental Law Association Ltd ACN 008 657 761 (**NELA**) welcomes the opportunity to make a submission on the exposure draft of the Nature Repair Market Bill 2023 (**NRM Bill**).

1. NELA's Objects and its interest in this Consultation

NELA is the national peak body for advancing Australian environmental law and policy. It is an independent, multidisciplinary, member-based association focused on environmental law and sustainability. NELA is managed by a national board that includes Directors with expertise in international and domestic legal frameworks for biodiversity conservation, climate change and natural disasters, environmental regulation and regulatory theory and natural resource management.

One of NELA's core objectives is to provide a forum for, and to otherwise assist in, the discussion, consideration, and advancement of environmental law across the legal profession and the wider community. NELA is also a member of the leadership committee of the Professional Bodies Climate Action Charter Australia and New Zealand Forum, which represents professional members in Australia across a wide range of sectors from finance, insurance, science, engineering, law, health, construction, and the built environment.

Given the potentially significant influence that the NRM Bill and the introduction of a national voluntary market for biodiversity certificates (**the Market**) may have on Australia's biodiversity protection and restoration efforts, the Bill is of key concern for NELA's members. NELA is grateful for the opportunity to make a submission on the NRM Bill.

2. Background to this Submission

At the 15th Conference of the Parties to the CBD, on 19 December 2022, the Parties—including Australia—adopted the Kunming-Montreal Global Biodiversity Framework (GBF), and NELA commends the Australian Government for the productive role that it played in negotiations in Montreal.

NELA welcomes the Australian Government’s international leadership and expresses its unreserved support for the four long-term goals agreed under the GBF, including that:

- the integrity, connectivity, and resilience of all ecosystems are maintained, enhanced, or restored, *noting that enhancement and restoration are particularly important as up to nineteen Australian ecosystems have been identified as in the early stages of collapse and thousands of species are listed as threatened with extinction;*¹
- biodiversity is sustainably used and managed, *noting concerns about the limitations of ‘sustainability’ as the core goal of existing Australian environmental laws, and its demonstrated incapacity to arrest biodiversity decline and promote healthy, flourishing ecosystems in Australia;*²
- monetary and non-monetary benefits of genetic resources are shared equitably; and
- adequate means of implementation (e.g., financing, capacity-building) to fully implement the GBF are secured and equitably accessible, *noting NELA’s strong support for the Australian Government’s signature on the ‘Joint Donor Statement on International Finance for Biodiversity and Nature’ and the ‘10 Point Plan for Financing Biodiversity’, and urging the Australian Government to actively fulfil its commitments to those financing arrangements over coming years.*

NELA also supports the 23 global targets to be initiated immediately and achieved by 2030 to reach the 2050 goals that are outlined in the GBF. In particular, NELA notes the targets to stimulate innovative schemes such as biodiversity credits with environmental and social safeguards, and to optimise co-benefits and synergies of finance targeting biodiversity and climate change,³ both of which are relevant to the development and operation of the proposed Market, which is the subject of this submission.

The Australian Government has expressed its support for the GBF through recent reforms such as the new zero emissions target in legislation, its national ‘Nature Positive Plan’, and the proposal on which it is now seeking submissions: to establish a new national Market to facilitate restoration and repair of

¹ Dana Bergstrom et al, “‘Existential Threat to Our Survival’”: See the 19 Australian Ecosystems Already Collapsing’ *The Conversation* (Article, 26 February 2021) <<https://theconversation.com/existential-threat-to-our-survival-see-the-19-australian-ecosystems-already-collapsing-154077>>.

² See, eg, Allan Hawke, *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, 21 December 2009); Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) (‘Samuels Review’).

³ United Nations Convention on Biological Diversity, Kunming-Montreal Global Biodiversity Framework, UN Doc CBD/COP/15/L.25 (18 December 2022) targets 19(d)–(e).

Australian environments.⁴ These domestic legislative reform efforts are consistent with Australia's international commitments and with domestic reports and inquiries over recent years, including independent reviews of the national *Environment and Biodiversity Conservation Act 1999 (EPBC Act)*, and the 2021 State of the Environment Report, which called for significant investment in conservation and restoration to reverse rapid biodiversity loss and declining trends in the health and resilience of Australian environments. We note that many of the design elements of the proposed Market, such as the biodiversity assessment instruments and methodologies, are not included in the NRM Bill and are not yet a topic of government consultation. NELA looks forward to opportunities to engage with the Australian Government on the content and design of biodiversity assessment instruments and methodologies as they are being developed.

3. Summary of Submissions

NELA welcomes the Australian Government's efforts to design a new mechanism for funding conservation actions, including from private sector proponents, and its commitment to improve on historically limited funding for conservation and restoration. However, in relation to the exposure draft of the Bill itself, NELA submits that:

- the objects of the NRM Bill should expressly, and in more detail than is included in the current exposure draft, enshrine the protection, conservation and restoration targets of the GBF;
- the Clean Energy Regulator (**CER**) is not currently an appropriate regulator for the new Market, and an independent, specialised regulator should be charged with compliance and enforcement of anticipated Market rules and its operation;
- the Nature Repair Committee must include mandatory biological and/or ecological science expertise in its membership, to ensure that relevant expertise is incorporated into the design of methodologies and their consistency with the biodiversity integrity standards;
- if the Bill is to ensure that the Market achieves nature-*positive* outcomes, biodiversity certificates should not be used to achieve a compliance offset. However, if the Australian Government is determined to use certificates for that purpose, NELA submits that it take that approach only in the context of the strongest possible protections for additionality, net gain, transparency, and ground-truthing. Further, the Australian Government must ensure Market

⁴ Department of Climate Change, Energy, the Environment and Water ('DCCEEW'), 'A New Global Biodiversity Framework: Kunming-Montreal Global Biodiversity Framework' (Web Page, 17 January 2023) <<https://www.dcceew.gov.au/environment/biodiversity/international/un-convention-biological-diversity/global-biodiversity-framework>> ('A New Global Biodiversity Framework'); DCCEEW, *Nature Positive Plan: Better for the Environment, Better for Business* (Report, December 2022) ('*Nature Positive Plan*').

integrity and accountability mechanisms exceed the heavily criticised arrangements that are currently in operation around Australia;

- determinations about making or varying methodologies must be required to comply with biodiversity integrity standards and advice from the Nature Repair Committee; and
- certain, minor issues should be revised in the next iteration of the Bill, as detailed below.

4. Comments and Recommendations

4.1 NELA submits that the first and second objects of the NRM Bill should expressly enshrine the GBF’s protection, conservation, and restoration targets, for which the Australian Government has expressed its support, and which will not be achieved without legislative recognition.

The first and second object of the NRM Bill are ‘to facilitate the enhancement or protection of biodiversity in native species in Australia’ and ‘to contribute to meeting Australia’s international obligations in relation to biodiversity’. NELA strongly supports incorporating nature-positive principles into the objectives of the NRM Bill. Without a focus on nature-*positive* outcomes, the proposed Market risks perpetuating biodiversity declines and ‘locking in’ perverse incentives, consistent with the shortfalls identified (and heavily criticised) in state biodiversity offsetting arrangements and the operation of the existing EPBC Act.

NELA submits that the objects in the Bill should go further, to enshrine the GBF’s proactive and measurable targets for protection, conservation, and restoration, recognising that the Australian Government has announced its support for those targets and that they are consistent with Government policy, as expressed in its Nature Positive Plan.⁵ . To that end, NELA submits that the following new objects should replace clauses 3(a) and (b) in the NRM Bill:

- (a) to contribute measurable improvements in Australia’s biodiversity protection, conservation and restoration outcomes and, in particular:
 - (i) create new mechanisms for financing Australia’s goal to protect at least 30 per cent of its terrestrial, inland water and coastal and marine areas by 2030;
 - (ii) create new mechanisms for financing the active and effective restoration of at least 30 per cent of degraded terrestrial, inland water and coastal and marine ecosystems in Australia by 2030; and
 - (iii) ensure that all resources created by the operation of this [Act] are allocated exclusively to activities that measurably improve protection, conservation and restoration outcomes for Australian biodiversity; and

⁵ *Nature Positive Plan* (n 4).

- (b) to improve the management of terrestrial, inland water and coastal and marine ecosystems across Australia in a way that:
 - (i) halts the extinction of known threatened species and significantly reduces extinction risks;
 - (ii) reduces the rates of introduction and establishment of known or potential invasive alien species by at least 50 per cent by 2030; and
 - (iii) minimises the impact of climate change and ocean acidification on biodiversity.

Enshrining these targets into the NRM Bill would bolster Australia’s efforts to promulgate reform overseas, as part of its leadership of the ‘High Ambition Coalition for Nature and People’,⁶ while also providing clarity and certainty to the Australian and state and territory Parliament, the broader electorate, the Market proposed in this Bill, and Australian markets more broadly. NELA submits that these GBF targets should be incorporated into all Commonwealth legislation that is relevant to environmental management and biodiversity protection, to ensure that legislation consistently reflects Australia’s international and domestic commitments to a nature-*positive* approach to the environment.

In addition to these proposed new objects, NELA submits that the Bill must be integrated into Australia’s broader environmental law framework—including the new or revised iteration of the EPBC Act that is due for release for consultation in mid-2023. The overarching object of the revised EPBC Act ought to be replicated or adopted in this NRM Bill, to ensure that both pieces of legislation are promoting and regulating activities in a consistent, nature-positive way. Adopting the overarching object of the EPBC Act for environmental protection (or enhancement, as it may be) is consistent with the statutory drafting recommendations made in the original review of the EPBC Act by Allan Hawke (approved but not implemented by the then-Australian Labor Government).

4.2 NELA submits that the CER—at least in its current form—is not the appropriate regulator for the proposed Market. An independent, specialised regulator should be charged with compliance and enforcement of the Market rules and its operation.

While the CER can exercise functions conferred on it by any Commonwealth law,⁷ its primary purpose and exclusive current functions are to regulate climate change and energy laws.⁸ The CER does not currently have the relevant biodiversity conservation and restoration expertise to effectively administer the proposed Market. The CER has been heavily criticised for a lack of regulatory integrity and effectiveness, which is crucial to ensure that the proposed Market does not become an approach ‘to

⁶ See A New Global Biodiversity Framework (n 4).

⁷ *Clean Energy Regulator Act 2011*(Cth) s 12(b).

⁸ *Ibid* s 12(a); See also the functions conferred by or under the *Clean Energy Act 2011; Renewable Energy (Electricity) Act 2000; Australian National Registry of Emissions Units Act 2011* (‘CER Functions’).

managing biodiversity [that drives] decline rather than sustainability’, as foreshadowed by the most recent State of the Environment Report.⁹

The ‘range of responsibilities’ already conferred on the CER¹⁰ has been seen to complicate and potentially conflict with its functions—making the conferral of another, quite distinct and complex, regulatory function on the CER under the NRM Bill concerning.¹¹ NELA submits that the CER’s remit should be confined to its primary role in the carbon market, with the regulatory functions of the NRM Bill to be conferred on a more suitable independent and specialised regulator.

If the Australian Government intends to integrate the regulation of the new proposed Market with CER’s existing responsibilities, NELA submits that the CER itself should be reformed. In particular, NELA submits that an effective regulatory body for both carbon and biodiversity must be based on a clear statutory separation of: (a) responsibility for methodology design and determinations; and (b) regulatory oversight and enforcement of the implementation of those methodologies.

If such a reform was implemented, and both governance components (methodology design and regulation) integrated both carbon and biodiversity goals, the Australian Government may be in a position to achieve the ambitious co-benefits identified by the Intergovernmental Panel on Climate Change (**the IPCC**) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (**IPBES**) workshop report, that recommends integrated responses to the intersecting global crises of climate change and biodiversity loss.¹²

4.3 The Nature Repair Committee should be required to include at least one person with extensive and well-recognised ecological or biological science expertise. Scientific experts must have primary responsibility for leading the design of methodologies under the Bill.

The Bill currently requires the Nature Repair Committee to include four or five members with expertise or standing in at least one of the following: agriculture, biological or ecological science, environmental markets, Indigenous knowledge, land management or economics.¹³ The way that the current provision is framed would allow the Committee to be formed without any biological or ecological expertise. NELA submits that this is not appropriate, given the importance of the Committee’s roles in ensuring positive outcomes for biodiversity in Australia.

Expertise in agriculture and land management are, of course, relevant to the operation of the new Market, particularly because many of the activities designed to be regulated by the proposed Market

⁹ Identified as a ‘major risk’ in the 2021 State of the Environment Report: DCCEEW, *2021 State of the Environment Report* (Report, 2021).

¹⁰ Ian Chubb et al., *Independent Review of Australian Carbon Credit Units* (Final Report, December 2022) 6.

¹¹ See, eg, CER Functions (n 8).

¹² Hans-Otto Pörtner et al, *IPBES-IPCC Co-Sponsored Workshop Report on Biodiversity and Climate Change* (Report, 2021) 15.

¹³ Nature Repair Market Bill 2023 (Exposure Draft) s 198(2).

will be located on agricultural land. Similarly, Indigenous knowledge will provide a crucial and beneficial connection between the operation of this Bill and the Australian Government's priorities in the protection of heritage and recognition of Australia's First Nations in the management of the environment and cultural heritage. Expertise in economics and/or environmental markets will also help to ensure that the Committee takes a sophisticated approach to valuing and recognising the value of the environment in its methodologies. However, given that:

- the focus of the Committee, and the Bill more generally, is on achieving improvements in biodiversity conservation and restoration and not simply maintenance,
- the very low standard for nature protection that is the starting point for this Bill (as demonstrated clearly in the consistent trends of biodiversity decline and loss in each State of the Environment Report since it was initiated), and
- the significance of the Committee in advising the Minister on the regulation and operation of the proposed Market, and the development of methodologies that underpin the activities in that Market,

scientific expertise needs to be a mandatory expertise represented in the membership of the Committee at all times.

4.4 NELA submits that if the Bill is to ensure that the Market achieves nature-positive outcomes, biodiversity certificates should not be used to achieve a compliance offset, however if the Australian Government is determined to use certificates for that purpose, NELA submits that it take that approach only in the context of the strongest possible protections for additionality, net gain, transparency and ground-truthing.

There are significant challenges in appropriately measuring offsets in compliance markets, including calculating and measuring intended positive outcomes. While Graeme Samuel's review of the EPBC Act¹⁴ speculated that biodiversity offsets may assist with environmental restoration,¹⁵ the most recent State of the Environment Report found more than 70 per cent of development proposals assessed under the EPBC Act include offsets as a condition of approval, and the Australian National Audit Office (ANAO) revealed that almost 90 per cent of approvals in the year 2014-15 included an offset as a condition of approval.¹⁶ The ANAO also identified concerns with the way that developers are increasingly relying on offsets to achieve the objectives of the EPBC Act in protecting the environment and biodiversity, despite offsets being intended to be the 'last resort' in the mitigation hierarchy, only

¹⁴ Samuels Review (n 2).

¹⁵ Ibid 137 [8.3.1].

¹⁶ Australian National Audit Office ('ANAO'), *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999* (Report No 47, 25 June 2020) ('*Referrals, Assessments and Approvals of Controlled Actions*').

for implementation if an action cannot be conducted in a way that avoids harm, minimises, or mitigates harm or restores harm to a matter of national environmental significance.¹⁷

While biodiversity offsets are a compliance instrument that are designed to compensate for adverse environmental impacts of project development, biodiversity credits are seen as a more voluntary market instrument which can be used to finance stronger biodiversity outcomes. Biodiversity credits have the ability to achieve positive impacts for the environment in a way that the carbon credits scheme cannot. NELA therefore submits that the Market should only provide for certificates to be traded as offsets, in very limited circumstances following assessment.

NELA understands that the Australian Government intends to explore a mechanism that would allow biodiversity certificates to be traded as offsets under the Bill. On that basis, NELA submits that the Australian Government should:

- **only allow offsetting for ‘residual impacts’ of a proposed project, not for all impacts that a project proposes to have on a matter of national environmental significance:** this will require, in essence, a re-commitment to the mitigation hierarchy. Project proponents should be able to demonstrate the actions that they have taken to avoid the potential harm, minimise it and restore the environment, before seeking offsets for residual impacts. The Australian Government should consistently require proponents to demonstrate a concerted effort and their commitment to spending additional resources on a project to avoid having to offset, before approving a project with offsetting conditions. This is a standard market-based approach—seeking to suppress demand for items that are in limited supply (e.g., threatened species habitats) either by reducing their availability (i.e., setting a threshold for what can and cannot be offset, excluding biodiversity that is of exceptionally high value or irreplaceable), or by dramatically increasing their cost, consistent with their value (i.e., based on their limited availability). The Australian Government’s commitment to developing national accounts may help in this regard, by properly demonstrating the full value of threatened natural assets and building more realistic expectations about the price of offsets and their long-term availability.
- **demonstrate that it has learned from the inadequacies of other schemes:** existing offsetting schemes around Australia have been criticised as weak, ineffective, and lacking in transparency and integrity, including in reports produced by the Audit Office of NSW and the national

¹⁷ *Referrals, Assessments and Approvals of Controlled Actions* (n 15) 64–65; See also that the ANAO has highlighted the following topic for potential audit in 2022-23: ANAO, ‘Management of Biodiversity Offset Obligations by Government Business Enterprises’ (Web Page, 2022) <<https://www.anao.gov.au/work/performance-audit/management-biodiversity-offset-obligations-government-business-enterprises-0>>.

ANAO report. As a result, any mechanism to use biodiversity certificates as offsets must include:¹⁸

- a long-term Strategic Plan that guides the implementation of the offsetting scheme and the interaction of proponents with the proposed Market;
 - statutory safeguards against conflicts;
 - statutory clarity and consistent, robust implementation, to avoid policy uncertainty;
 - ensure the availability of a form of property right for an offset/certificate area that can be lodged on title, operates in perpetuity, and is enforceable against future development proposals such as mining;
 - transparency, sustainability, and integrity arrangements in clear, statutory provisions that are then properly resourced, monitored and enforced;
 - appropriate (substantial) penalties for non-compliance with an offsetting provision;
 - published planning to address questions of credit supply, demand, and market price, that are then monitored as the scheme is implemented, to ensure the proper functioning and valuation of credits in the market. In particular, the question of whether supply *can* meet demand is essential and should be addressed in order to manage market expectations and prices;
 - include enforcement mechanisms for the protection and effectiveness of offset sites to ensure that offset conditions are, in fact, producing the promised biodiversity gains;
 - require public reporting and data management that improves public trust in the operation and effectiveness of the scheme; and
 - ensure that the effectiveness of the market can be monitored and assessed, and that there is a legislative mechanism to halt trading in the event of market failure.
- **accept that some offsets will be the cause of native species becoming extinct:** where offsets for a particular species or ecosystem are unavailable—which is a near-term challenge in NSW,¹⁹ and together with other Australian jurisdictions —the only options available to a decision maker will sometimes be to (a) reject the development application or (b) allow the permanent loss of the affected ecosystem by approving an offset that is not like-for-like. The national and multiple state-based State of the Environment reports have identified habitat loss, including as a result of native vegetation clearing, as the single greatest threat to Australia’s biodiversity. If the Australian Government proposes to make biodiversity certificates available as offsets, it will need to accept the inconsistency in some cases between accepting a proposed

¹⁸ See generally reports of the Audit Office of NSW (‘AONSW’), the ANAO and domestic and international scholarship.

¹⁹ See AONSW, *Effectiveness of the Biodiversity Offsets Scheme* (Report, 30 August 2022).

offset and meeting its commitment to prevent any more Australian native species from becoming extinct.²⁰

- **implement international best-practice:** the OECD, IUCN, and various other bodies have produced outlines that purport to recommend international best practice. NELA urges caution with these reports because they are typically quite vague and high-level and may not represent an accurate picture of outcomes ‘on the ground’. Nevertheless, key features of an international ‘best practice’ scheme include: setting thresholds; requiring equivalence, additionality, and permanence; imposing obligations for monitoring, reporting, and verification (**MRV**); accounting for transaction costs; and fully resourcing and implementing systems for compliance and enforcement.²¹

4.5 Methodology decisions

NELA supports the strong wording of sections 47(3) and 48(4), that the Minister must not make a determination to make or vary a methodology unless the Nature Repair Committee has provided advice to the Minister that the determination complies with the biodiversity integrity standards.

In addition to those sub-sections, section 47(1) requires that the Minister separately ‘have regard’ to the biodiversity integrity standards in deciding whether to make a methodology determination (with the same applying to variation of a determination under section 48(2)). In the absence of sections 47(3) and 48(4), the ‘have regard’ standard would be wholly unsatisfactory. The Minister would, with that drafting, be entitled to note the existence of a biodiversity integrity standard but nevertheless make a determination that is inconsistent with the standards. NELA submits that the relevant requirement in both sections 47 and 48 (with necessary changes to the summary in section 44) should go further to require that the Minister must satisfy themselves, in addition to the Committee’s advice, that the determination will ‘meet’ or ‘comply with’ or ‘ensure that the determination complies with’ or ‘achieve’ the biodiversity integrity standards. This revision would clarify the purpose of the Minister having to turn their mind to the standards separately and ensure that the determination does, in fact, contribute to nature-positive outcomes through the operation of the Market.

If sections 47(3) and 48(4) were to be removed, NELA would submit that it is even more important that the obligation on the Minister be increased from a requirement to ‘have regard’ to the biodiversity integrity standards (and also to the advice from the Nature Repair Committee) in sections 47 and 48

²⁰ DCCEEW, *Threatened Species Action Plan 2022-32: Towards Zero Extinctions* (Action Plan, 2022).

²¹ See, eg, OECD, *Biodiversity Offsets: Effective Design and Implementation* (Report, 7 December 2016); Nicky Jenner and Pippa Howard, *Biodiversity Offsets: Lessons Learned from Policy and Practice* (Report, October 2015).

and instead seek to implement or achieve those standards and the subject matter of the Committee's advice.

4.6 Minor clarifications and revisions to be addressed in the next iteration of the Bill.

NELA has outlined at 4.1, above, the need for important revisions to the objects of the Bill. If those submissions are not accepted, section 3(a) should nevertheless be revised for clarity, either by replacing the word 'in' with the word 'and', or by removing the phrase 'native species' and adding 'native' before 'biodiversity'. That is, either:

- 'to facilitate the enhancement or protection of biodiversity ~~in~~[and] native species in Australia; and'; or
- 'to facilitate the enhancement or protection of [native] biodiversity ~~in native species~~ in Australia'.

5. Conclusion

NELA emphasises the need to ensure that the proposed Market achieves positive outcomes for Australia's rich natural heritage, and for the critical ecosystem functions and resilience, on which all Australian communities and economies rely. Achieving positive outcomes will require the highest standards of integrity and accountability, and an express commitment to protection, conservation, and restoration targets, along with well-resourced, expert, and specialised enforcement.



Madeline Simpson, NELA Director of the Publications and Submissions Portfolio,

with Ethan Kumar (NELA Publications Officer), Tom Webb (NELA Secretary), and Dr Phillipa McCormack (NELA Vice President)

On behalf of the NELA Board