# Submission on the Nature Repair Market Exposure Draft Bill

Megan Evans, University of New South Wales, Canberra

## Table of Contents

**Market purpose and function**

Issue 1: Lack of evidence for private demand for biodiversity certificates .................................................. 3

Recommendation 1: Significantly increase public investment in biodiversity conservation ................. 4

**Ensuring integrity**

Issue 2: There is a major risk that certificates will be issued to projects that *do nothing* ................. 5

Recommendation 2: Remove incentive for certificates to be issued to non-additional “avoided loss”/protection projects, in line with Government’s Nature Positive Plan .................................................. 7

Issue 3: Methods could be made even if they do not meet integrity standards ...................................... 7

Recommendation 3: Amend the Bill to ensure that methodology determinations and variations must meet or comply with the biodiversity integrity standards ............................................. 8

Issue 4: The biodiversity integrity standards are incomplete and poorly drafted ....................................... 8

Recommendation 4: Reduce ambiguity in biodiversity integrity standards ................................................ 11

Issue 5: Integrity risks due to market administration .................................................................................. 11

Recommendation 5: Prevent “double dipping” so that carbon and biodiversity outcomes delivered by overlapping project activities cannot be sold separately. Appoint the Environment Protection Agency (EPA) to administer market .......................................................... 12

Issue 6: Integrity risk due to the issuance of certificates ............................................................................ 13

Recommendation 6: Clearly distinguish certificates according to methodology and the extent to which biodiversity outcomes are to be delivered by protection, enhancement or a combination of both ......................................................................................................................... 13

**Making claims**

Issue 7: The use of certificates as offsets or compensation presents material risks biodiversity, firms, governments and proponents .......................................................................................... 13

Recommendation 7: Rule out the use of certificates as offsets or compensation .................................... 14

Issue 8: Advance reforms on the offset regime under the EPBC Act ...................................................... 14

Recommendation 8: Support reforms to offsetting under the EPBC Act – both those currently being progressed by DCCEEW, and those recommended by the Samuel Review yet still to be implemented ........................................................................................................... 14

**Transparency and oversight**

Issue 9: Lack of open standing provisions .................................................................................................. 14

Recommendation 9: Include open standing provisions in the Bill 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 .......................................................... 15

Issue 10: Secrecy and disclosure provisions ................................................................................................ 15

Recommendation 10: Guarantee transparency under the Nature Repair Market Act .......................... 15
Market purpose and function

**Issue 1: Lack of evidence for private demand for biodiversity certificates**

The Australian Government seeks to develop a nature repair market “to encourage investment in biodiversity and drive environmental improvements across Australia”\(^4\). Specifically, it seeks to “make it easier for businesses, organisations, governments and individuals to invest in projects to protect, manage and restore nature”\(^5\).

The rationale for the market is underpinned by an assertion that the public sector cannot afford to protect Australia’s environment without the assistance of the private sector\(^6\)\. Irrespective of the validity of this claim\(^7\), the purpose of the nature repair market is to facilitate private sector investment in biodiversity conservation. There are two issues that are likely to undermine the proposed market’s ability to fulfill this purpose.

The first, is that there is little evidence that private sector is willing and motivated to invest in biodiversity for reasons other than to offset or compensate for losses at scale. This means that private firms are likely to only engage in a biodiversity market if the purchase of certificates can deliver (a) financial returns at commercial rates, or (b) enable them to make claims to consumers that they are compensating for their biodiversity impacts elsewhere in their supply chain via the purchase of certificates. On point (a), there are multiple reasons why the scope to make positive financial returns from biodiversity only is extremely limited (Figure 1)\(^8\).

![Figure 1. Spectrum of project types with spectrum of funding available to support them. Note the scope for private investment is limited to biodiversity outcomes that occur alongside commercial agriculture, forestry or carbon offsets, and biodiversity mitigation and offsets (which at best maintain biodiversity decline\(^9\)). Ward and Lassen (2018)\(\text{\footnotesize{(accessed 2.20.23).}}\)\]

On point (b), the purchase and use of certificates to make consumer claims has major implications for overall biodiversity outcomes if biodiversity losses are permitted to be offset or compensated with certificates that do not meet “like for like” criteria. There are also financial, legal and reputational risks for governments and private firms around the potential for making false or misleading claims (see Section 3, Making claims).

The second issue that will undermine the nature market’s purpose is that the Australian Government has so far ruled out any public investment to kickstart this market. This is highly unusual, and will contribute to this market to being “thin” – characterised by few, small trades. The reasons for this are twofold. First, the private sector is risk-averse, and will not invest unless there is certainty over what the...
purchase of biodiversity certificates will deliver them (i.e. financial returns, or ability to make claims, see above). Why should the private sector invest if the public isn’t willing to do so first?\(^\text{10}\)

The second problem is around practicalities – if a firm wishes to purchase a biodiversity certificate, a land manager must have already taken on the financial risk of registering and implementing a biodiversity project. How will that land manager have obtained finance to initiate that project? Certainly not a retail bank at this stage. In absence of a government grant scheme, such as how the Queensland Government implemented via its Land Restoration Fund (LRF) Pilot project round\(^\text{11}\), very few projects are going to be registered – and those that will, will be geared towards companies and entities who already have considerable market power and access. Without an initial government grant scheme, the players that the Australian Government wishes to encourage into the marketplace – small and medium sized land managers, including First Nations, will be locked out of the market. This problem will be exacerbated if risks around integrity and adverse selection are not resolved (see Section 2, **Ensuring integrity**).

There are **several benefits of initiating the market with a government grant scheme**. First, it would encourage participation of small and medium-sized entities, as described above. The Queensland LRF team have a wealth of experience in implementing such rounds\(^\text{12}\). Second, it would provide crucial insights into project costs and the market value of biodiversity certificates. 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 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\(^\text{13}\). 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. The Australian Government could engage in a similar process – 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. I 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 “it is immaterial whether the biodiversity certificates are in existence when the contract is entered into.” (Section 79(1)).

**Recommendation 1: Significantly increase public investment in biodiversity conservation.**

This includes:

- Public investment required to initiate projects that will eventually deliver biodiversity certificates via a government grant scheme.
- Public investment required to effectively administer the Nature Repair Market, which will be significant.
- Public investment required to effectively administer national environmental laws, which have always been chronically underfunded.
- Public investment to fund biodiversity conservation that is not commercially viable or attractive to the private sector, which is a large majority (see Figure 1)
- Reversal of public investment in projects and industries which actively harm biodiversity (as per Target 18 of the Kunming-Montreal Global Biodiversity Framework\(^\text{14}\)), thus distorting market signals and undermining the capacity for environmental regulation and public funding in conservation to actually deliver positive outcomes for biodiversity.

Public investment to kick-start this market is critical to ensure broad participation and reasonable market activity, but there are several other risks that must also be addressed before the Australian Government progresses further down this path.

---


\(^{12}\) For sake of disclosure, I was an employee of the Queensland Government’s Land Restoration Fund unit from 2018-2019.


Ensuring integrity

**Issue 2: There is a major risk that certificates will be issued to projects that do nothing**

To be clear, when referring to integrity in this submission, I am referring to biodiversity outcomes that are real and additional to what would have occurred in absence of the issuance of a biodiversity certificate.

Environmental markets are inherently prone to integrity issues, most famously that of adverse selection – known as the “lemons” problem in economics. This occurs when market rules and administration incentivises the establishment of poor quality projects, which are then (in the case of carbon and biodiversity markets) issued credits or certificates that do not represent real or additional carbon abatement or biodiversity outcomes. In short, there is a major risk that governments and private firms invest in projects that essentially do nothing.

The market incentives are such that both the seller (land managers) and buyers (governments and firms) are geared towards purchasing these “lemons” – for the seller, it means being paid to do a low-cost activity (doing nothing). For the buyer, it means being able to make a claim that they are doing something beneficial (protect biodiversity) in a way that is far cheaper than investing in a higher quality, more expensive product. This is a win-win for the buyer and seller, but for the ultimate principal in this principal agent problem – the public, and the environment – it is a major loss.

Australia’s existing biodiversity and carbon offset schemes are already heavily undermined by adverse selection. In biodiversity offsets, this has played out primarily in the reliance on avoided/averted loss or protection offsets. This is the same issue that has been highlighted in recent research and investigative journalism on REDD+ projects, covered by the Guardian and Four Corners. This problem – whereby the risk of biodiversity being lost from a site are overstated such that the benefit delivered by an offset at that site is artificially overinflated – is sufficiently widely recognised that the Australian National Audit Office and the Samuel Review has warned of its risks. The current Australian Government’s Nature Positive Plan has stated:

“…many offsets deliver no benefit at all as they involve ‘protection’ of areas that would not have been cleared and they are not maintained long-term… and The use of ‘averted loss’ offsets (protecting one patch of existing habitat in exchange for clearing or loss of another) will be discontinued, unless it can be demonstrated that the habitat is under clear and imminent threat.” [emphasis added]

However, the current Bill provides ample scope for adverse selection to occur through the incentivisation of biodiversity certificates generated via averted loss or protection. This is

---

because a biodiversity certificate can be issued for “…protection of existing high-quality habitat or restoration of habitat”\textsuperscript{22} [emphasis added].

This means it is highly likely, particularly in the absence of a government grant scheme to kick-start the market (see Recommendation 1), the projects that will enter the market will overwhelmingly focus on protection and rely on outrageous and implausible claims of averted loss. This issue is compounded by specific parts of the Bill:

- **Section 57: Biodiversity integrity standards**
  (1) For the purposes of this Act, a methodology determination complies with the biodiversity integrity standards if:

  (h) 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 would be reasonably certain;

- **Section 70: Issue of Certificate**

  (2) If the Regulator is satisfied that:

  (e) the project is sufficiently progressed to have resulted in, or be likely to result in:

  (i) the biodiversity outcome for the project; or

  (ii) enhancement or protection of biodiversity that would be unlikely to occur in the absence of the project; and

  Regulator must issue a biodiversity certificate to the applicant in respect of the project by making an entry in the account in the Register identified in the application under paragraph 68(1)(c)

This wording provides ample scope for the Regulator (currently intended to be the Clean Energy Regulator, see Issue 4\textsuperscript{23}) to issue a certificate for the protection of existing biodiversity values if it is “satisfied” the project is "likely to result in" a biodiversity outcome (which may occur through protection or restoration/enhancement – two broad activities that provide quantitatively and qualitatively different benefits), and only that any “estimate, projection or assumption” be “reasonably certain”.

Maseyk et al.\textsuperscript{23} describe the risks of conflating protection and enhancement, and particularly the risk of overestimating the benefit of protection/avoided loss projects.

<table>
<thead>
<tr>
<th>Scenario</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>A: No net loss</td>
<td>Offset package inadequately compensates for losses</td>
</tr>
<tr>
<td>B: Net gain</td>
<td>Anticipated gain from protection actions underestimated; the total offset package is more than adequate to offset losses</td>
</tr>
<tr>
<td>C: Net loss</td>
<td>Anticipated gain from protection actions overestimated; the total offset package is inadequate to offset losses</td>
</tr>
</tbody>
</table>

Figure 2. A conceptual illustration comparing estimated biodiversity gain from offset actions with the actual biodiversity gain achieved from these actions, showing the influence of miscalculating gains from preventing loss of area (protection actions) on the adequacy of a total offset package. In this example, the offset package uses a combination of protection and other actions (e.g. maintenance or enhancement actions) in the offset design; with protection actions to prevent the loss of area being used as the primary action to achieve the offset, and other offset actions being used to supplement protection actions to reach the total biodiversity gain required to offset losses.

While this Figure refers to offsets, the principal risk of biodiversity benefits being overestimated through use of protection/avoided loss projects, and that a project is actually not delivering the biodiversity outcomes it promises and is certified to, is the same.

Source: Maseyk et al. (footnote 23)

There is so much interpretive leeway and ambiguity in this wording that it is **highly likely to enable non-plausible estimates of averted/avoided loss, and overstated claims of biodiversity outcomes that are therefore non-additional**. Our research has shown that risk of loss values for biodiversity

\textsuperscript{22} Department of Climate Change, Energy, the Environment and Water, 2022. Nature Repair Market Draft Bill Factsheet. Biodiversity Certificates

\textsuperscript{23} 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. \url{https://doi.org/10.1017/S0030605319000526}.

offsets 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%\textsuperscript{24}. 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.

**Recommendation 2: Remove incentive for certificates to be issued to non-additional “avoided loss”/protection projects, in line with Government’s Nature Positive Plan**

- This would require amendments to Sections 47, 57 (integrity standards), and 70 (issuance) as described above
- Specifically, the treatment of “enhancement or protection” as falsely equivalent activities should be amended in Section 57 as per Table 1.
- Instead, certificates should be issued on the basis of predicted or estimated biodiversity outcomes, and then the certificate can detail how much of that outcome is to be delivered via protection activities and how much by restoration. This is how the EPBC Act Environmental Offsets Policy and Offsets Assessment Guide works.

**Issue 3: Methods could be made even if they do not meet integrity standards.**

There are other design elements in the Bill that is intended to ensure integrity – specifically, provisions which purportedly ensure that methodology determinations or variations can only be made such that they meet integrity standards – e.g in the "Ensuring integrity" factsheet, it says:

*The Minister can only make or vary a methodology if the Nature Repair Market Committee has advised this meets [emphasis added] the biodiversity integrity standards.*

This is not correct. The Bill actually states (Section 47):

(1) *In deciding whether to make a methodology determination, the Minister:*

  a) **must have regard to** [emphasis added]:
     i. **whether** the determination complies with the biodiversity integrity standards;
     ii. 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;

It goes on to say:

(3) *The Minister must not make a methodology determination unless:*

  a) the Nature Repair Market Committee has given the Minister advice under subsection 54(2) in relation to the making of the determination; and
  b) that advice includes a statement to the effect that the Committee is satisfied that the determination complies with the biodiversity integrity standards [emphasis added].

Therefore, 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 complies with integrity standards (47(1)(a)).

This means the test for whether a methodology determination is made (or varied under section 48) is whether it is of the Minister’s and of the Nature Repair Market Committee’s opinion that a methodology determination meets the biodiversity integrity standards – and not, simply, that the methodology meets the biodiversity integrity standards.

Note that the early version of the Carbon Credits (Carbon Farming Initiative) Act 2011 (which the Nature Repair Market Bill is modelled on) contained stricter wording, whereby the Minister could not make or vary a methodology determination unless the Domestic Offsets Integrity Committee endorsed the proposal AND the determination (or variation) complies with the offsets integrity standards\textsuperscript{25}.

Recent history has shown that such Committees – including the Emissions Reduction Assurance Committee – can be stacked with vested interests\textsuperscript{26}. The lack of open standing provisions in the draft

\textsuperscript{24} See footnote 15 for references.


\textsuperscript{26} Morton, A. 2022. Labor to reshape carbon credit committee as Coalition-appointed members resign. The Guardian. https://www.theguardian.com/environment/2022/jul/14/labor-to-reshape-carbon-credit-committee-as-coalition-appointed-members-resign

7
Bill (see Section 4, Transparency and oversight) also means that these critical decisions can occur without any community oversight or accountability by third parties (notwithstanding the 14 to 28 days that will be open for the public to comment on proposed methodology determinations by the Nature Repair Market Committee, as per Section 56 of the draft Bill).

Recommendation 3: Amend the Bill to ensure that methodology determinations and variations must meet or comply with the biodiversity integrity standards.

This could occur as follows:

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, and
   (b) must have regard to:
      i. any advice that the Nature Repair Market Committee …
      ii. whether significant adverse environmental, agricultural…

Issue 4: The biodiversity integrity standards are incomplete and poorly drafted

The draft bill outlines the biodiversity integrity standards at Section 57. These standards have been adapted from the CFI Act, but in some cases, they have been watered down. For example, the draft bill says that an “estimate, projection or assumption would be reasonably certain [emphasis added]”. Rather than “conservative” in the CFI Act. “reasonably certain” is completely ambiguous and will incentivise avoided loss/protection projects with implausible counterfactuals of decline, as discussed on page 5.

Section 57 is also complex and doesn’t clearly state what are the biodiversity integrity standards. Section 57(1)(i) also opens scope for methodology determinations themselves to propose additional biodiversity integrity standards. The biodiversity integrity standards should be encoded in legislation and consistently applied to all methodologies, and not such that some methodologies meet more or less biodiversity integrity standards than other methodologies.

Adapting from Butler et al. (2022, p 7) and the draft bill, there are six main integrity risks associated with biodiversity certificates:

- **additionality** – the risk of issuing certificates for biodiversity outcomes that would occur anyway, without the incentive provided by the scheme;
- **measurement** – the risk of issuing certificates for biodiversity outcomes that has not occurred because of the failure to accurately measure or estimate biodiversity losses and gains associated with the project activities;
- **leakage** – the risk of issuing certificates for biodiversity outcomes that has not occurred because of the failure to account for increases in biodiversity losses, or reductions in biodiversity gains, that occur outside of the project boundary as a consequence of the project activities;
- **permanence** – the risk that biodiversity outcomes by projects, and certified under the scheme, will be fully or partially released as a result of future events; and
- **perverse outcomes** – the risk that project activities will have adverse impacts on biodiversity within and outside of the project area.

Neither the draft bill (nor the CFI Act) contains, either in the integrity standards or elsewhere, an overarching standard that certificates (ACCUs) should only be issued where there is high confidence that the certified outcomes (credited abatement) is real and additional. Such an integrity standard should be added to Bill, so that the standards in 57(1)(e) and (f) could then be included as ways of giving effect to this overarching standard.

---

The biodiversity integrity standards' coverage of these issues, the associated problems with the relevant standards, and suggested amendments to solve these problems are summarised in Table 1.

Table 1. Biodiversity integrity standards coverage of standard integrity risks

<table>
<thead>
<tr>
<th>Risk</th>
<th>Draft standard and problem</th>
<th>Suggested solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Additionality</td>
<td>57(1)(a) a biodiversity project carried out in accordance with the methodology determination should result in enhancement or protection of biodiversity in native species (whether the effect on biodiversity occurs within or outside the project area) that would be unlikely to occur if the project was not carried out; and • Conflates protection and enhancement, will incentivise non-additional outcomes via adverse selection</td>
<td>57(1)(a) a biodiversity project carried out in accordance with the methodology determination should result in enhancement or protection of biodiversity outcomes in native species (whether the effect on biodiversity occurs within or outside the project area) that would be unlikely to occur if the project was not carried out; and • For each project, identify whether the outcome will be delivered by protection, restoration/enhancement, or a combination of both – and clearly note this on the certificate</td>
</tr>
<tr>
<td>Perverse outcomes – adverse impacts</td>
<td>57(1)(b) a biodiversity project carried out in accordance with the methodology determination should be designed to prevent the project from having a significant adverse impact on biodiversity in a native species that is protected under: (i) a law of the Commonwealth; or (ii) a law of a State or a Territory in which the project area is wholly or partly situated; and • A project designed to prevent an adverse outcome may still have an adverse outcome. Who is liable should this occur and what are the consequences?</td>
<td>57(1)(b) a biodiversity project carried out in accordance with the methodology determination should be designed to prevent the project from having not result in a significant adverse impact on biodiversity in a native species that is protected under: (i) a law of the Commonwealth; or (ii) a law of a State or a Territory in which the project area is wholly or partly situated; and • Suggested amendment below adopts “result in” language in 57(1)(a) for consistency and clarity • Define significant adverse impact – informed by significant impact test under EPBC Act?</td>
</tr>
<tr>
<td>Perverse outcomes – non-indigenous species</td>
<td>57(1)(c) a biodiversity project carried out in accordance with the methodology determination should be designed to achieve enhancement or protection of biodiversity in native species that is appropriate to the project area; and • Who decides what is “appropriate to the project area?” Is this suggesting that biodiversity that is planted or introduced to the project is indigenous to the area?</td>
<td>57(1)(c) a biodiversity project carried out in accordance with the methodology determination should result in be designed to achieve enhancement or protection of biodiversity outcomes in native species that is appropriate to the project area; and</td>
</tr>
<tr>
<td>Measurement</td>
<td>57(1)(d) a biodiversity project carried out in accordance with the methodology determination should be designed to achieve enhancement or protection: (i) that is of biodiversity in native species; and (ii) that can be measured, assessed and verified; and</td>
<td>57(1)(d) a biodiversity project carried out in accordance with the methodology determination should be designed to achieve enhancement or protection result in biodiversity outcomes: (i) that is of biodiversity in native species; and (ii) that can be measured, assessed and verified; and</td>
</tr>
<tr>
<td>High confidence outcomes are real and additional, Perverse outcomes – non-indigenous species</td>
<td>57(1)(e) any condition set out in, or requirement imposed by, the methodology determination in accordance with subsection 45(4) or (5): • (i) is supported by clear and convincing evidence; and (ii) is, so far as is reasonably practicable, consistent with relevant Indigenous knowledge and values;</td>
<td>57(1)(e) any condition set out in, or requirement imposed by, the methodology determination in accordance with subsection 45(4) or (5): (i) is supported by clear and convincing evidence; and (ii) is, so far as is reasonably practicable, consistent with relevant Indigenous knowledge and values; (iii) is consistent with enhancement or protection of biodiversity outcomes in native species that is appropriate to the project area; and</td>
</tr>
</tbody>
</table>
(iii) is consistent with enhancement or protection of biodiversity in native species that is appropriate to the project area; and

(iv) in the case of a condition or requirement that relates to the measurement or assessment of the enhancement of biodiversity of native species—requires a clear indication of the level of certainty of achievement of the enhancement; and

(v) in the case of a condition or requirement that relates to the measurement of the protection of biodiversity of native species—requires a clear indication of the level of certainty of achievement of the protection; and

- Draft 57(1)(e) combines multiple integrity risks and other considerations.

**Measurement and additionality**

<table>
<thead>
<tr>
<th>Draft 57(1)(f) if any condition set out in, or requirement imposed by, the methodology determination in accordance with subsection 45(4) or (5) involves an estimate or projection—the condition or requirement must require disclosure of:</th>
<th>57(1)(f) 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:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) the assumptions and methods used to make the estimate or projection; and (ii) the level of certainty of the estimate or projection; and</td>
<td>(i) the estimate, projection or assumption to be conservative, (ii) the estimate, projection or assumption to be disclosed</td>
</tr>
</tbody>
</table>

- This suggested amendment covers the intent for estimates to be conservative which protects against wildly implausible estimates being used and accepted even if "the level of certainty of the estimate" is disclosed

**High confidence outcomes are real and additional**

| 57(1)(g) any statements or information that could be included in: (i) an entry in the Register for a biodiversity project covered by the methodology determination; or (ii) a biodiversity certificate issued in relation to a biodiversity project covered by the methodology determination; would be supported by clear and convincing evidence; | 57(1)(h) 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 would be reasonably certain; and |

| 57(1)(i) the methodology determination meets such other standards (if any) as are prescribed by the rules. | The biodiversity integrity standards that apply to all methodologies should be encoded in legislation, and not such that some methodologies meet more or less biodiversity integrity standards than other methodologies |

- This opens scope for methodology determinations to propose more biodiversity integrity standards – is this appropriate?

**Leakage**

| No explicit standard. | There are two types of leakage: direct and indirect. Direct leakage occurs when the biodiversity project proponent moves the biodiversity damaging activity to another location, while |

-
| Permanence | No explicit standard | There is no standard that explicitly relates to permanence. However, section 34 covers the permanence period, which is 25 years for all projects and methodologies. |

Recommendation 4: Reduce ambiguity in biodiversity integrity standards

- Improve the biodiversity integrity standards as per Table 1 such that estimates, projections and assumptions must be conservative rather than just “reasonably certain”
- Remove scope for methodology determinations to create their own biodiversity integrity standards.

Issue 5: Integrity risks due to market administration

There are two major risks to the integrity of biodiversity outcomes that are likely to occur under the current proposal.

First, there is a risk of double-dipping or double counting. This is because the Clean Energy Regulator is being tasked with administering the biodiversity market in parallel with the existing carbon market, with a register for each. The Australian Government has indicated:

“The market will operate in parallel with the carbon market. This will encourage carbon farming projects that also deliver benefits for biodiversity.”

Since the government has gone down the road of wishing to issue project-based certificates to certify biodiversity outcomes—which, based on the Bill as currently drafted—could feasibly occur on a site with or without a carbon project—it is highly plausible that a proponent could sell ACCUs from a project at a premium price to a seller, in addition to a biodiversity certificate from that project to the same buyer or a different one.

Alternatively, if the Nature Repair team within the Department was tasked with contracting projects that issue biodiversity certificates, and the team responsible for contracting ACCUs within the Department (once that responsibility is moved away from the Clean Energy Regulator, as per the Chubb Review’s recommendation), it is entirely feasible for these individual contracting activities to occur without regard for the other, and for a project proponent to receive a premium ACCU price for the biodiversity benefits they are delivering, in addition to a biodiversity certificate.

This risk of “double dipping” is lessened under schemes where such as Queensland Government’s LRF, or the Carbon + Biodiversity Pilot administered under the previous federal government, because in each of those cases the tradeable unit is simply the ACCU that is bundled (not stacked) with some additional information about co-benefits that are tracked on the one register.

The creation of a biodiversity certificate, and the additional administrative complexities that arise with two different parts of the Department contracting different units, and the Clean Energy Regulator now being tasked with two markets and reporting to two Ministers (Environment and Climate Change), means this is a significant risk that will likely undermine the integrity of biodiversity outcomes. To be


30 “Bundling” is when a suite of ecosystem services produced on a piece of land is sold as a single package (typically as a single unit of trade or credit) to the same buyer. There is one payment for an aggregated set of overlapping services.

“Stacking” is when various overlapping ecosystem services produced on a given piece of land are measured and separately ‘packaged’ into a range of different credit types or units of trade that together form a stack. The components of the stack can then be sold individually to different buyers and separate payments received for each set of services.

clear – double dipping/counting benefits all market players – including sellers and Government and private buyers – since overstated claims can be made around environmental protection. The public, and the environment, ultimately loses, however.

The second major risk to biodiversity integrity due to market administration is specifically related to the Clean Energy Regulator (CER). The final report of the Chubb review31 made several recommendations to improve the integrity of Australia’s carbon offset scheme. The case of the human-induced regeneration (HIR) method is instructive here. The review panel’s recommendations and findings establish four key eligibility tests32 for the interpretation and application of the HIR method. In short, the panel recommended that:

- ‘Project administration for the human-induced regeneration (HIR) method should ensure that all HIR projects conform to its current intent: that it is reasonable to expect that the project area will become native forest, attain forest cover, and permanently store carbon as a direct result of project management actions’. [emphasis added]

- ‘The method should be interpreted as requiring: (a) evidence of a causal relationship between the nominated eligible HIR activity or activities and the dominant suppression mechanism(s) that occurred through the entirety of the baseline period; (b) demonstration that these suppressors are directly addressed by the HIR activity or activities throughout the life of the project; and (c) demonstration that the application of FullCAM is consistent with the guidelines. Each project must meet these criteria before future ACCUs may be issued’. [emphasis added]

By and large, the panel’s commentary on the intent and interpretation of the method are consistent with the ANU-UNSW ERF research team’s position regarding the proper application of the method. What the panel failed to do is acknowledge that this is not how the method is being interpreted and applied by the Clean Energy Regulator. To date, the Clean Energy Regulator has refused to admit there are any problems with the scheme or its administration, including with the interpretation and application of the HIR method. This behaviour does not provide confidence that the CER will administer the Nature Repair Market in a way that ensures biodiversity integrity – with respect to certificate issuance (Section 70, see page 5) or under circumstances where either an individual project, or projects associated with a particular methodology determination are failing to deliver real and additional biodiversity outcomes.

The draft Bill provides the Regulator with broad powers to compel proponents to relinquish biodiversity certificates under circumstances where there is found to be false or misleading information (Section 144), or reversal of biodiversity outcomes (Sections 146 to 148). But the experience with HIR projects has shown that the Clean Energy Regulator has never exercised its power to compel proponents to relinquish ACCUs where there has been a complete or partial reversal of sequestration, even for projects where forest cover has declined33.

**Recommendation 5: Prevent “double dipping” so that carbon and biodiversity outcomes delivered by overlapping project activities cannot be sold separately. Appoint the Environment Protection Agency (EPA) to administer market.**

- This would require clear tracking on a single registry. That is, if a biodiversity project is associated with a carbon project, linking these project codes to ensure a biodiversity certificate cannot be sold in addition to a price premium for an ACCU with “co-benefits”.

- It would be practically difficult to manage two interdependent registers, especially if multiple agencies were involved.

---


The independent Environment Protection Agency would be a more appropriate regulator of the market rather than the Clean Energy Regulator.

**Issue 6: Integrity risk due to the issuance of certificates**

According to the draft Bill:

> A biodiversity certificate represents the biodiversity outcome that a registered biodiversity project is designed to achieve. Biodiversity certificates are the property of their registered holders, and may be transferred. [Emphasis added]

There are clear risks for moral hazard – that is, projects do not deliver the outcomes they are certified to – if certificates are issued too early relative to the progress of the project. Too early certificate issuance, particularly for projects where biodiversity outcomes are delivered via protection and therefore an avoided loss, would provide an appearance of additional biodiversity outcomes on paper that do not match what is occurring on the ground.

**Recommendation 6:** Clearly distinguish certificates according to methodology and the extent to which biodiversity outcomes are to be delivered by protection, enhancement or a combination of both.

Section 70(2)(e) should also be 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, or
- 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 is included in the 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 Issue 7 and Recommendation 7, below).

**Making claims**

**Issue 7:** The use of certificates as offsets or compensation presents material risks biodiversity, firms, governments and proponents.

Although there appears to be confusion within Government over the difference between a biodiversity certificate and a credit, it must be understood that they are fundamentally different instruments, which impacts on who will buy them, what claims can be made, and thus market function.

Certificates represent project-based activities. This means certificates are not fungible – and so the use of certificates to offset biodiversity losses would contravene globally recognised scientific principles. Certificates are essentially non-fungible tokens (NFTs). The NFT market operates more that of an art sale, rather than a liquid, traded commodity market.

On the Nature Repair Market, Minister Plibersek has said that:

> "This is not designed to be an offset scheme to give developers an opportunity to buy these credits instead of protecting the natural environment,"

---


35 Evans, M.C. 2022. Submission to a proposed National Biodiversity Market.

However, the scheme should not even make this available as an option – particularly while continued unresolved problems with the federal environmental offset policy as outlined by my own research37, the Samuel Review, in the NSW BOS as outlined by the NSW Auditor-General, and in the carbon credit scheme.

The Government has stated they it will be up to federal, state and territory regulators to decide whether nature repair certificates can be used as offsets38. This is plainly false. The Government can and should establish rules around how parties can trade or make claims around biodiversity certificates.

There are not just massive risks to biodiversity if a firm or jurisdiction used project-based certificates to make general, uncertain claims about “going nature positive” in exchange for certain, immediate losses to specific components of biodiversity (and particularly Matters of National Environmental Significance).

The recent referral of Climate Active – which is a certification scheme – to the ACCU39, and its broader “crackdown” on greenwashing40 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 and firms.

To minimise risks to all parties, the use of certificates as offsets or compensation should be explicitly ruled out by the federal government.

Recommendation 7: Rule out the use of certificates as offsets or compensation.

Issue 8: Advance reforms on the offset regime under the EPBC Act

The Samuel Review provided a comprehensive set of interconnected recommendations – which, if implemented – would significantly improve the effectiveness of biodiversity offsetting under the EPBC Act. The government should prioritise the implementation of these recommendations, including that of a national standard for environmental offsetting. Further, the government should continue to support the reforms currently being implemented by the Environmental Offsets team in the Governance and Reform Branch, Environment Approvals Division of DCCEEW41.

To be clear, the known legislative, resourcing and administrative deficiencies in the EPBC Act offsetting regime42 cannot be rectified by the introduction of the Nature Repair Market. To attempt to do so could only be described as an exercise in extreme hubris.

Recommendation 8: Support reforms to offsetting under the EPBC Act – both those currently being progressed by DCCEEW, and those recommended by the Samuel Review yet still to be implemented.

Transparency and oversight

Issue 9: Lack of open standing provisions

As is the case with the CFI Act, the draft bill does not contain open standing provisions. This is a major oversight that will undermine integrity and accountability of the Nature Repair Market, unless revisions to the Bill are made. Open standing provisions43 allows third parties to seek relief in courts without needing to satisfy the normal ‘standing’ requirement - which typically require applicants to be a person directly affected, a person aggrieved or a person with a special interest.


38 2022-23 Budget estimates Hansard, 28 October 2022. Climate Change, Energy, the Environment and Water, at page 40


The federal EPBC Act contains similar such provisions, which provides environmentalists and environmental organisations with standing in courts to seek injunctions to restrain contraventions of the Act and judicial review of administrative decisions made under the Act. Such provisions have proven critical in many historical decisions by the courts in relation to Matters of National Environmental Significance.

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; and 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 that systemically de-prioritise real and additional outcomes means that environmental markets are highly vulnerable to fraud, manipulation and maladministration.

Regulators also commonly have strong incentives to prioritise certificate or credit supply over integrity, both to demonstrate program effectiveness and to put downward pressure on certificate or credit prices. These asymmetries of information and conflicting regulatory incentives leave environmental markets vulnerable to fraud, manipulation and maladministration. While not a complete cure for these issues, open standing provisions can lessen the scope for regulatory failure and market manipulation by allowing third parties to play a role in upholding the law.

**Recommendation 9: Include open standing provisions in the Bill 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.**

**Issue 10: Secrecy and disclosure provisions**

The draft Bill, like the CFI Act, contains broad provisions (Sections 126 and 127) which restrict the release of audit information and information regarding the biodiversity of project areas.

Section 132 enables disclosure audit information if:

(a) the audit team leader or person assisting the audit team leader reasonably believes that the disclosure is necessary to prevent or lessen a serious risk to the environment; and

(b) the disclosure is for the purposes of preventing or lessening that risk.

This provision is welcome, but is not likely to cover the more likely circumstance where audit information is likely to reveal that nothing is happening (Issue 2) – that is, there are no changes in the condition or protection status of biodiversity, such is likely to occur where protection (and avoided loss) is the primary mechanism through which a biodiversity outcome is certified.

But overall, the Bill as drafted suffers from the core transparency failings of the CFI Act, which has been the central source of conflict and disagreement over the integrity of ACCUs.

**Recommendation 10: Guarantee transparency under the Nature Repair Market Act.**

Include requirements in the Bill that mandate the disclosure of monitoring reports, audit reports, biodiversity project areas, any data submitted to evidence compliance with eligibility requirements and all data relied on by the proposed Nature Repair Integrity Committee in evaluating and endorsing methods. The registry should also be required to include details of the certificate issuance timepoint and permanence periods for registered projects.

---

44 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/


See also various instances where Clean Energy Regulator Chair David Parker, Senators Pocock and Hanson-Young and others have all publicly supported the release and access of Carbon Estimation Area data to enable scrutiny by third parties. Most recently this occurred during the Safeguard Mechanism Bill Senate Inquiry hearing on 27-28th February 2023