

**Submission to the Senate Environment and Communications Legislation Committee  
Inquiry into the Nature Repair Market Bill 2023**

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Thank you for the invitation to make a submission to this important inquiry and for allowing a much-appreciated short delay in submission deadline until 8 June 2023. This is a complicated proposal for a new and potentially far-reaching law (I only make comments on the Nature Repair Bill not the consequential amendments bill) and the more I have considered the content of the exposure draft Bill and then the little altered final Bill tabled in the Parliament in March this year, the more I have struggled to fully understand its logic and the more concerned I have become of its likely workability. This is despite its undeniably positive intent to both finance and address the biodiversity crisis faced by Australia as a key element of the Australian Government's Nature Positive Plan.

By way of background, in February 2023 I provided a submission on the second round of consultations on the Nature Repair Market (NRM) Bill exposure draft released by the Department of Climate Change, Energy, the Environment and Water (DCCEEW). My submission is in the public domain, and I attach it (as Appendix A) as an integral part of this submission that I hope members of the Committee will consider. That earlier submission drafted just over three months ago focused on the potential impacts of the proposed NRM framework on First Nations lands and interests. Arguably some of my concerns have been addressed by minor additions and amendments to the tabled NRM Bill that I will highlight. But such additions do not address the first order issue of whether this framework legislation is either properly structured or likely to achieve its stated objects. In other words, one can tinker with a proposed law without considering whether such a law is warranted. In saying this, I am acutely aware as a veteran contributor to policy and legal reform processes that the Albanese Government is determined to pass this law already making budgetary allocations for its further development in the current (2023–24) financial year, with an expectation that a Nature Repair Market will be operational by 1 July 2024. This leaves one with the dilemma of whether to merely make minor recommendations to improve the current proposal for new law; or to continue to highlight what might be fundamental flaws in the proposed law that warrant its overall reconsideration. In this submission I try and straddle the horns of this dilemma by doing both.

So, while I do not resile for any of my concerns about the exposure draft, here I look to supplement my earlier submission with more recent observations based on research undertaken since February 2023. Some of this research was presented for peer review as work-in-progress at a public seminar at the School of Regulation and Global Governance, ANU on 11 April 2023 titled 'Can a "nature-repair" market finance conservation on First Nations lands?' My focus in the seminar was on the impact that the NRM Bill might have on financing biodiversity conservation on First Nations titled lands that currently constitute the majority share of the National Reserve System and that are likely to quickly grow in conservation significance in the next seven years to 2030 as Australia looks to

meet its ambitious commitment made under the Global Biodiversity Framework in December 2022 to expand protected areas from 20 per cent to 30 per cent of the continent.

The seminar was well attended by academics as well as staff of DCCEEW and the Parliamentary Library and generated some productive discussion that I acknowledge as informing the development of my thinking.

In this submission I want to revisit three broad issues that I raised in the seminar: the process for developing the NRM Bill, its apparent policy logics, and its prospects for successfully meeting its objectives (which coincidentally do not explicitly seek the establishment of a Nature Repair Market). I end my submission with some recommendations. As noted above, some recommendations focus on the overarching NRM legislative framework, others are more targeted and seek to ensure that if the Bill is passed it addresses some evident (unintended) oversights.

I note that my submission is more discursive than my usual practice: this partly reflects my attempts to comprehend the innovative legislative framework that is being proposed here and partly my attempts to add economic and regulatory considerations to my initial observations on the exposure bill that mainly focused on implications for First Nation landowners and interests.

### **The NRM Bill drafting process**

The NRM Bill, if passed, will provide a complex legislative framework in 258-pages that will likely have ramifications for the funding of biodiversity conservation in Australia for 100 years. This is a long time and so the development of this law, with much detail still to come in subsequent and subordinate legislation (especially about regulatory rules, methods, and assessment instruments) needs careful consideration. Unfortunately, one senses that the process for drafting the NRM Bill, first mooted as a possibility in August 2022 and then included as just one element of the Government's Nature Repair Plan released in December 2022, is rushed.

Simultaneously in late December 2022 the exposure draft of the NRM Bill was released for public comment with responses due by 3 March 2023 (initially 24 February 2023). This process attracted over 180 submissions that staff of DCCEEW were required to consider, summarise, and incorporate into a final Bill tabled in the House of Representatives less than four weeks later, on 29 March 2023. This is astonishingly fast work that might arguably be linked to the urgent problem that biodiversity loss represents. However, one must question the capacity of the staff of the Biodiversity Markets Branch in the Nature Repair Market and Environmental Science Division of DCCEEW to effectively undertake comprehensive assessment of so much material within such a tight timeframe. Additionally, it should be noted that there were few submissions from First Nation groups, especially Indigenous ranger projects actually undertaking biodiversity conservation work within Indigenous Protected Areas; rapid fire policy and legislative reform that impacts on First Nations interests often works against remote living and under-resourced Indigenous organisations. This is part of the Government's rationale for establishing an enduring Voice to the Parliament and Executive in the Australian Constitution.

The 180 submissions were reduced by departmental officials to a one-page summary that frankly does little justice to the considerable effort made by submission writers, me included. Indeed, a far more comprehensive analysis of the diversity of issues raised in submissions has been made by Dr Emily Gibson from the Technology, Environment and Resources Section of the Parliamentary Library in her Bills Digest No.72, 2022–23 released on 10 May 2023.

I inquired with staff of the Biodiversity Markets Branch in DCCEEW if there was a marked-up version of the tabled Nature Repair Market Bill 2023 that indicated amendments that had been made to the exposure draft after the public consultation process. I was advised that such a document did not exist. However, using Microsoft support ‘compare and merge two versions of a document’ software I was able to see the track changes that had been made to the exposure draft: I suggest that the Senate Committee undertakes a similar exercise because it indicates little overall change.

However, in my area of particular interest, there had been some important additions to the exposure draft that I was able to locate by searching using the terms ‘native title’ ‘land rights’ and ‘Aboriginal persons and Torres Strait Islanders’ (one reference to First Nations people was deleted). These can be summarised as follows:

- The overall objects of the NRM Bill had been strengthened with the addition of requirements to i) support and promote the unique role of Aboriginal persons and Torres Strait Islanders in enhancing and protecting biodiversity in native species in Australia; and (ii) enable the use of the knowledge of Aboriginal persons and Torres Strait Islanders related to biodiversity in native species in Australia, guided by the owners of that knowledge
- In Part 2, Division 2 ‘registration of a biodiversity project’ and elsewhere (e.g. Biodiversity Maintenance Declarations) consent provisions for native title holders and registered claimants have been strengthened. This accord with recommendations in the Independent Chubb Review of ACCUs.
- While there are amendments to the exposure draft to strengthen rights and interests on native title determined and claimed lands by requiring consent for biodiversity projects, the rights and interests of claimants under land rights laws in the NT and NSW have been overlooked. This has been noted by the Law Council of Australia (submission no. 3) and can be readily rectified by noting in S232 of the Bill that statutory land rights as well as native title rights are unaffected by provisions in the NRM Bill.

My overarching concerns on process are twofold.

First, there is a need to slow down the development of law to create a Nature Repair Market to allow further assessment of its workability especially if empirical evidence can be garnered to demonstrate some proof of this concept. This is a standing requirement Policy Impact Statements for new policy and law as outlined by the Office of Impact Assessment. Second, during the year of the Voice referendum and given the significance of First Nations lands and people to any national project to repair nature there is a need in the absence of a

national Indigenous representative organisation to ensure that the future legitimacy of this market is not eroded by actual or perceived inadequate consultation.

### **Policy Logic and A 'Nature Repair Market' Logic**

In her second reading speech introducing the NRM Bill on 29 March 2023 the Minister for the Environment notes that the bill will establish a new Nature Repair Market in Australia, the first of its kind in the world. She notes it will make it easier for businesses, philanthropists and other Australians to invest in activities that repair and protect nature; the legislation is 'about connecting people who want to invest in nature repair, with the people who can do the work on the ground' ... 'the legislation is designed to [...] add private money to the stream of investment our government is already making in nature protection and preservation'.

It is difficult to fault this sentiment. As the Minister notes later in her speech 'For almost 250 years, since Europeans first colonised Australia, we have been running down our natural environment'. Now the Government is committed to reverse this trend with its Nature Positive Plan. It has been estimated that \$2 billion per annum for 30 years will be needed to reverse biodiversity loss and the Australian Government is adamant that it cannot meet this cost alone, private money and philanthropic support is also needed, 'not to replace government effort, but to reinforce it' as supplementary funding, not as a substitute.

There are several logics at work here.

As capitalism and settler colonialism is responsible for biodiversity loss and environmental harm it seems reasonable to require those who have done the harm, intentionally or coincidentally, historically and today, to meet some or all the cost of repair. Arguably such requirements should be embedded in strictly monitored regulatory frameworks, but these have clearly failed and need to be strengthened. In their absence and given the urgency of the problem of biodiversity loss it is anticipated that the operations of a voluntary Nature Repair Market will generate some or all the additional \$ 2 billion per annum required. This is an appealing proposition although one could ask whether a voluntary market selling biodiversity certificates will be more effective than a mandatory environmental repair levy or tax? Such a tax would only total an additional 0.3% of the current Government tax take (\$683 billion in 2021–22), but clearly it is judged unpalatable to impose such a surcharge on all Australians. This is the sort of issue that should have been raised in the Final Policy Impact Statement appended to the Explanatory Memorandum for the NRM Bill.

There are other policy logics at work. The NRM Bill is clearly influenced by the workings of the Carbon Farming Initiative Act 2011 that has resulted in the commodification of carbon abatement units into a currently robust voluntary market. This market has been assessed as being a relative success in the recently completed Independent Chubb Review of ACCUs so borrowing from this framework makes some sense. Except that carbon is not biodiversity or nature and the carbon market was initially underwritten by multibillion dollar public investments. Arguably, 'nature' is a more nebulous form of property that has more commonalities with fresh water that was also commodified in parts of Australia by the National Water Initiative. But this market too was partly underwritten by Government

intervention and has been of far more questionable success in ensuring equitable and environmentally and commercially effective allocation of water. Finally, the NRM Bill has been shaped by much of the policy logic of the previous Government's Agricultural Biodiversity Stewardship Market Bill 2022 that was tabled but not passed and was limited jurisdictionally to agricultural land. However, the Morrison Government did provide over \$50 million to two pilot schemes, the Carbon + Biodiversity Pilot and the Enhancing Remnant Native Vegetation Pilot. It is my understanding that DCCEEW has commissioned an early review of the pilots. The review is focused on identifying lessons learned from the pilots that can inform the development of a Nature Repair Market; given the difference between this earlier Bill (with Government support) and the proposed NRM Bill (with no direct Government subvention) it is difficult to see what lessons might be generated by these pilots. In any case, surely it would have been preferable to have completed these reviews before moving to full implementation of the current proposals.

It is difficult to see how a public purpose Nature Repair Market will be financialised on a voluntary basis with private funds alone. The Taskforce on Nature-Related Financial Risk beta report of March 2023 has suggested that voluntary markets are seeing philanthropic and reputation seeding funding from corporates (to demonstrate Environmental, Sustainability and Governance (ESG) credentials) being invested into biodiversity. But such investments of unspecified quantum are being allocated directly to nature repair activity rather than through the purchase of biodiversity certificates. From my experience in north Australia, such direct investments by corporations and philanthropy are already occurring, but they take considerable time to nurture and grow; one suspects that if biodiversity certificates are just floated in an initial public offering there will be slow uptake.

It is possible that if a global nature-related financial disclosures framework was introduced on a voluntary (or better still mandatory) basis one could see the rapid establishment of a Nature Repair Market as corporates are required to communicate nature-related investment risk to potential investors. But whether such a framework is established that will mirror the rapid emergence of a compliance market requiring the disclosure of climate-related financial risk will not be clear until September 2023. This again suggests that delaying the development of a NRM Bill as a more integrated element of the Nature Positive Plan might be prudent.

Nevertheless, the Government has allocated \$7.7 million in 2023–24 to continue developing the foundations of a Nature Repair Market, including detailed rules (methods) for different types of projects. Such financial commitment assumes that the market and a complex regulatory regime that ensure that certificated biodiversity projects will demonstrate performance integrity and additionality that will require independent auditing (as with carbon credits) will proceed. This sophisticated market architecture will not only require considerable public funding to establish and operate but might also inequitably impact on First Nations landholders and proponents. This is because most reside in remote regions facing considerable infrastructural and human capital shortfalls while managing massive areas for biodiversity conservation. First Nations conservation organisations (like many others) face capacity challenges in delivering biodiversity outcomes alongside continual performance monitoring over the long term.

My overall observations on policy and market logics are as follows.

First, there is no question that additional funds for biodiversity conservation work are needed, irrespective of their source from the public or private sector or both. Even if a Nature Repair Market is operational by 1 July 2024 it will take time to attract private finance. In the meantime, 'nature negative' biodiversity decline will continue making the challenge of switching from negative to positive outcomes more challenging. Given the biodiversity conservation commitments made by the Government as a signatory to the Global Biodiversity Framework to be implemented by 2030, it would seem prudent for the Government to make enhanced public investments in the short to medium term.

Second, there may be no shortage of suppliers of biodiversity conservation environmental services. As noted in my earlier submission such supply is already evident on First Nations titled lands, especially within the 82 Indigenous Protected Areas that currently constitute over half the National Reserve System. I also noted that it is unclear if the market will provide the best mechanism to judge biodiversity conservation priorities? What is even less clear is whether converting such supply of environmental services into tradeable biodiversity certificates will generate market demand from private investors? It is to this issue that I now turn.

### **Prospects for a valuable Nature Repair Market**

The Australian Government proposal to establish a Nature Repair Market is a part of a global movement to source finance to underwrite biodiversity conservation. This has been summarised in a report 'A Comprehensive Overview of Global Biodiversity Finance' commissioned and published by the OECD in 2020. Australian experts are divided on whether the establishment of such a market will generate private sector investments that will make significant financial contributions to the repair of nature. The spectrum ranges from outright hostility to the financialization of nature and any prospects for such a market to generate net financial benefit (discounting the cost of compliance) to cautious optimism and a view that if it supplements public investments, it is worth a try.

In truth, it is difficult to predict, a priori, if the establishment of such a market in tradable biodiversity certificates will succeed, especially as there is no comparative information globally.

The only serious attempt at a proof of concept on the value of an Australian biodiversity market and potential demand for biodiversity certificates has been published by PricewaterhouseCoopers (PWC) Australia in late 2022. This report 'A nature-positive Australia: The value of an Australian biodiversity market' was produced pro bono to inform a broader discussion of the potential to address Australia's biodiversity crisis through a biodiversity market. The report adapts the methodology of the OECD commissioned report to provide an important overview from publicly available sources of current expenditure on biodiversity conservation in Australia and to then make some projections of the potential value of the market in 2050. PWC estimates that financial flows to biodiversity could total \$137 billion per annum of direct value by 2050, with \$78 billion of this coming from private biodiversity, conservation, and natural capital investments.

The Minister for the Environment and the Final Policy Impact Assessment prepared by DCCEEW (with Office of Impact Assessment oversighting) rely heavily on the PWC report. Unfortunately, as is too often the case, there is selective referencing to parts of the PWC report that support the Government's commitment to establish a Nature Repair Market and no articulation of the PWC report's seven recommendations for important conditions that will need to be addressed prior to its establishment. Does the Government agree with PWC that its recommendations on both process and implementation issues are prerequisites, especially for significant engagement with local stakeholders and greater recognition of First Peoples, as well as the need for greater biodiversity and ecological expertise to ensure a market is effectively delivering biodiversity gains? If not, why not? The Government might argue that it will look to address such conditions in regulations after the NRM Bill is passed and when the independent review of the Carbon + Biodiversity Pilot and Enhancing Remnant Native Vegetation Pilot is completed. If so, such commitments should be explicitly stated.

The Final Policy Impact Assessment by DCCEEW also suggests that demand for projects that deliver improved biodiversity outcomes will grow with the appropriate frameworks in place. This is an assertion with import that seems to suggest that 'supply of a framework' will drive demand. It is also noted that the Australian government is (financially) supporting the Taskforce on Nature-related Financial Disclosures that (as noted earlier) is in the process of developing a global risk management and disclosure framework for corporates and financial institutions to report and act on evolving nature-related risks and opportunities. The government seems to be optimistically pre-empting that a framework for growing corporate demand for projects that improve the environment will emerge from the Taskforce process; and so, it is looking to be a global leader and potential destination for global financial flows seeking nature repair projects. The instrumental motivation for corporate demand for biodiversity certificates might be to gain access to investment capital possibly at a discount for projects with sound 'nature positive credentials. There is no doubt that a Nature Repair Market would gain considerable traction if it were to be established alongside mandatory implementation of a nature related financial disclosure framework.

While reading the Final Policy Impact Assessment, I became aware of the latest Australian Government Guide to Policy Impact Analysis published by the Department of Prime Minister and Cabinet in March 2023 (but available earlier). I query if the DCCEEW assessment canvasses the full range of genuine and viable options available to government to underwrite the repair of nature, including from public sources.

### **Recommendations**

I understand the enthusiasm of a new reformist government to experiment with new, world-leading institutional arrangements and laws. This is especially so with environmental policy where the State of the Environment is documented to be in rapid decline and where the existing regulatory regime needs radical overhaul: a combination of pressing domestic biodiversity conservation needs and international commitments make a compelling case for reform. Nevertheless, in my view the NRM Bill requires significant additional consideration before it is passed into law.

I make five recommendations for the Committee's consideration.

First, in my view the NRM Bill as currently tabled should not be passed. It needs considerable additional work reflecting perhaps its rushed development. It is difficult to envisage the development of a Nature Repair Market without public funds as initial seed funding support as occurred with the emerging Carbon Market.

Second, if the development of the NRM Bill was slowed, it could be reconsidered as just one element of the more wholistic Nature Repair Plan foreshadowed in the Government's response to the *Independent review of the EPBC Act* (the Samuel Review). The Government is proposing to implement this Plan during 2023, with considerable funding allocated in the May 2023 budget for the establishment of Environmental Protection Australia and Environment Information Australia. These two new agencies must play a key role in developing any voluntary scheme to attract private investment for nature repair. The risk of only legislating some elements of the Nature Repair Plan is to leave open a greater risk of fundamental policy failure.

Third, is the issue of review. In the Final Policy Impact Statement, it is noted that given the uncertainties associated with creating a new property right and market, a Post Implementation Review will be undertaken within two years from commencement of the Legislation. But in the NRM Bill it is proposed that an independent review initiated by the Minister is undertaken after five years. If the NRM Bill is passed, I recommend that an independent (not departmental) review is undertaken after two years.

Fourth, is the need for equitable treatment of all owners of First Nations titled lands. In the NRM Bill registered claimants for native title determination are afforded consent rights over biodiversity conservation projects. But there is no mention of claimants under current and possible future Commonwealth and State and Territory statutory land rights regimes. If the NRM Bill is passed this anomaly should be addressed.

Finally, the Government is committed to amend the Australian Constitution in 2023 to ensure that Indigenous Australians have a Voice to the Parliament and the Executive on policy matters that directly impact on them. Given the extent of First Nations land holdings across the entire breadth of the Australian continent, the NRM Bill will disproportionately impact First Nations people. Indigenous perspectives have been largely overlooked in the current reform process. Delaying the passage of the NRM Bill will provide opportunity to consider if a Nature Repair Market will operate equitably with respect to First Nations people and their lands that are also invariably in need of nature repair.



## Appendix A:

### Submission on the Nature Repair Market Bill – Exposure Draft of Legislation

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I appreciate the opportunity to provide comment on the proposed development of a ‘nature repair’ market also referred to as a ‘biodiversity market’. At the outset I note that I missed the rapid-fire development of this proposed legislation first mooted by the current government in August 2022 as a sophisticated development of the previous government’s far more spatially limited Agriculture Biodiversity Stewardship Market Bill 2022: the environmental policy reform agenda since May 2022 has accelerated rapidly. I was alerted to an hour-long briefing provided by the Department of Climate Change, Energy, the Environment and Water (DCCEEW) about the Nature Repair Market Bill that I attended on 6 February 2023. I am aware that DCCEEW has received about 200 submissions in a completed first round of consultations; and that this current round of consultations has been prompted by the release of the 226-page exposure draft of the *Nature Repair Market Bill* (the NRM Bill) on 23 December 2022 (just prior to the release of the report of the Independent Review of Australian Carbon Credit Units on which I had focused).

By way of brief background, my training is in economics and anthropology and for the last four decades I have undertaken university-based and applied research focused on exploring forms of economic development that might accord with First Nations people’s aspirations in all their diversity but especially on Country. Over the past two decades my work has increasingly focused on describing, analysing, and advocating for biodiversity conservation effort on First Nations titled lands in general and Indigenous Protected Areas in particular.

Of relevance to this proposed legislation, since 2009 I have been a foundation director of an environmental philanthropy Karkad Kanjdji Trust that looks to source financial support from public, corporate and philanthropic sources for locally driven projects for several ranger groups in Arnhem Land: one of our innovative projects is the grounded close monitoring of biodiversity outcomes in the 12,000 sq kms Warddeken Indigenous Protected Area. I am also a director (since 2018) of Original Power that auspices the First Nations Clean Energy Network that I assist as a policy and research adviser; and I work with the Australia Institute as chair of its research committee and with Arnhem Land Fire Abatement (NT) Limited in research.

All the views expressed in this submission are mine alone and do not necessarily reflect those of any of the companies mentioned above. Nevertheless, I do make some observations in the submission that reflect some of my experiences with these companies.

In this brief submission I limit my comments to the Australian terrestrial estate of c 7.7 million sq kms and not its marine jurisdiction of c 8.2 million sq kms. This is not because I

see marine and terrestrial biodiversity issues as separable, it is just that most of my expertise and experience has focused on the former. More specifically within the terrestrial domain, I focus on that majority part of Australia (currently 4 million sq kms or 52%) where native title rights and interests have been recognised exclusively or non-exclusively under land rights and native title laws. This First Nations estate is likely to expand significantly once all currently registered native title claims have been determined.

At the UN Biodiversity Conference (COP 15) in December 2022, Australia as a key signatory to the Kunming-Montreal Global Biodiversity Framework made commitments to dedicate 30 per cent of terrestrial and marine Australia to protected area jurisdictions. Australia also endorsed global goals to halt and reverse biodiversity loss by 2030. Meeting these ambitious goals will be highly dependent on more and more of the growing First Nations terrestrial and marine estates being voluntarily included in the National Reserve System.

I have no doubt that if Australia is to address biodiversity decline that is comprehensively documented in the *State of the Environment Report 2021* (publicly released in July 2022) this will be highly dependent on efforts already under way in the 82 Indigenous Protected Areas that comprise half the conservation estate. I make these points to emphasise that First Nations people are not just another landowning interest group alongside governments and private landowners and leaseholders. While comprising only 4 per cent of the national population, First Nations people will be the dominant players in any real or imagined 'nature repair' or 'biodiversity' market in Australia today because of their rights and interests in a majority part of the continent, much in remote and very remote Australia, that is relatively environmentally intact and so has relatively high biodiversity 'value'.

In this submission I set out to do four things. First, I outline in general terms my interpretation of the immediate biodiversity conservation and environmental policy problem that Australia is facing. Second, I consider what the NRM Bill is proposing. Third, I provide some critical perspectives on some shortcomings in the NRM Bill proposal that is tantamount to a financialization of 'nature'. And finally, as someone used to the frequent dominance of political expediency over sound policy making in Canberra, I provide some guidance on how First Nations people and their lands must be afforded exceptional treatment if a version of the NRM exposure bill is to become law. In this submission I will not look to engage with the regulatory and administrative details in the NRM Bill as I am sure there will be later opportunity to do so as a modified bill is presented to the parliament: the government has already indicated in its response of 9 January 2023 to the Independent Review of Australian Carbon Credit Units that there will be alignment between the proposed Nature Repair Market and the Carbon Market especially in relation to governance arrangements.

### **What is the problem?**

In historical terms, since 1788 Australian settler society has extracted natural capital from the Australian continent for financial gain. I will not rehearse issues around the legality of this extractive process or the inequitable distribution of the financial gain (for Australian and global stakeholders) except to note that First Nations people have been excluded intergenerationally from much of the material wealth generated. Alongside the physical impacts of extraction and the modification of the environment for agricultural purposes, the

importation of exotic species and weeds has resulted in environmental damage and widespread biodiversity loss.

Every five years since 1995 the Australian government has commissioned a State of the Environment (SOE) Report from independent experts with the latest released in July 2022 comprehensively documenting continual biodiversity decline. The Report noted in its opening statement: 'Overall, the state and trend of the environment of Australia are poor and deteriorating as a result of increasing pressures from climate change, habitat loss, invasive species, pollution and resource extraction. Changing environmental conditions mean that many species and ecosystems are increasingly threatened. Multiple pressures create cumulative impacts that amplify threats to our environment, and abrupt changes in ecological systems have been recorded in the past 5 years'; and 'Our inability to adequately manage pressures will continue to result in species extinctions and deteriorating ecosystem condition, which are reducing the environmental capital on which current and future economies depend. Social, environmental, and economic impacts are already apparent'.

Simultaneously, the independent Samuel review of the Environmental Protection and Biodiversity Conservation Act, the regulatory framework established to protect Australia's environment and biodiversity has highlighted significant operational shortcomings in its ability to protect the environment and cultural heritage (that are inseparable in the worldview of most if not all First Nations people).

Some of this environmental decline might be due to global factors like climate change that Australia has only recently seriously committed to address but cannot unilaterally control. Some might be due to continuing broad acre mineral extraction and agricultural land clearing that is resulting in habitat loss that Australia can control. Whatever the diverse causes of decline, well documented in the massive 12-part 2,556-page *State of the Environment 2021* report, there seems to be broad agreement that successive Australian governments have underinvested in biodiversity conservation both within protected areas that currently cover 20 per cent of terrestrial Australia and on the other 80 per cent off-reserve, leaving aside the issues of proper regulation and strict monitoring.

Simultaneously, as we are informed of ongoing biodiversity loss continentally, in December 2022 the Australian government made a commitment to protecting 30 per cent of Australia's land and seas by 2030 in alignment with the United Nations Convention on Biological Diversity. The current national government has signalled clearly that it will adopt a two-pronged approach to reduce environmental damage and associated biodiversity loss and if possible, reverse this trend evident at a continental scale beyond business-as-usual that has failed. One approach is to expand the conservation estate; the other is to reverse historical underinvestment in environmental protection.

I am not aware of any comprehensive estimate of the current cost of environmental repair and protection. Clearly the decline in biodiversity that has resulted from species extinctions cannot be overturned regardless of financial commitment. A DCCEEW fact sheet summarising the SOE 2021 report notes that one (unsourced) estimate of the cost of environmental restoration in Australia is approximately \$10 billion annually—which is substantially more than current levels of investment. Another source (Threats to Nature

project *Averting extinctions: The case for strengthening Australia's threat abatement system* published in 2022) refer to the need for \$1.5 to \$2 billion per annum. In a speech to the National Press Club in July 2022, Minister for the Environment Tanya Plibersek referred to an Australian Land Conservation Alliance estimates that Australia needs to spend over \$1 billion a year to restore and prevent further landscape degradation. Referring to the 'over \$1 billion dollar estimate', the Minister noted that 'The scale of this challenge means that governments can't do the job alone'.

Accepting that the DCCEEW figure of \$10 billion annually could make a difference, assuming it is targeted effectively, it is instructive to put this amount in a broader context. Two other expenditures come to mind. The first is the estimate by the Australia Institute that current Federal and State government subsidies to the fossil fuel industry total \$11.5 billion annually. The second is the estimated cost of Stage 3 tax cuts at \$20 billion per annum and about \$243 billion over ten years.

The current Treasurer Jim Chalmers has recently written an essay on 'values-based capitalism'. If those values elevated biodiversity conservation over fossil fuel subsidies or personal income tax cuts, then a best-guess bill for environmental repair and conservation of \$10 billion per annum could be readily met by the Australian government through the reprioritisation and reallocation of taxpayer funds.

### **What is the NRM Bill proposing?**

The NRM Bill is at the broadest level looking to establish biodiversity conservation as a form of tradable property through the commodification of 'nature'. 'Nature' is a term that is coincidentally used in DCCEEW fact sheets about the bill but is never defined including in the exposure draft itself. It is worth noting the standard dictionary definition of nature: 'Nature refers to all the animals, plants, and other things in the world that are not made by people, and all the events and processes that are not caused by people.' The use of the term 'nature' in both the NRM Bill's name and in fact sheets is problematic: as noted above there seems to be no demurring from an acceptance that much of the biodiversity loss in Australia is caused by human activity.

One key goal of the proposed framework is to commodify biodiversity to generate funds through a three-way public/private/philanthropic partnership to finance environmental repair and maintenance that the Australian government believes it cannot underwrite from taxpayer funds alone. The NRM Bill though is not just about financialization of nature, it also looks to set up a sophisticated framework to ensure that the issuance of tradable biodiversity certificates will result in positive biodiversity outcomes. Consequently, much of the exposure draft focuses on methodology to ensure the integrity standards, assurance, compliance, and governance of biodiversity projects that will be provided to an expert committee for independent assessment.

The proposed framework is clearly heavily influenced by the perceived success of the Carbon Farming Initiative (CFI) that saw the commodification and financialization of carbon. This success has been publicly and politically legitimised by the findings of the Independent Review of Australian Carbon Credit Units. My own collaborative research on the efficacy of the savanna fire management method operating in the tropical savanna concurs with this

broad assessment. The Australian government clearly believes that the financialization success of the CFI in creating a voluntary carbon market can be replicated with a voluntary ‘nature repair’ market.

In summary, as stated in a fact sheet on the draft NRM Bill ‘the Australian Government is developing a nature repair market to make it easier for businesses, organisations, governments and individuals to invest in projects to protect, manage and restore nature’. I note the positioning of government here after businesses and organisations and before individuals as potential investors. I make two brief observations here.

First, in the establishment of the carbon market, the Australian government was a first mover and early investor with a commitment of \$4.5 billion to the Emissions Reduction Fund that offered 10-year contracts to proponents via a reverse auction system underwritten by the Australian taxpayer. There is no commitment by the government to a similar financial contribution in the case of the proposed biodiversity market despite much reference to transparency. Perhaps this will be announced in the May 2023 Budget?

Second, and more conceptually, this shift to financialise nature resonates with the recent writings of Italian economist Marianna Mazzucato and transnational anthropologist Andrea Muehlebach. The former writes about how the entrepreneurial state can create and shape new markets and look to direct public and private investments. She also highlights the distinction between price and value, in this case market price of biodiversity and the value of biodiversity outcomes. Muehlebach writes about ‘moral neoliberalism’, the fundamental re-arrangement of public institutions under neoliberal conditions—in this case looking to outsource much of the financial burden of repairing nature to the corporate and philanthropic sectors. The goal of a public/private/philanthropic partnership to finance the halt and potential reverse of biodiversity loss will be highly dependent on how the voluntary market values ‘nature’.

### **Will the NRM law, as proposed, address the problem?**

It is impossible to predict if the proposed financialization of nature approach to address biodiversity decline in Australia will work. This is primarily because the success of the carbon market has been based on the marketability of carbon credit units that are tangible and desired. Initially, under the Clean Energy Act 2011 heavy emitters sought to purchase ACCUs to avoid carbon compliance costs. Subsequently ACCUs have been purchased through the Australian government’s Emissions Reduction Fund and in the voluntary carbon market in support of international and corporate climate commitments. This in turn is directly linked to the emergence of a global climate-related financial disclosures framework as recommended by the Taskforce on Climate-related Financial Disclosures (TCFD) in 2017. There has been a steady increase in global demand for information by investors since then seeking TCFD-aligned disclosures; the Australian Treasury is currently considering a fit-for-purpose potentially mandatory framework for Australian-based large businesses.

To date, there is no firm proposal for a ‘nature-related’ or ‘biodiversity-conservation-related’ financial disclosure global framework, although such a framework is being considered by the international Taskforce on Nature-related Financial Disclosures (TNFD). The bottom line literally is that corporations are making judgments right now that engaging

in the voluntary carbon market is good for shareholder value, a judgment that has seen Australian Carbon Credit Units (ACCUs) currently valued at about \$A50 each, a figure at least three times higher than the amounts paid in earlier ERF reverse auctions. Whether we see a parallel response in relation to 'nature' remains highly uncertain at present, although this cannot be discounted as a future development.

Without going into an in-depth analysis, it is noteworthy that ACCUs are very different from biodiversity ('nature') credits, something that the NRM Bill recognises. Hence it is proposed that the value of a biodiversity unit will be judged by the market (government inclusive) based on the cost of delivering biodiversity outcomes over the long-term through highly variable projects in high diverse environmental contexts. The NRM Bill assumes that biodiversity units will initially attract finance in a voluntary 'nature repair' market. This might occur if there is rapid adoption of the new global initiative currently being considered by The Taskforce on Nature-related Financial Disclosures which proposes the establish a framework to give financial institutions and companies a complete picture of the environmental risks they face.

Assuming that private and philanthropic investors were willing to purchase biodiversity credits certified by a regulator (such as the proposed Environmental Protection Authority rather than the Clean Energy Regulator)—that is if finance was not an issue—I still have some fundamental concerns about how effective the proposed NRM Bill will be in its principal objective of halting and reversing biodiversity loss. My comments here focus on just three aspects of the proposed framework and not on the wider issues that much economic activity (especially mining and agriculture) that directly impacts on biodiversity needs far greater regulation, including harsh penalties for negative environmental impacts and subsequent biodiversity loss.

The first issue is of administrative complexity given that all landholders including the Commonwealth (on and off protected areas) can participate in the proposed NRM market. Let me just focus for now on protected areas and agricultural businesses.

According to the Collaborative Australian Protected Areas Database (CAPAD) there are currently (2020) 13,500 protected areas in Australia with an overall coverage of just over 1.5 million sq kms (covering about 19.6% of Australia) and an average size of about 110 sq kms each. Of these protected areas, 82 are Indigenous Protected Areas currently covering about 850,000 sq kms (over half the National Reserve System) with an average size of about 10,500 sq kms each.

According to ABARES Agricultural Snapshot 2022, there are 87,800 agricultural businesses in Australia covering 55 per cent of terrestrial Australia (4.235 million sq kms) with the greatest area of agricultural use by far (2.83 million sq kms) being grazing native vegetation. The previous government's Agriculture Biodiversity Stewardship Market Bill 2022 targeted these lands only. Over 50 per cent of agricultural lands largely comprising pastoral leases share title with holders of non-exclusive native title (covering nearly 2.2 million sq kms of Australia on 1 January 2023).

To be effective continentally, tradable biodiversity certificates might need to be issued to as many as 100,000 entities delivering projects over 75 per cent of terrestrial Australia, with the regulator needing to ensure that certificates to deliver multi-year outcomes have integrity. This strikes me as a challenge that will not only be administratively complex, but extraordinarily expensive to regulate and operate for assurance and compliance.

Second, and related to the issue of scale, it is proposed that just one tradable biodiversity certificate will be issued per project irrespective of spatial jurisdiction. It is unclear why this limit is imposed, unlike ACCUs that are issued based on verified performance (at least under the savanna fire management method with which I am most familiar). As certificates will be issued on a project-by-project basis there is the possibility that project numbers will proliferate fragmenting biodiversity challenges that need to be addressed at a landscape scale (like feral animals and exotic weeds). If biodiversity certificates are issued irrespective of spatial scale, then issuing a certificate for a project on 100 acres and one on 10,000 sq kms will potentially result in inequities.

Third, markets are inherently unstable and volatile. This generates two types of risk for landholders with tradable biodiversity certificates for projects that must comply with a multi-year methodological determination (like the 25- and 100-year requirements for carbon sequestration projects).

One risk is that a purchaser of a biodiversity certificate will default resulting in a multi-year project being un- or under-funded. There is no suggestion that I can see in the exposure NRM Bill that the Commonwealth will act as guarantor in cases of private or philanthropic sector default.

Another risk evident from the current carbon market and Indigenous Protected Areas program is that landholder proponents for projects that protect, manage, and restore biodiversity will accept funding bids that underfund projects hence undermining the integrity of environmental outcomes that can be delivered in the absence of alternative or additional sources of funds. Furthermore, the market value of biodiversity certificates might grow over time, and this might penalise early adopters as has occurred with some Indigenous carbon projects now financially liable if seeking to break multi-year contracts to get better financial returns.

I make a final comment based on my experience as a director for over a decade now of the Karrkad Kanjdji Trust (KKT). There has been commentary provided both in submissions on the Nature Repair Market proposal and in the media about the absence of any testing of likely market responsiveness from public, private or philanthropic sectors to the proposed sale of biodiversity certificates, especially I would add if for public land like national parks. In a way that is precisely what KKT looks to do, raising funds in this very market for biodiversity projects within Indigenous Protected Areas that are partially funded by government, partially from the sale of ACCUs. Over time, KKT has been increasingly successful in its fund-raising activity, with two provisos. First it takes time and effort to establish personal relationships with potential donors in all sectors. And second, most our projects have multiple financial supporters. If it is consortiums that are the buyers of biodiversity certificates for large areas in a Nature Repair Market, this will further complicate

administrative arrangements and enhance risk of default—unless a broker agency or organisation is established to operate on behalf of proponents.

### **How must the NRM Bill be modified to accommodate First Nations land interests**

The current discussions about the NRM Bill demonstrate a degree of familiarity with the Carbon Market and Indigenous carbon projects that are contributing to abatement and sequestration and delivering environmental co-benefits. But there is surprisingly limited reference to Indigenous Protected Areas (IPAs) and their interlinkages with Indigenous-owned carbon projects invariably undertaken by Indigenous ranger groups.

Prior to the establishment of the IPA Program in 1997, CAPAD information indicates that protected areas covered 13 per cent of terrestrial Australia. Today that proportion has grown to 20 per cent, with almost all this growth being due to the declaration of 82 IPAs to date (another 19 are in the consultation process than invariably results in later declaration): as the First Nations estate has expanded so has the proportion of the conservation estate that is either First Nations owned under inalienable freehold title or over which there have been successful native title determinations. This trend is likely to continue if there is any chance that Australia is to reach its aspirational goal of covering 30 per cent of the continent with protected areas by 2030. To date, native title rights and interests are recognised over 4 million sq kms. It is possible that this figure will increase to nearly 5 million sq kms (or 65% of Australia) by the time over 100 currently registered claims are determined.

I make this point to emphasise again that First Nations people are not just another category of landholders alongside governments (public land), farmers, conservation groups and other corporates, including mining companies. Their special status as First Peoples needs to be recognised for many social justice reasons but let me just focus here on biodiversity matters. There is considerable evidence from resource atlas mapping that First Nations titled lands are among the most environmentally intact and biodiverse in Australia, in part because of their remoteness and historical lack of agricultural extraction (commercial) value. There is also a growing body of evidence that the efforts of Indigenous ranger groups operating on declared IPAs (and elsewhere on First Nations titled lands) are generating positive biodiversity outcomes, in many cases alongside fire management activities that are abating and sequestering carbon, reducing greenhouse gas emissions. One of the key reasons for this success is the sheer scale (average size over 10,000 sq kms) of IPAs that often operate as 'environmental commons' at a landscape scale. Such scale has resulted from careful consultations with numerous small Indigenous traditional owner groups that in the case of each IPA have reached a documented consensus to voluntarily incorporate their lands into the conservation estate. The extent of the effort and cost of such consultation should not be underestimated.

The NRM Bill as currently proposed needs careful assessments to ensure that it has no adverse unintended impacts on the efforts and aspirations of First Nations peoples. I make this point cognisant that First Nations national, peak and community-based organisations will make their own representations on the proposal to marketize biodiversity. Let me just briefly highlight three risks that need to be avoided.



First, there is the risk that the provision of one biodiversity certificate per project will provide incentive for landscape scale IPAs to fragment. There are some biophysical scientists who might argue that such fragmentation will be beneficial for biodiversity outcomes, but this overlooks the challenges that need to be addressed at a landscape scale. It also overlooks the potential for labour intensive Indigenous carbon projects operating at the landscape scale conflicting with labour intensive Indigenous biodiversity projects operating at a finer scale. There are a limited number of trained Aboriginal rangers and fire managers living and working in remote Australia. This is something that was recognised in recommendations of the Independent Review of Australian Carbon Credit Units now accepted in principle by the Australian government. Increased investment in education, training, employment, and support for remote Aboriginal communities is required to increase the number of rangers and prevent potential fragmentation of the current workforce.

Second, and relatedly, it is important to consider the broader role that the First Nations estate might play not just in the national project of biodiversity conservation but also in the national project to decarbonise to net zero by 2050. There is potential for these two projects to operate in harmony: biodiversity conservation through realistic investments in environmental repair and maintenance on First Nations lands; and net zero from a raft of decarbonisation initiatives including carbon abatement and storage and renewable energy generation. It is important that a holistic perspective is retained on the interlinkages between climate change, the environment, energy, and water evident in the name of the government agency formulating the NRM Bill. Conversely, it is imperative that any development of a Nature Repair Market does not counter many current productive efforts with positive biodiversity outcomes undertaken by First Nations people on their lands.

Finally, there is the political reality that undertaking any projects on First Nations lands requires careful negotiation with landowners to gain their free prior and informed consent. There is a danger that a new institutional arrangement to financialise biodiversity conservation ('nature') will result in duplication and further complication of an already complex cross-cultural land administration system. There is also the risk that the release of biodiversity certificates into a new voluntary market will generate uncertainty, duplication, and a reluctance to invest among those who are already making significant financial contributions in the existing voluntary market.

## **Conclusion**

An incoming reforming government is understandably looking for a means to rapidly increase financial investments in biodiversity conservation and ensure the integrity of biodiversity outcomes. There is a policy and political urgency to both these imperatives. The reform proposal is for the radical creation of a Nature Repair Market that will look to commodify and sell tradable biodiversity certificates in a voluntary market to create a public/private/philanthropic partnership to underwrite the multi-billion dollars per annum expenditure needed to protect, manage, and restore the continually degrading Australian environment and associated biodiversity. One wishes, of course, that having learnt lessons from the Carbon Market that has operated for nearly a decade now, such reform will be seamless and productive in terms of generating finance and ensuring biodiversity outcomes. But as this submission indicates I am sceptical.

Part of my scepticism is because 'Nature' is a complex entity that cannot be commodified as readily as carbon. Another is that any imperative for the corporate sector to invest in nature will likely be contingent on 'nature-related' financial disclosure requirements that are only now being considered by the international Taskforce on Nature-related Financial Disclosures (TNFD). It is unlikely that such a framework, whether voluntary or mandatory, will be developed in the short-term. And so, the potential to generate the billions of dollars needed from non-government sources is similarly unlikely to be generated in the immediate term. This suggests that the public sector must be the main source of funding if the urgency of biodiversity decline is to be addressed right now. And finally, and perhaps most importantly there is under-recognition and under-resourcing of the efforts of Australia's major landholders and their First Nations lands that comprise a growing proportion of Australia's conservation estate. In the immediate term the best way to enhance urgently needed biodiversity outcomes would be to enhance investments in what is demonstrably working.

I end with two observations.

First, as I indicated at the outset there is overwhelming evidence that greatly enhanced national investment in biodiversity conservation is urgently needed; and there is an equal need to develop monitoring regimes that ensure that investments are well targeted and generate positive environmental and biodiversity outcomes. Political expediency aside, it is important to ask if it might not be more straightforward to cut multi-billion-dollar subsidies to fossil fuel industries; or generate billions of dollars from foregoing Stage 3 tax cuts than establish a new market that looks to financialise nature with numerous attenuated risks some of which I have outlined in this submission. In short, in my view rather than establish a statutory framework for a Nature Repair market, it would be preferable to properly support existing biodiversity effort underwritten by the state on behalf of all Australian taxpayers.

Second, the exposure draft of the Nature Repair Market Bill is extraordinarily complex in part because it is looking to address a complex policy problem that extends beyond the biodiversity decline crisis to the climate crisis and the transformational challenges facing the Australian economy and society as a rapid shift is made to renewable energy and net zero emissions. Like many others, I counsel that the biodiversity reform process that is indisputably urgent is undertaken with care and with the informed consent of First Nations people who have rights and interests over the majority (and growing) share of terrestrial Australia and its conservation estate.