



**Australia's
Biodiversity
Agenda:
Nature Repair
Market**

Australia's biodiversity journey: a pathway to sustainability

Over the past two years, momentum towards addressing the staggering biodiversity loss has been steadily building. On the domestic and international fronts, government and industry have explored ways to incentivise a reversal of this decline in an effective and economically efficient manner.

A nature repair market is one initiative (borrowing from the carbon offset market) that government and industry are exploring.

Unveiled on 29 March 2023, the Australian Commonwealth Government took the major step of introducing legislation into Parliament to facilitate the establishment of a market in tradeable certificates for nature protection, repair and restoration - proposed as the *Nature Repair Market Bill 2023 (Bill)*.

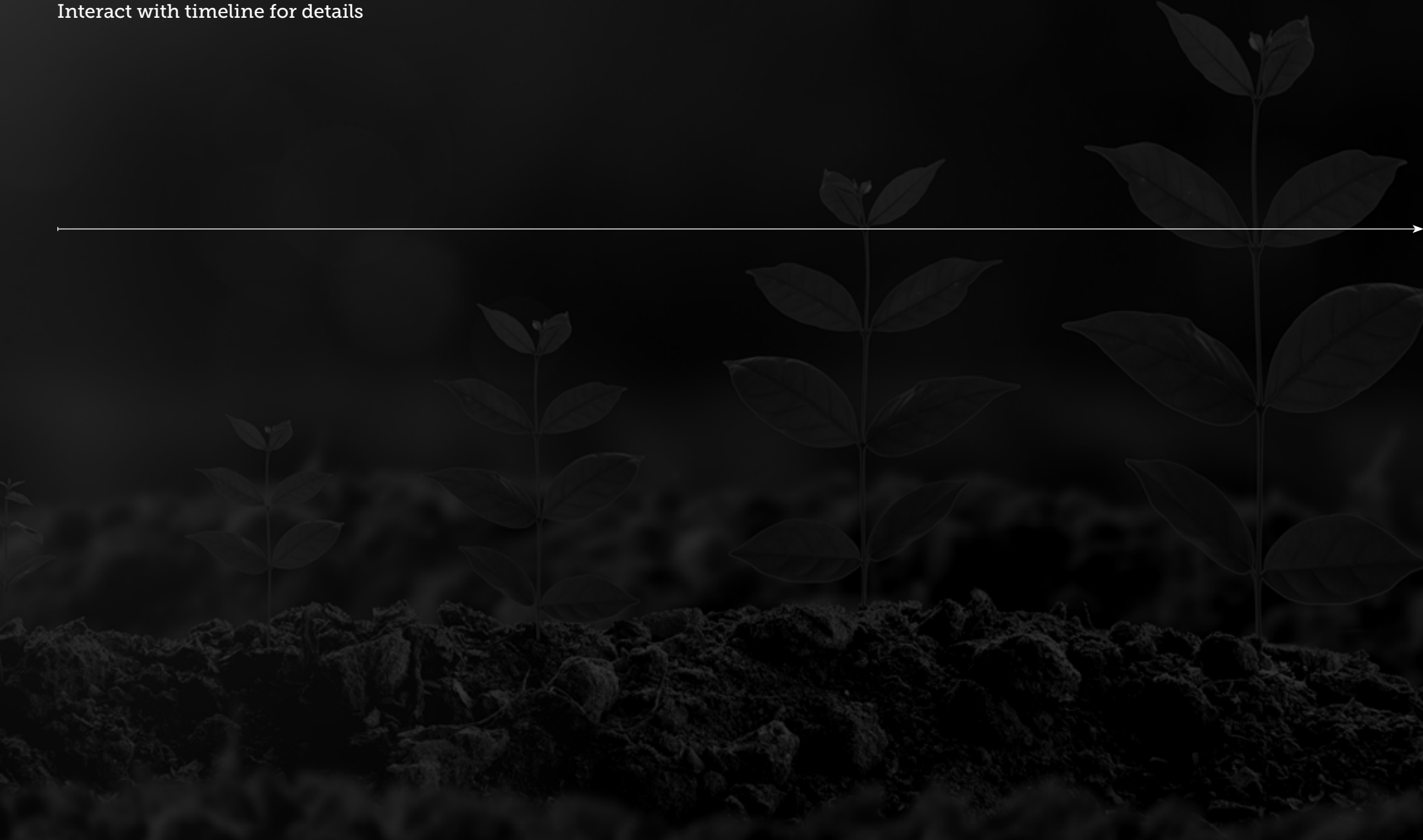
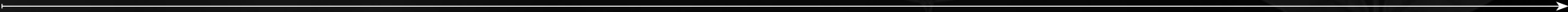
Our insights step you through the developments which have culminated in the announcement by the Australian Commonwealth Government of a national voluntary nature repair market, which has been self-described as a 'world first scheme.'

We explore the road that has led to the release of the Bill, the critical aspects of the Bill, and the opportunities it presents for eventual market participants.



The journey so far:

Interact with timeline for details



Nature Repair Market Bill

On 29 March 2023, the Nature Repair Market Bill was introduced to Parliament by the Federal Minister for the Environment and Water, Tanya Plibersek.

The Bill establishes a framework under which Australian landholders and other project proponents can be issued with tradeable biodiversity certificates for having undertaken projects that protect, manage and restore nature. Following is a summary of the key components of the Nature Repair Market Bill.

General structure

The blueprint for the Nature Repair Market has taken inspiration from the machinery underpinning the carbon market established under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act). The key reasons for this are so that the Nature Repair Market can operate in parallel with carbon markets and incentivise both carbon and biodiversity outcomes, and also so that the Nature Repair Market can readily leverage the learnings to date on how to operate an effective carbon market in the Australian context. Examples of the similarities in market design are that biodiversity projects will need to be undertaken in accordance with legislated methodology determinations (as carbon market projects currently are) and both markets will be regulated by the Clean Energy Regulator (CER).

Eligible persons, projects and project registration

The Bill allows an eligible person to apply for approval to register a 'biodiversity project'. Broad participation in the market is encouraged and it is intended that a diverse range of groups (including First Nations people, conservation groups, governments and farmers) will play a role.

Eligible biodiversity projects will include those that involve undertaking activities that relate to conservation, restoration, maintenance, threat abatement, fire management, weed management, pest management, regeneration, rehabilitation, remediation and habitat augmentation. Specific examples of potential biodiversity projects include:

- reviving wetlands and mangroves;
- replanting koala habitat;
- reviving a nature corridor;
- planting native vegetation;
- restoring a damaged waterway; and
- managing pests and weeds.

Projects can be located across a wide range of geographical settings and land types, including on freehold and Crown land, inland waterways, and in marine and coastal environments.

The CER will decide whether to approve an application for registration of a biodiversity project based on an assessment against specified criteria, including that:

- the project is covered by a methodology determination;
- the project proponent is a fit and proper person;
- the project proponent has appropriate tenure, or otherwise has the consent

of the relevant landowner of the land on which the project is proposed;

- carrying out the project is likely to result in a biodiversity certificate being issued; and
- any consents required prior to registration of the project have been obtained.

Project registration can be approved subject to a condition requiring necessary regulatory approvals to be obtained. This is intended to provide project proponents with a level of certainty regarding the registration of their project, before going to the expense of obtaining the required regulatory approvals. Projects can also be registered subject to a condition requiring consents from certain eligible interest holders or native title holders. If regulatory approvals, eligible interest holder or native title holder consent are required but not obtained within five years, the CER will have powers to cancel the project's registration.

Following registration, for projects proposed on Torrens system land, the CER will be required to give notice to the Registrar of Titles or their equivalent so that a notification can be placed on the relevant land title to alert anyone taking an interest in the project land that the land may be subject to requirements under the Bill.

Methodology determinations

Like carbon projects under the CFI Act, each biodiversity project will need to be undertaken consistently with a 'methodology determination'. Methodology determinations are legislative instruments that will detail how biodiversity projects are to be carried out as well as any requirements that a project proponent must comply with in order to receive a biodiversity certificate. A key focus of the methodology determinations will be to ensure that only genuine and verifiable biodiversity protection or enhancement is rewarded, including that certificates are only issued for biodiversity protection or enhancement that is additional (i.e. the protection or enhancement of biodiversity is additional to what would have occurred if the project had not been carried out).

A methodology determination will specify:

- the conditions that must be met for a project to be registered and for a biodiversity certificate to be issued in respect of the project;
- the activities that are to be carried out (or that are not to be carried out) for the purposes of the project;

- information on how the 'activity period' and 'permanence period' for the project (if any) will be worked out (these concepts are explained in more detail below);
- conditions and requirements relating to the measurement of biodiversity achieved by a project; and
- requirements for reporting, notification, record-keeping and project monitoring.

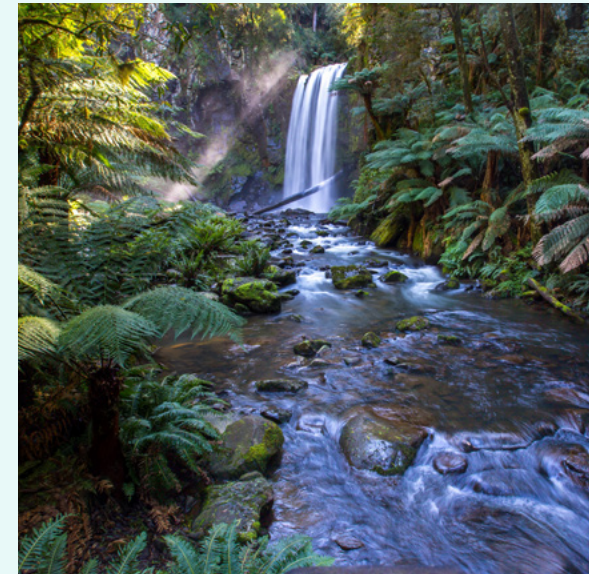
A methodology determination may also include requirements relating to the provision of a 'project plan' in some circumstances. A project plan will act as an integrity measure to facilitate a more accurate assessment by the CER of the appropriateness of a project to achieve the relevant biodiversity outcome and the requirements of the methodology determination.

An expert and independent technical committee, known as the Nature Repair Committee, will be established and charged with reviewing the proposed methodology determinations and advising the Minister on whether the methodology determination complies with a legislated suite of biodiversity integrity standards. The Minister would only be able to make or vary a methodology determination if the Nature

Repair Market Committee has provided advice that they consider the methodology determination (or methodology determination as varied) complies with the biodiversity integrity standards, and if the Minister has also satisfied themselves of this. There will also be a period of mandatory public consultation for each proposed methodology determination or variation.

One of the key recommendations from the Chubb Review into the integrity of the carbon crediting scheme (see our insight piece here) was that there should be a more modular and proponent-led approach to methodology determinations to provide for necessary flexibility in the development of methods that are suitable to a proponent's particular purpose and the project's local context. While this recommendation does not appear to have been directly imported into the architecture of the Nature Repair Market, the Explanatory Memorandum for the Bill emphasises that methodology determinations will be co-designed with stakeholders outside of the legislative process. Accordingly, a more proponent-led regulatory framework may be something that is given effect in a non-statutory way, and may come more into focus as the Nature Repair Market matures.

The Bill will allow the Nature Repair Committee to provide advice to the Minister on the prioritisation of methodology determination developments. The prioritisation process will be informed by factors such as demand from industry and the Government's environmental targets and priorities. Currently, two methodologies are being prototyped through the Agriculture Biodiversity Stewardship Package pilots. The Explanatory Memorandum to the Bill notes that the Nature Repair Market will commence based on these two methodologies and expand over time as others are developed and approved.

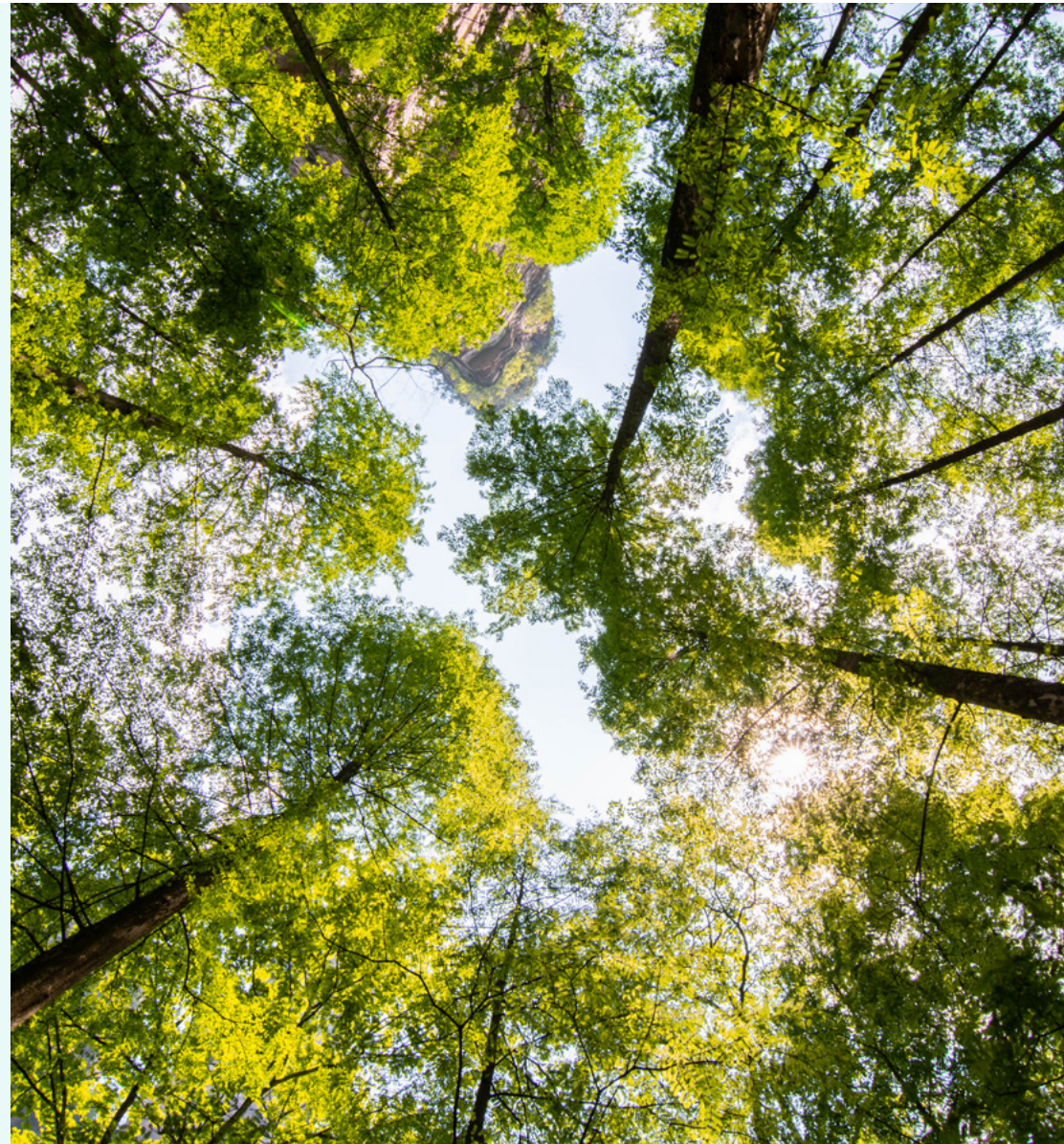


Activity and permanence periods

The 'activity period' is the period of active management required to achieve the relevant projected biodiversity outcome. The length of the activity period will need to be calculated in accordance with the methodology determination that covers the biodiversity project. This period of active management operates in a similar manner to biodiversity offset markets, which typically require a 10-year management plan to be complied with under an agreement registered on title to the offset project land and should be broadly familiar to market participants.

It is proposed that the 'permanence period' for a project would be either 25 or 100 years (unless a different period is provided for in the applicable methodology determination), with proponents electing the permanence period that is best suited to their circumstances. It is expected that during the permanence period, activities undertaken pursuant to the project would generally consist of monitoring to ensure there is no significant reversal in biodiversity outcome, preventing or responding to negative outcomes, and meeting any requirements set out in the methodology determination.

This broadly reflects the position adopted for carbon projects under the CFI Act with respect to the duration of a permanence period. However, it differs from Commonwealth and State-based biodiversity offsetting frameworks which typically require in-perpetuity protection. To the extent the nature repair market will be used to deliver biodiversity offsets under State or Commonwealth offset frameworks, we expect that an in-perpetuity permanence period will be set out as a requirement within the relevant methodology determination.



Biodiversity certificates

When a registered project has met certain conditions and requirements, the project proponent will be able to apply to the CER for the issuance of a biodiversity certificate. These conditions and requirements are primarily designed to ensure certificates have integrity and accurately reflect the environmental improvements achieved by the project. They include:

- the project is sufficiently progressed to have resulted in, or be likely to result in, the biodiversity outcome for the project;
- the proponent being a fit and proper person; and
- eligibility requirements and conditions required by the applicable methodology determination have been met.

Biodiversity certificates will be a form of tradeable personal property which can be purchased, transferred, claimed, used and publicly tracked. Fundamentally, they will enable biodiversity outcomes to be owned and traded separately from the underlying land.

It is proposed that a single biodiversity certificate will be issued by the CER for each registered project. While this reduces tradability (by restricting the ability of project proponents to transact specific biodiversity outcomes from a project to different purchasers), it also provides simplicity in that purchasers will be able to easily understand what they're investing in and what the certificate relates to. Purchasers will need to compare and value projects based on the terms of the certificate, rather than basing price on the value of a generated habitat unit (as is the case under State-based offsetting frameworks).

We expect that the policy decision to have one certificate issued per project will incentivise project proponents to seek to define project areas within their applications in a compartmentalised manner, such that multiple certificates can be created and sold to different purchasers (in circumstances where additional returns could be generated by doing this).

In addition, the Bill contains provisions which allow equitable interests to be created in a certificate which may lead to the utilisation of innovative ownership structures (such as trusts) for the purposes of establishing differentiated multi-owner beneficial ownership of certificates.

Biodiversity certificates must contain a range of standardised information to enable the market to compare and value projects, and to make informed investment decisions. This will include information such as the size of the project land, the type of work conducted and the threatened species protected.



Reporting and measurement

Proponents will be required to provide regular project reports as part of the application process for a biodiversity certificate, and also on an ongoing basis (post-issue of a biodiversity certificate) during the permanence period for a project to facilitate verification of whether environmental outcomes are being achieved. Reporting during the permanence period will be required at least once every five years after a certificate is issued, and potentially more regularly if required under a methodology determination. These reports will be available on a public register (as outlined below), and the cost of procuring or preparing reports will be factored into the pricing of biodiversity certificates.

A consistent approach to measuring and assessing biodiversity will be set out in a biodiversity assessment instrument, which would apply either across all methodology determinations or for a specified class of methodology determinations.

From a broader perspective, we expect that a Government-endorsed and nationally consistent framework for describing and measuring biodiversity outcomes may be influential in driving uniformity in

other settings (for example in biodiversity assessments for project approvals, or for natural capital accounting outside of the Nature Repair Market context).

Compliance, relinquishment and enforcement

The CER will have broad monitoring, compliance and enforcement powers to ensure that projects are being conducted in accordance with methodology determinations and other requirements. This includes powers to require the production of information or documents, powers to audit projects, and powers to require project proponents to commission a third-party audit. Other compliance and enforcement tools available to the CER or appointed inspectors include issuing infringement notices, prosecuting, issuing civil penalties, obtaining enforceable undertakings, and seeking injunctions.

In some circumstances, a notice can be served on a project proponent requiring them to relinquish a certificate, even if the certificate has been sold to a third party. These circumstances include where:

- the project proponent supplied false or misleading information;
- there has been a significant reversal of a biodiversity outcome that is not attributable to natural disturbance; or
- there has been a significant reversal of the biodiversity outcome that is attributable to natural disturbance (for example fire or flood), and the CER is not satisfied that the project proponent has, within a reasonable period, taken reasonable steps to mitigate the effect of the natural disturbance.

In these circumstances, the project proponent will either need to re-purchase the biodiversity certificate, or purchase an equivalent certificate and relinquish it. If the relinquishment requirement is not met, the project proponent may be liable for a civil penalty, and the CER will be able to make a 'biodiversity maintenance declaration' which prohibits certain activities from occurring within specified areas, with the aim of ensuring the relevant biodiversity outcome is achieved on the project land.

The Bill also contains requirements for project proponents to notify the CER of certain events, such as where they no longer have the right to carry out a project,

where they are no longer a fit and proper person, or where an event or conduct that causes, or is likely to cause, a significant reversal of a biodiversity outcomes occurs (including natural disturbances such as a bushfire or cyclone).



Nature Repair Market Bill

Biodiversity Market Register

The Bill provides for the establishment and administration of a public register (known as the Biodiversity Market Register) to facilitate transparency, accountability and market efficiency.

The Biodiversity Market Register will be maintained by the CER and will track the issuance, ownership, transfer, relinquishment and cancellation of biodiversity certificates. Future legislative rules may also require the register to show whether projects have been used for regulatory purposes (for example as biodiversity offsets to compensate for development impacts), or for other purposes.

The Biodiversity Market Register will allow information relating to each biodiversity project to be viewed, compared and scrutinised by the public. It will also allow certificate owners to show their shareholders, customers, and employees how they are supporting nature repair and restoration.

Transfers of biodiversity certificates would not take legal effect until the transfer is reflected in the Biodiversity Market Register. This is intended to ensure that the register operates as a 'single source of truth' regarding ownership of certificates.

The Explanatory Memorandum to the Bill suggests that in the early stages, it is envisaged that an online platform will operate to allow project proponents to advertise biodiversity certificates for purchase. Prospective purchasers will be able to view available certificates on the platform and obtain contact details for project proponents. At a later stage, the operation of the online platform may expand so that trades can be conducted on the platform itself.



Insights and key takeaways

Long-term demand from both compliance-created and voluntary purchasers

The Nature Repair Market will provide a mechanism through which parties best placed to deliver nature protection, repair and restoration outcomes can be incentivised.

There is scope in the longer term for the Nature Repair Market to meet compliance-created demand in the form of delivering credible and robust offsets or nature positive outcomes under Commonwealth laws (addressing a range of criticisms that were highlighted in the State of the Environment Report 2021 relating to the inadequacy of the current offset framework). This is likely to occur once biodiversity certificates can be created in a form that meets requirements set out under a National Environmental Standard for environmental offsets, which is currently being prepared as part of the EPBC Act reforms.

While recent Government guidance suggests that this Standard will ensure offsets are only used as a last resort (which indicates offset demand will be limited), the more ambitious environmental policy settings that have already been flagged in the Nature Positive Plan (i.e. beyond 'no net loss' and towards 'nature positive') is likely to act as a counterbalance and stimulate additional activity in the market.

From a voluntary demand perspective, our expectation is that organisations will align their activities to international biodiversity commitments (akin to the way organisations have made net zero commitments aligned with the goals set out in the Paris Agreement).

In the biodiversity space, this will mean aligning with the commitments made at COP15 such as the commitment to protect 30 per cent of land and seas by 2030.

Coupled with either mandated or expected reporting in line with the Taskforce for Nature-related Financial Disclosures (which is due to be released in September 2023), we expect there will be significant long-term voluntary demand to acquire biodiversity certificates to assist market participants to deliver on their ESG commitments.

We also expect that demand for carbon credits will continue to mature, including differentiating and preferentially pricing projects that deliver both biodiversity and carbon outcomes.

In quantifiable terms, a recent report by PWC estimated that an Australian biodiversity market could unlock \$137 billion in financial flows to advance biodiversity outcomes by 2050.



Government should lead the way in the short-term

Biodiversity offsetting has had a long and winding history under both State and Commonwealth frameworks, and the key shortcomings are clearly highlighted in the State of the Environment 2021 report. In addition, there has been recent focus on the challenges associated with the integrity of carbon markets which are highlighted in the Chubb Review.

A range of mechanisms to address these issues have been directly addressed in the architecture of the Bill, and investors will take comfort from the transparency and integrity offered under a legislative-based regulatory framework. Despite these factors, we expect there to be a level of trepidation from potential market participants about entering an immature and largely untested market, and a cautiousness by from purchasers as to how to manage greenwashing liability exposures arising from making biodiversity-related claims which can't be substantiated because certified projects ultimately underperform.

In light of this, and similar to the Government's active role as a purchaser of carbon credits in the early stages

of the carbon market to build market confidence, we think there is a role for Government in actively backing the scheme in the early stages as a purchaser of biodiversity certificates. This has clearly been contemplated by the Government given provisions in the Bill provide for the Secretary to enter into biodiversity conservation contracts for the purchase of a biodiversity certificate on behalf of the Commonwealth, including through tender processes and reverse auctions.

Non-realisation of biodiversity outcomes post-transfer of a certificate remains a challenge

A key challenge for both project proponents and purchasers of certificates will be how to deal with a scenario where biodiversity outcomes are not achieved but certificates have been created and sold.

Although the Bill establishes a framework for relinquishment notices and biodiversity maintenance declarations (providing some level of protection), there is no direct ability proposed under the Bill for purchasers to have recourse against project proponents to recover loss and damage where they have paid for a certificate that has been rendered worthless because the relevant

biodiversity outcome no longer exists or cannot be achieved.

This seemingly dead-end is analogous to the issue that currently exists under current Commonwealth biodiversity offsetting framework. In that context, purchasers of offsets sometimes require the offset project proponent to indemnify or otherwise cover the project proponent's loss and damage in circumstances where the purchaser does not comply with their requirement to offset an impact because the offset project has failed.

However, this liability framework significantly exposes the offset project proponent to additional risk and changes the risk-reward equation for them (i.e. the potential reward on offer by generating and selling offset credits is less than the potential risk associated with doing so).

In the Nature Repair Market context, there is a risk that these factors may lead to market distortions and inefficient risk pricing, complex contractual arrangements (where parties seek to allocate these risks in an appropriate manner), increased transaction costs, and ultimately act as a disincentive to landholder participation in the Nature Repair Market.



Insights and key takeaways

A targeted level of purchaser due diligence is recommended

Despite the strong emphasis on integrity and transparency related mechanisms within the Bill, there remains a level of risk in purchasing biodiversity certificates under the proposed Nature Repair Market architecture. As discussed above, there are a number of circumstances imaginable in which biodiversity outcomes are not ultimately achieved for a project which has already generated a certificate that has been on-sold. In addition, the scheme architecture contemplates that a biodiversity certificate can be issued before the relevant biodiversity outcome is achieved.

In light of these risks, in our view it will be important for purchasers to conduct a tailored and targeted level of due diligence which is at least focussed on these key risk areas, and for purchasing decisions to be made and priced accordingly. To the extent that purchasers are unwilling to assume the risks associated with the possibility of a biodiversity outcome failing to be achieved, consideration will need to be given as to how to mitigate this risk through appropriate contractual protections or through procurement strategies that aim to ensure an adequate buffer between

any claim made and the certified outcome purchased.

Innovative contracting structures to deploy capital, de-risk investments and secure credits

Our experience in Commonwealth and State biodiversity offsetting is that landholders are often reluctant to invest the capital required to undertake activities necessary to generate offset credits without the certainty that they can be sold. In response to this hesitation, we have assisted landholders to enter the market by using innovative contracting structures which allow capital to be deployed to landholders from future offset credit

purchasers at an early stage (pre-credit generation), in exchange for a promise of future credit transfer from the landholder to the future offset credit purchaser. This arrangement helps landholders to secure capital, minimise immediate cashflow impacts, and de-risk their biodiversity project monetisation strategy. Purchasers also benefit from this contracting structure by obtaining certainty that they will obtain future credits (often at a discount to the spot price), which de-risks their credit procurement strategy and mitigates against the risk that securing appropriate credits falls onto the critical path for their purposes.

The architecture of the Bill allows this practice to continue, such that funds can

be deployed by biodiversity certificate purchasers to landholders early, allowing them to meet upfront capital costs associated with developing a biodiversity project that minimises immediate cashflow impacts, and de-risk their biodiversity project monetisation strategy. Future biodiversity certificate purchasers will also be able to rely on a range of mechanisms that have been built into the Bill to help protect their investments (such as a requirement for a notification to be placed on the relevant land title, and allowing equitable interests in biodiversity certificates to be registered on the Biodiversity Market Register once a biodiversity certificate is generated).



How best to monetise opportunities?

Project proponents will have choices around how to monetise their projects – for example through State offsetting, the Nature Repair Market, or through other mechanisms such as Victoria’s BushBank program. Project proponents will also need to carefully manage requirements so as to be able to monetise projects in both biodiversity and carbon markets.

Key considerations are that there are different risk profiles and rewards that will be offered under the Nature Repair Market framework when compared to other frameworks. For example, non-compliance with a methodology determination under the Nature Repair Market can result in civil penalty liability of up to \$550,000, whereas under State-based offset frameworks non-compliance with a management plan attached to an agreement registered on title can often have less significant potential liability exposures.

Competition between State-based offsetting frameworks and the Nature Repair Market may also result in longer-term supply shortages in both markets, as project proponents make decisions as to which market to participate in, which best

reflects their perception of risk, reward and ultimate value.

In addition, while the Nature Repair Market has been designed to have similarities with the carbon offset market established under the CFI Act, project proponents will need to carefully design projects and manage applications so as to be able to maximise value by monetising both the carbon and biodiversity attributes of projects, particularly in relation to being able to demonstrate additionality.

Managing compliance across carbon and biodiversity schemes will also require project proponents to turn their minds to appropriate management and governance frameworks, along with ongoing and proactive management to ensure relevant carbon and biodiversity outcomes are achieved and ongoing requirements (such as monitoring, reporting and notification) are met.

Capacity and supply chain limitations will be key constraints to market development

In our experience, the skillset required to appropriately manage biodiversity offset sites is particular. Proficiency is

required with respect to matters such as natural resource management, ecological management, reporting and compliance, all while dealing with seasonality-related fluctuations and events such as floods and droughts. The market of providers who see nature repair or land restoration as their core business is small and nascent, and for many landholders it is often a ‘second job’ on top of running an active agricultural enterprise.

In addition to this, complex ecological restoration at scale requires a supply chain in areas such as native seed stock supply which to our knowledge does not exist in Australia at the depth that is required if the market delivers long-term and sustained demand at volume.

The solutions to these constraints are multi-faceted and will require industry-level capacity building and development. However, at least in the short term, purchasers will need to mitigate these risks by conducting an appropriate level of counterparty due diligence prior to purchasing certificates so they can assure themselves that the project proponent has the expertise and access to resources to be able to deliver the promised biodiversity outcomes.



What's next? Further consultation and market preparation

The Government has flagged that further consultation on the Nature Repair Market and methodologies will occur in 2023 as it develops the details required to open for trading in the second half of 2024. The Bill was referred to the Senate Environment and Communications Legislation Committee on 30 March 2023 for inquiry and report by 1 August 2023.

The Bill creates clear opportunities for both project proponents and purchasers to actively contribute towards nature repair and restoration, and now is the time to start considering the best approach to get involved.

We are assisting a range of organisations to understand both supply and demand-side opportunities and growth strategies. We encourage participation in the consultation process and are available to guide you on taking an active role.

Our long history advising both project proponents and purchasers in biodiversity offset and carbon markets, combined with our expertise in adjacent disciplines such as natural resource management, environmental engineering and land access and assembly, mean we are ideally placed to help both project proponents and purchasers to realise opportunities and manage risks within the proposed Nature Repair Market. Please contact Joshua Dellios or Sarah Barker to understand more.



Meet our team

Lead authors and key contacts



Joshua Dellios

Partner, Environment and Planning

M +61 436 023 233

joshua.dellios@minterellison.com



Sarah Barker

Partner, Head of Climate and Sustainability Risk Governance

M +61 402 220 556

sarah.barker@minterellison.com



Simon Ball

Partner, Environment and Planning
NSW and ACT

M +61 402 282 428

simon.ball@minterellison.com



Luke Walker

Partner, Environment and Planning
NSW and ACT

M +61 421 587 327

luke.walker@minterellison.com



Joshua Dellios

Partner, Environment and Planning
Victoria and Tasmania

M +61 436 023 233

joshua.dellios@minterellison.com



Sarah Barker

Partner, Head of Climate and Sustainability Risk Governance
Victoria and Tasmania

M +61 402 220 556

sarah.barker@minterellison.com



Tim Hanmore

Partner, Environment and Planning
Queensland

M +61 423 924 506

tim.hanmore@minterellison.com



Nada Raphael

Partner, Environment and Planning
Western Australia

M +61 409 791 357

nada.raaphael@minterellison.com



Jeremy Hill

Partner, Environment and Planning
South Australia and Northern Territory

M +61 413 009 721

jeremy.hill@minterellison.com

MinterEllison.