



Proposed Nature Repair Market Legislation is Bad Policy

- High transaction costs
- No validated methodologies for assessment and measurement
- Scope for strategic action neglected

Who we are

We are the Rubicon Forest Protection Group (www.rubiconforest.org). We have been working to stop the destruction of biodiversity in the native forests of Victoria's Central Highlands for eight years. We are part of a larger forest conservation movement that has been working to protect native forest ecosystems across Victoria for many decades.

We have watched as corporate interests who are monetising the forest destruction are protected by politicians, sitting astride a flawed regulatory regime ([designed to fail](#)).

This submission has been developed by a team comprising:

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Policy failure

This proposed 'nature repair market' is a case of egregious policy failure: lack of validated methods for assessment or measurement; high transaction costs; wide scope for greenwashing of continued environmental degradation; wanton benefaction of consultants and banks; and government dereliction of policy responsibility for strategically addressing biodiversity loss.

Instead of taking full responsibility for repairing the legacy of environmental degradation (sanctioned by previous governments), the Commonwealth is now proposing to let the corporate sector determine environmental repair priorities.

Repealing the Stage 3 tax cuts, ending the massive Commonwealth subsidies for housing investors and reining in war preparation expenditure would give the Government ample fiscal room to tackle the extinction crisis through effective regulation and project funding.

Flawed design

At the heart of the nature repair scheme is the following sequence. On-the-ground repair work is proposed which promises enhancement or protection of biodiversity. This proposal may come from the landholder or an independent contractor in association with the landholder.

First, the proposed project is registered with the regulator, subject to conditions set out in the relevant methodology determination (including requirements with respect to measurement or assessment). Sometime after the registered project has commenced, the proponent (landholder or contractor) may apply for a certificate to be issued and if prescribed conditions (in the methodology determination) are met, the regulator issues such a certificate.

The certificate is tradeable and the proponent may offer it for sale. However, whether market price for the certificate corresponds to the cost of the 'nature repair' will depend on market demand. If the sale price of certificates is consistently less than the cost of the repair work the scheme will collapse - unless the Commonwealth enters the market to push the price up or provides further incentives for corporate participation.

The [2020 Frontier Economics study](#) found that it was not possible to reliably quantify the size of demand for biodiversity services and demand from various sources. The proposed legislation envisages significant purchases of certificates by the Commonwealth. While there is no reference to tax incentives or off-setting requirements in the draft legislation, it is clear, from the precedent provided by the [National Stewardship Trading Platform](#), that such could be used to encourage private capital. The cost to the Commonwealth of incentivising private capital may be well in excess of the cost of a directly administered program. It appears that no such comparison has been commissioned.

Measurement or assessment of biodiversity: need for a panel of indicators which are mutually exclusive and jointly comprehensive

The draft bill promises (S58(3)) that biodiversity assessment instruments will be developed which will prescribe requirements for the assessment and measurement of biodiversity in different settings.

However it is doubtful that such requirements will provide valid and reliable measures, either of the value of biodiversity enhanced or of the value of biodiversity protected.

The bill is silent as to whether the value of biodiversity (enhanced or protected) will be estimated in terms of 'natural capital' or 'ecosystem services produced' or some other assessment paradigm. Presumably this will be left to the Nature Repair Market Committee.

The whole project depends on valid, reliable, and cost-effective methodologies for measurement or assessment but rather than examine whether such methodologies are feasible (in principle and in practice), the whole edifice is being constructed on the basis of a promise that they can be developed.

A key methodological question is whether the indicators selected for measurement or assessment are jointly comprehensive (capture all of the values) and mutually exclusive (avoid double counting).

The Stage 1 report of the Natural Capital Investment Initiative produced a [huge list of potential indicators](#) with great scope for double counting, significant omissions and unbalanced assessments.

Biodiversity is characterised at taxonomical, genetic and ecological levels. How shall the indicators which correspond to these different levels be itemised and aggregated? In view of the emergent nature of higher level phenomena (ecosystem compared with species) would this involve double counting?

The published information indicates that some nature repair projects may be eligible for both biodiversity credits and carbon credits. How will we know that we are not double counting or double dipping?

Consideration of this legislation must be deferred pending the preparation of an expert report on the principles and practicalities of measuring and assessing biodiversity and ecosystem resilience including the development of draft biodiversity assessment instruments and field work validation, reliability and cost studies.

Relationship between biodiversity and ecosystem resilience

'Biodiversity' is defined (S7) as "the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part) and includes: (a) diversity within species and between species; and (b) diversity of ecosystems". These references to ecosystems are appreciated but there are no further references to ecosystem resilience in the draft bill.

There is no suggestion in the draft bill that biodiversity assessment instruments shall in any way reflect ecosystem resilience. Ecosystem resilience is a function of the relationships between ecosystem components and their abiotic context, not some kind of arithmetic aggregate of indicators of species prevalence.

The relationships between biodiversity indicators and ecosystem resilience is not linear, as in: the more species, the greater the resilience. The relationship is more commonly chaotic or non-linear. In some circumstances, demonstrated improvement in indicators might have no impact on resilience; in others it might have a dramatic impact.

These relationships have been completely neglected in this draft bill.

Striking the right balance between specificity and generality

The obligations of the project proponent are set out in the methodology determination and the relevant biodiversity assessment instrument.

It will be important that these obligations are not so broadly specified as to allow any interpretation and permit almost anything to be covered. An overly general specification will be both unenforceable and open to gaming by corporate, consultant, contractor and landholder interests. On the other hand it would be quite impractical to attempt a failsafe methodology that covers every detail of every kind of project, and expect it to remain valid over time as new information emerges.

Managing this balance will require expert judgement and rigorous formative evaluation. The limited ecological expertise on the Nature Repair Market Committee (see below); the discretionary approach to monitoring certified projects (see below); and the lack of public accountability of the scheme (see below) generally give no assurance that such judgement and learning will be a feature of the scheme.

The pricing of natural capital improvement

The market value of the certificate will set a dollar value on the enhanced biodiversity or the biodiversity protected. The price paid for the certificate is determined by the market, not the cost of the repair work undertaken.

There is no guarantee that a voluntary market in certified biodiversity credits will yield prices that will slow down the rate of degradation, much less repair the existing damage.

While the purchasing of certificates lies within the discretion of corporate strategists, philanthropists and greenwashers, there is no guarantee, or even suggestion, that the ecosystems which are being protected are those in most need of protection (or enhancement). Handing this across to the market would be a dereliction of governance duty.

Lack of Commonwealth accountability regarding purchase of certificates

Without substantial purchasing by the Commonwealth there is no guarantee that the aggregate flow of funds to environmental repair will bear any relation to the investment which is needed. Without substantial strategic purchasing by the Commonwealth there can be no expectation that priority is assigned to the most critical repair work.

S84(3) sets out certain principles which should guide the Secretary in purchasing certificates. However, there are no mechanisms to ensure that Commonwealth purchasing is guided by evidence based priority setting regarding ecosystems and biodiversity loss.

<p>The nature repair legislation should require a formal statement of national priorities with respect to biodiversity protection and repair which would be regularly revised with annual</p>

revisions to be tabled in parliament. The legislation should include provision for an annual report by the Secretary, also to be tabled in Parliament, which sets out how Commonwealth purchasing has realised the priorities set out in the statement of priorities applying during the reporting period.

Relative effectiveness of market mechanisms versus regulation, for biodiversity *protection*, as distinct from *enhancement*

The inclusion of biodiversity protection as well as enhancement in this proposed legislation is perplexing. The words ‘Nature Repair’ in the title of the Bill would lead an ordinary person to presume that the market only allows for enhancement of biodiversity, not avoidance of loss.

It is not clear what sort of projects would be eligible for certification and trading in relation to the common causes of biodiversity loss which include land clearing, soil-degrading agricultural practices, excessive water consumption, leakage from mining retention dams, and fertiliser run-offs. These cases all reflect market failure, the externalisation of production costs to the environment. For all of these cases the default approach surely would be regulation to make the market work better.

Perhaps mining companies raise funds through the nature repair market to construct proper dam walls; farmers can raise funds to adopt regenerative farming techniques. This would leave shoddy dam wall construction and degradative farming practices as optional for the landholder. Surely regulation to prevent environmental degradation would be a better choice.

In some cases ‘protection’ may seem appropriate, such as fencing to keep out pest animals, but that can simply shift the pest problem to the other side of the fence. Pest plant and animal eradication should be properly Government funded and address the problem across the entire range of pest animals and plants, not through a piecemeal ‘market’ solution.

Clearing native vegetation should, as a rule, not be permitted and so should not be eligible for biodiversity certificates. Where clearing is evidently unavoidable, as with mining, project proponents must be obliged – as project approval requirements - to restore an area of land at least 10 times larger than the mine footprint.

The starting point for the Bill should be that protection from biodiversity loss, such as native vegetation clearing, is prevented by Government regulation not by any invented ‘market’. Thus, only ‘enhancement’ of biodiversity should be eligible for registration and certification, not ‘protection’. Revising the scheme in this way would also go a little way to addressing the ‘integrity’ problem that is one of its many failings.

It is bizarre that the same Government that is proposing this Bill explicitly sanctions biodiversity loss in forests through permitting State Governments to continue to engage in logging practices that destroy

biodiversity across thousands of hectares annually. Perhaps if the Bill was expanded to allow State Governments to participate, they could get biodiversity certificates for stopping logging!

Much more detail about protection and enhancement provisions in relation to a wide range of biodiversity issues and settings will be included in the methodology determinations and biodiversity assessment instruments. Without this kind of detail, asking Parliament to consider this bill would be premature.

Consideration of the legislation must be deferred pending a careful analysis of leading causes of biodiversity loss and the kinds of projects which would be certified for purposes of protection and enhancement, including a close consideration of the relative merits of regulation, direct subsidy, and the artificial market.

Transaction costs

Assuming that robust methodologies (for measurement and assessment in different ecosystems) can be developed, the transaction costs of integrity would be huge.

A new cohort of consultants will be needed who can apply the required methodology and provide assurance regarding the biodiversity integrity standards. PWC, KPMG, McKinsey and a range of other 'environmental consultancies' have already indicated their interest in getting a slice of the action but these organisations are not cheap.

A new industry of biodiversity conservation contractors will be established by this legislation. However, there are no references in the biodiversity integrity standards (S57) to any risk management provisions that might be needed in the regulation of this industry.

A new bureaucracy will be required to manage the register and ensure compliance with the ground rules. Almost certainly the budget for the bureaucracy will be inadequate and the integrity of the scheme will be at risk of collapse because of this.

The scheme as proposed envisages the price of the certificate providing the landholder/proposer with the capital to effect the proposed repairs or protections. However, before the certificate can be created, registered and marketed the landholder/proposer will need to pay the consultants to assist in documenting the proposed enhancements and protections and undertaking the required assessments and measurements.

It is clear that the banks and other players in the financial system are looking forward to new business opportunities based on issuing green bonds for biodiversity enhancement and protection; such bonds to be purchased by greenwashers and philanthropists and to provide affordable credit for landowners and contractors.

The costs of certification, registration and compliance plus the cost of floating green bonds (see below) all add to the transaction costs and reduce the efficiency (technical and allocative) of the scheme.

The [2020 Frontier Economics study](#) found that while there is growing interest in biodiversity services from voluntary corporate and philanthropic buyers, there was a lack of standard, credible, transparent information, and transaction costs were high. The transaction costs would be significantly increased through the implementation of this legislation.

Consideration of the proposed legislation must be deferred pending an evidence based review of comparative costs, efficiencies and effectiveness of the market strategy versus a directly administered program (including regulation and subsidy) for the protection and enhancement of biodiversity. Such a study should be commissioned from the Productivity Commission.

Incentives for participation

The nature repair market is presented as a voluntary scheme. However, there is a strong likelihood of failure. If the prices are too low (the demand is not sufficient to generate prices which cover the cost of repair plus the cost of consultants plus a reasonable margin) the returns for the landholder/proposer will be insufficient and they will pull out.

Three policy options are available.

Price support through Commonwealth purchase

The draft bill makes provision for Commonwealth purchases of certificates. In view of the high transaction costs associated with this artificial market, to direct government funds through this scheme as opposed to direct subsidy or regulation will be an expensive option.

Biodiversity restoration credits tied to tax credits

Alternatively tax benefits could be tied to the purchase of 'nature repair certificates'. Clearly this is something that the consultants and the banks would greatly appreciate and is already available under the National Stewardship Program.

However, funding through tax expenditure would be a very inefficient way of funding biodiversity restoration.

Purchase of nature repair certificates as off-sets tied to the approval of continuing environmental degradation

Corporations and landholders seeking approval for projects which involve environmental degradation may be invited to purchase nature repair certificates as offsets. This is not provided for in the draft bill

but it could be achieved through amendments to environmental approval provisions in other legislation, including the EPBC Act.

Offsetting demonstrable harm through the use of dubious environmental credits would be a further dereliction of the government's stewardship obligations. Landholders would be able to continue degrading natural capital while seeking funds for nature repair by selling green wash.

Seeking to deploy market forces to drive 'nature repair' recalls JM Keynes' prescient comment:

If the Treasury were to fill old bottles with banknotes, bury them at suitable depths in disused coal mines which are then filled up to the surface with town rubbish, and leave it to private enterprise on well-tryed principles of laissez-faire to dig the notes up again (the right to do so being obtained, of course, by tendering for leases of the note-bearing territory), there need be no more unemployment and, with the help of the repercussions, the real income of the community, and its capital wealth also, would probably become a good deal greater than it actually is. It would, indeed, be more sensible to build houses and the like; but if there are political and practical difficulties in the way of this, the above would be better than nothing.

Book 3, Chapter 10, Section 6 pg.129 "The General Theory.."

Commodification of humanity's relationship with nature

Society's relationships with nature

The fundamental causes of biodiversity loss are the unsustainable pursuit of economic growth (growth in energy and material throughput) and the externalisation of the costs of production and consumption to the environment. Corporate profit from externalisation corresponds directly to biodiversity loss.

There is no suggestion in this scheme that the value of the biodiversity credits purchased will be measured against costs externalised. Far from it; the greenwashing will obscure the ongoing growth fetish and continuing externalisation of costs.

The marketisation of environmental policy values nature in terms of the benefits to human society which can be derived from nature. The concept of ecosystem services is based on the services to human society. The concept of natural capital is based on the productivity of nature in producing ecosystem services for human society.

These assumptions about nature as an asset for humanity have rationalised the pathway which has brought us to our current predicament. The spiritual traditions of many indigenous peoples offer a different perspective, one which gives a central position to country and to Mother Earth and which recognises the claims of all of her children (including those who are not humans).

Market power, greenwash and vested interests

The commodification of biodiversity enhancement or protection transfers responsibility for prioritisation and efficiency from government to private corporations. Landholders will be in a position to choose what sort of biodiversity improvements or protections they will undertake, greenwashers what sort of certificates they purchase; banks will be able to choose what sort of green bonds they offer.

The prioritisation of environmental stewardship is an obligation of government, which should not be handed over to the private market.

The National Farmers' Federation has been pressing for a market in environmental restoration for several years. See [Farming for the Future](#) and [A return on Nature](#) both of which were sponsored by the NFF (with PWC and KPMG respectively).

The influence of the NFF is evident throughout the draft bill. With continued land clearing for agriculture, ongoing opposition to environmental water flows, and widespread fertiliser runoff as key causes of biodiversity loss this is equivalent to giving the fox the keys to the henhouse.

Farmers who have allowed their land to be degraded can have their repair work subsidised through this scheme while farmers who have looked after their land have much less scope for investing in biodiversity repair, indeed, the certification of such investments could be judged to be inappropriate.

<p>The objects of this Act (S3) should include references to strategic priorities for nature repair and the need for cost-effectiveness in commissioning such repair.</p>

Neoliberalism and marketisation

Does the Minister really believe that the marketisation of environmental regulation will yield better outcomes than regulation and direct funding?

Have the failures of marketisation in human services, infrastructure, and utilities no relevance to environmental repair?

Surely the Labor Party is not so captured by donor lobbying and so intimidated by vested interest campaigning that it will accept this flawed scheme as a solution to the critical challenges of biodiversity loss.

Comments on specific provisions in the exposure draft

In the view of the Rubicon Forest Protection Group, the proposed 'Nature Repair Market' is bad policy for the reasons set out above.

If, however, the government decides to proceed, there are specific provisions which need to be strengthened as outlined below.

Sustainability: Monitoring and locking in enhancement

S34 provides that the default term of operation for a project is 25 years only. The biodiversity enhancement created through the certified project is a public good. In theory this then allows for a return to degradative practices once the project is concluded. There should be provision in the act for some kind of ongoing monitoring of the preservation of biodiversity enhancement after the permanence period and some kind of obligation on the landholder to protect the enhancement achieved. This could involve mechanisms such as [EPBC Act Conservation Agreements](#) or [Conservation covenants](#).

Accountability

Transparency

S56(2) and S65(2) provide for a 28 day public consultation period regarding draft methodology determinations and draft biodiversity assessment instruments respectively. This is far too short a period for public input on matters as important as methodology determinations.

The minimum consultation window provided for in S56(2) and S65(2) must be 60 days and S56(3) and S65(3) must be deleted.

Confidentiality

S56(5) and S65(5) provide that a person responding to a consultation around a draft determination or a draft biodiversity assessment instrument may choose for their submission to be not published on the grounds of commercial-in-confidence or biodiversity outcomes.

It is hard to contemplate circumstances where matters relevant to the making of a methodology determination or a biodiversity assessment instrument could prejudice any person's commercial interest.

Certainly the submitter's commercial interests should not be allowable considerations for the NRMC in finalising a draft determination. Only the ecological facts and impacts should be relevant.

Delete S56(5)(a) and S65(5)(a).

Where a submission is not to be published, the name of the submitter must be disclosed.

If a submitter considers that information they submit could be prejudicial they may ask for that the specific information to be redacted in the published submission.

Secretary reporting

S175 provides that the Secretary may publish annual reports regarding the Commonwealth's purchase of biodiversity certificates.

Replace "may" with "shall" in S175

Integrity

S33(2) gives the Minister the power to exclude a project from registration on the grounds that it might have a material impact on the availability of water; employment; the local community; and access to land for agricultural production. This is a serious threat to the integrity of the scheme. Any large project that would turn farmland into forest will have an impact on water, employment and access to land for agriculture.

Similarly large projects may well have impacts on 'the local community', but be of benefit to the 'wider community'. For example the interests of 'the local community' have drastically curtailed environmental water buybacks in the Murray-Darling Basin to the detriment of the environment and to the repair of nature. The provision of 'local community' input should be mediated through such planning approvals as the local, regional or statewide planning schemes may require. The repair of nature must involve a shrinking of the footprint of humans on the forests, lands and waters of the Earth and the purpose of this legislation must be to facilitate, not impede, that outcome.

Ministerial discretion in making or varying a methodology determination

S47(1)(b) and S48(2)(b) provide that the Minister may choose not to make, or not to vary a methodology determination on the grounds of adverse environmental, agricultural, economic or social impacts.

This is inappropriate. These are planning issues and should be dealt with under State/Local Government planning schemes.

Insert the word "not" after the word "may" in S47(1)(b) and S48(2)(b) so that the Minister may **not** have regard for adverse environmental, agricultural, economic or social impacts in making or varying such a determination.

Measurement and assessment should not be discretionary

S57(1) sets out the criteria for a methodology determination to be judged as compliant with the biodiversity integrity standards. These criteria are cast as features of a biodiversity project which is governed by a specific determination.

Throughout this subsection the word 'should' is used rather than 'must'. Thus the determination may be judged to be compliant even where approved projects do not achieve the desirable features listed in this subsection. See, in particular, S57(1)(d):

“(1) For the purposes of this Act, a methodology determination complies with the biodiversity integrity standards if ... a biodiversity project carried out in accordance with the methodology determination should be designed to achieve enhancement or protection:

- (i) that is of biodiversity in native species; and
- (ii) that can be measured, assessed and verified;”

It is apparent that even the obligation to measure and assess is discretionary.

A scheme that may end up conferring financial benefit for big corporations, including aiding 'greenwashing' their projects, should not have such lax provisions.

Replace “should’ with “must” throughout S57(1)

Reporting intervals

S102(2)(c) and S102(2)(c) set maximum reporting intervals at 5 years. This is too long.

Replace 5 years with 2 years in S102(2)(c) and S102(2)(c)

Membership of NRMCM

S198(2). Given the role of the NRMCM is to provide expert advice to the Minister on matters relating to the measurement of biodiversity and ecological restoration, how can it be appropriate that a committee could be established with one or no persons with substantial experience/knowledge and standing in ecology?

Revise S198(2) to provide that persons with substantial experience/knowledge and standing in ecology or ecological restoration comprise at least two-thirds of the members.

S198(3) provides that the Chair of the NRMCM may not be an employee of the Commonwealth. This leaves open the possibility that Commonwealth employees with potential conflicts of interest (eg an employee of Treasury) may be members. This is not appropriate.

Employees of the Commonwealth Department of the Environment exist to advise the Minister independently of the Committee. Excluding government employees as members would not lead to any expertise deficit since S210 allows Government employees to assist/advise the Committee.

No member of the Committee should be an employee of the Commonwealth or any of its arms.

Auditors

S68(1)(f)(ii), S103(1)(d)(ii) and S122(1) provide for the appointment of biodiversity project auditors, in each case specifying that they be registered greenhouse and energy auditors.

Greenhouse and energy auditors are required to have specified training to be registered. This does not include training in biodiversity or ecology.

Whilst lead auditors for the nature repair market can seek expert advice they are not obliged to do so. This is an unnecessary weakness in the audit provisions.

Parliamentary consideration of this draft bill must be deferred pending the development of training requirements and a training package and negotiation with the CPA for the mounting of training, assessment and registration of auditors as biodiversity auditors. This may require amendments to other legislation.