Law Council
OF AUSTRALIA

Legal Practice Section

3 March 2023

Department of Climate Change, Energy, the Environment and Water
GPO Box 3090,
Canberra ACT 2601,

By email: naturerepairmarket@dcceew.gov.au

Dear Sir/Madam,

NATURE REPAIR MARKET BILL 2023 EXPOSURE DRAFT

1. The Australian Environment and Planning Law Group of the Law Council's Legal Practice Section (**AEPLG**) welcomes the opportunity to make a submission to the Biodiversity Market Team of the Department of Climate Change, Energy, the Environment and Water (**Department**) on the 'Nature Repair Market Bill 2023—Exposure Draft' (**Draft Bill**).

2. The AEPLG recognises that the *State of the Environment Report 2021* emphasised that innovative management and restoration schemes are required to address biodiversity decline in Australia.[1] This is mirrored by the findings of the 2020 review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (the **Samuel Review**).[2] The Samuel Review recommended that the Commonwealth Government investigate and consider "opportunities to leverage existing markets (including the carbon market) to help deliver restoration".[3] The AEPLG and the Law Council support the implementation of the reforms proposed in the Samuel Review.[4]

3. The Draft Bill, as the AEPLG understands it, would establish a framework for a national voluntary market for projects that (upon their approved registration) are determined to enhance or protect biodiversity in native species and in turn, generate biodiversity certificates that can be bought, sold, or cancelled (**NRM**). Establishing the NRM, being a novel market to foster private sector participation in restoration, is broadly consistent with the recommendations of the Samuel Review.[5]

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[1] Ian Creswell, Terri Janke and Emma L Johnston, "Australia State of the Environment 2021: Overview", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 11 (**Creswell, Janke and Johnston**); Helen Murphy and Stephen van Leeuwen "Australia State of the Environment 2021: Biodiversity", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 9 (**Murphy and van Leeuwen**).
[2] Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) (**Samuel Review**).
[3] Ibid, Recommendation 28.
[4] Law Council of Australia Media Release, *EPBC Act in need of fundamental and incremental reform* (19 July 2022).
[5] Samuel Review (n 2), Recommendation 28.

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4. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact The Australian Environment and Planning Law Group Chair, Robyn Glindemann on robyn.glindemann@lantegy.com.au

Yours sincerely



Geoff
Chair, Legal Practice Section

Law Council
OF AUSTRALIA

Legal Practice Section

26 May 2023

Committee Secretary
Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@apgh.gov.au

Dear Secretary

SUBMISSION: NATURE REPAIR MARKET BILL 2023 AND NATURE REPAIR MARKET (CONSEQUENTIAL AMENDMENTS) BILL 2023

1. This submission has been prepared by the Australian Environment and Planning Law Group (**AEPLG**) of the Law Council of Australia's Legal Practice Section. The AEPLG welcomes the opportunity to make a submission to the Environment and Communications Legislation Committee in relation to the Nature Repair Market Bill 2023 (**NRM Bill**) and the Nature Repair Market (Consequential Amendments) Bill 2023 (**NRM Amendments Bill**), (collectively, the **Bills**).

2. On 3 March 2023, the AEPLG made a submission to the Department of Climate Change, Energy, the Environment and Water (**Department**) during the second stage of public consultation undertaken in relation to what was then the exposure draft of the NRM Bill. A copy of that submission is **attached** to this correspondence.

3. Upon our review of the Department's publicly available stakeholder feedback document and the NRM Bill tabled on 29 March 2023, it appears that the issues raised in our previous submission have largely not been addressed in the NRM Bill or the NRM Amendments Bill.

4. We therefore restate and adopt the comments made in our previous submission for the purposes of making this submission to the Standing Committee.

Key Issues

5. As with our previous submission, the AEPLG draws particular attention to the following key issues and recommendations in relation to the NRM Bill and the NRM Amendments Bill:

(a) The NRM Bill is premature in the absence of detail about EPBC Act reforms

The Commonwealth Government is responsible for ensuring that Australia's international legal obligations are effectively implemented and delivered through domestic law. In relation to biodiversity conservation, the *Environment*

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Protection and Biodiversity Conservation Act 1999 (Cth) (**EPBC Act**) is the principal tool used to achieve this and requires that the Minister administering that Act to not act inconsistently with the *Convention on Biological Diversity*[1][2] in exercising his or her powers under the Act.[3] The EPBC Act, as the primary source of federal environmental regulation, has been criticised for its operative failure to arrest biodiversity decline.[4]

In addition to obligations already reflected in the EPBC Act, the Commonwealth Government has also recently committed to a new global biodiversity framework and specific conservation and restoration targets.[5]

In 2020, the EPBC Act underwent a review[6] and the Commonwealth Government has committed to reforming Australia's environmental laws to better protect, restore and manage the environment.[7] As at the date of this submission, details of the actual amendments proposed to the EPBC Act to reflect that commitment have not been released.

The AEPLG submits that the release of the NRM Bill and the NRM Amendments Bill in the absence of detail as to the specific amendments proposed to the EPBC Act misses the significant opportunity: for a coordinated position on biodiversity conservation and achieve Australia's recent biodiversity commitments; to address the matters discussed in the Samuel Review; and for the Bills to:

(1) be regulated by the proposed Commonwealth Environmental Protection Authority (**EPA**), which appears likely to be a better equipped entity to meet the objectives of and achieve compliance with the NRM Bill;

(2) align with the proposed National Environmental Standards generally, or at least aim to achieve the proposed conservation planning outcomes stated therein; and

(3) achieve the outcomes sought in the recommended National Environmental Standard for Indigenous Engagement and Participation in Decision-Making.

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[1] *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993).
[2] For example, as stated in ss 139 and 146K of the EPBC Act.
[3] Article 1 of the *Convention on Biological Diversity* states that "[t]he objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, … ."Article 6 provides that each Contracting Party shall, in accordance with its particular conditions and capabilities: develop national strategies, plans or programs for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programs to reflect the measures set out in the Convention relevant to the Contracting Party concerned; and integrate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programs and policies.
[4] Ian Creswell, Terri Janke and Emma L Johnston, "Australia State of the Environment 2021: Overview", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 11 (**Creswell, Janke and Johnston**); Helen Murphy and Stephen van Leeuwen "Australia State of the Environment 2021: Biodiversity", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 9 (**Murphy and van Leeuwen**).
[5] United Nations Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, UN Doc CBD/COP/15/L.25 (18 December 2022) (**Global Biodiversity Framework**).
[6] Graeme Samuel, Independent Review of the EPBC Act (Final Report, October 2020) (**Samuel Review**).
[7] Australian Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: Better for the Environment, Better for Business* (December 2022) (**Nature Positive Plan**).

It is also noted that the Bills do not require or recommend cooperation and consultation with the existing and long-established Threatened Species Scientific Committee established under the EPBC Act. This should be addressed.

The AEPLG submits that changes to incorporate the above would more appropriately integrate the NRM with the broader federal environmental framework, give increased weight to the proposed reforms and provide an opportunity to achieve the biodiversity objects stated in the NRM Bill.

(b) The Clean Energy Regulator is not the appropriate regulator

Compliance and enforcement of the Nature Repair Market (**NRM**) should be the responsibility of a regulatory body with the appropriate expertise, such as the proposed Commonwealth EPA.

While the AEPLG accepts that aligning the NRM with the existing Australian carbon market could deliver a greater incentive for investment and co-benefits for biological diversity and climate change, the Clean Energy Regulator (**CER**) is not sufficiently equipped in its purpose or functions to be responsible for compliance and enforcement of the biodiversity outcomes which underpin the effectiveness of the proposed NRM.

The AEPLG notes that one of the findings of the Chubb Review[8] is that the CER's "brief should be simplified and the role of the CER clarified". Instead of progressing that recommendation, the NRM Bill is contemplating that the CER be responsible for the achievement of both biodiversity outcomes and the creation and operation of a certificate trading market (which varies from the unit trading system adopted in the carbon market). The Bills propose a regime to be regulated by an entity without the expertise or resources to meet those outcomes. Simply amending section 18 of the *Clean Energy Regulator Act 2011* does not automatically imbue the CER with the necessary capacity or ability to adequately oversee the NRM.

(c) The NRM should not become a biodiversity "offset" scheme

The Australian Government's Nature Positive Plan suggests that the proposed Commonwealth EPA may allow certain types of nature repair market projects to be used to meet approval and/or offset obligations.

The AEPLG submits that it would be inappropriate to allow the use of NRM projects and biodiversity certificates issued under the NRM Bill as compliance offsets for biodiversity damage. This would undermine the integrity and effectiveness of the NRM to achieve its stated objective "to promote the enhancement or protection of biodiversity in native species in Australia"[9] and would not deliver a nature positive outcome.

[8] Ian Chubb et al, *Independent Review of ACCUs* (Australian Department of Climate Change, Energy, the Environment and Water, 2022) (**Chubb Review**).
[9] Section 3(a), NRM Bill. The AEPLG notes that the exposure draft of the NRM Bill sought "to facilitate" this objective rather than "to promote" the objective however, we do not consider that this changes the position.

The AEPLG foresees that by facilitating a biodiversity offset scheme, the biodiversity offset market that was driven by biodiversity damage is the antithesis of the market the government is seeking to engage.

(d) The NRM Committee

The appointment of NRM Committee members should be qualified in the NRM Bill by prescribing the number of committee members that can be drawn from a particular field of expertise or mandating that appointments to the committee must reflect a variety of representatives of the fields of expertise at any given time.

The AEPLG submits that prescribing that the Minister ensures that at all times at least one NRM Committee member has:

(1) substantial experience or knowledge; and significant standing in biological or ecological science relevant to the functions of the Committee; and

(2) substantial experience or knowledge; and significant standing in Indigenous knowledge relevant to the functions of the Committee;[10]

will not provide certainty or confidence that committee appointments will reflect the variety of expertise required to deal with the breadth of expertise necessary to carry out its various functions under the NRM Bill.

As stated in our previous submission, the NRM Bill falls short by not requiring a committee member to be a person who, to the Minister's satisfaction, has "substantial experience or knowledge and significant standing" in matters relevant to the scope of the NRM Bill and who identifies as Indigenous.

(e) The NRM and Indigenous consultation

The NRM Bill[11] should be amended to introduce a requirement to at least consult with appropriate or relevant Indigenous communities and Traditional Owners on proposed methodology determinations or biodiversity assessment instruments under the NRM Bill.

In places where native title or cultural heritage rights are likely to be affected, the agreement processes must be observed and early engagement encouraged.

(f) Recognition of Indigenous interests as "eligible" interests

As set out in the AEPLG's previous submission, the NRM Bill[12] does not recognise as "eligible interests" the interests of registered Indigenous claimants under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW) where the claim has not been determined. These interests amount to an inchoate right to the land.

[10] Sections 198(3) and 198(4), NRM Bill.
[11] Section 56, NRM Bill.
[12] Part , Division 2, NRM Bill.

These claimants may be prejudiced if there is a registered biodiversity project put in place over the land and their interests in the land are not recognised.

6. The Committee would welcome the opportunity to discuss this submission (and the attached documents). In the first instance, please contact the Australian Environment and Planning Law Group Chair, Robyn Glindemann on robyn.glindemann@lantegy.com.au.

Yours sincerely



Geoff Provis
Chair, Legal Practice Section

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OF AUSTRALIA

Legal Practice Section

Nature Repair Market Bill 2023—Exposure Draft

Biodiversity Market Team
Department of Climate Change, Energy, the Environment and Water

3 March 2023

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Mr Geoff Provis, Chair
- Dr Leonie Kelleher OAM, Deputy Chair
- Mr Ben Slade, Treasurer
- Ms Maureen Peatman
- Mr Andrew Smyth
- Ms Robyn Glindemann
- Mr Luke Barrett
- Mr Pier D'Angelo

Acknowledgements

This submission has been prepared by the Australian Environment and Planning Law Group of the Legal Practice Section and with input from the Indigenous Legal Issues Committee of the Law Council of Australia.

Introduction

Executive Summary

1. The Australian Environment and Planning Law Group of the Law Council's Legal Practice Section (**AEPLG**) welcomes the opportunity to make a submission to the Biodiversity Market Team of the Department of Climate Change, Energy, the Environment and Water (**Department**) on the 'Nature Repair Market Bill 2023—Exposure Draft' (**Draft Bill**).

2. The AEPLG recognises that the *State of the Environment Report 2021* emphasised that innovative management and restoration schemes are required to address biodiversity decline in Australia.[1] This is mirrored by the findings of the 2020 review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) (the **Samuel Review**).[2] The Samuel Review recommended that the Commonwealth Government investigate and consider "opportunities to leverage existing markets (including the carbon market) to help deliver restoration".[3] The AEPLG and the Law Council support the implementation of the reforms proposed in the Samuel Review.[4]

3. The Draft Bill, as the AEPLG understands it, would establish a framework for a national voluntary market for projects that (upon their approved registration) are determined to enhance or protect biodiversity in native species and in turn, generate biodiversity certificates that can be bought, sold, or cancelled (**NRM**). Establishing the NRM, being a novel market to foster private sector participation in restoration, is broadly consistent with the recommendations of the Samuel Review.[5]

4. The AEPLG generally supports the Draft Bill, however submits in summary that:

   (a) There is no indication in the Draft Bill that there is suggested or intended alignment with the proposed National Environmental Standards or the conservation planning outcomes proposed in the Department's *Nature Positive Plan*,[6] nor cooperation and consultation with the Threatened Species Scientific Committee. This calls into question the integration of the NRM with the broader framework of federal environmental law and the ability to achieve the biodiversity objects stated in the Draft Bill.

[1] Ian Creswell, Terri Janke and Emma L Johnston, "Australia State of the Environment 2021: Overview", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 11 (**Creswell, Janke and Johnston**); Helen Murphy and Stephen van Leeuwen "Australia State of the Environment 2021: Biodiversity", *Independent Report to the Australian Government Minister for the Environment* (Commonwealth of Australia, 2021) 9 (**Murphy and van Leeuwen**).
[2] Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020) (**Samuel Review**).
[3] Ibid, Recommendation 28.
[4] Law Council of Australia Media Release, *EPBC Act in need of fundamental and incremental reform* (19 July 2022).
[5] Samuel Review (n 2), Recommendation 28.
[6] Australian Department of Climate Change, Energy, the Environment and Water, *Nature Positive Plan: Better for the Environment, Better for Business* (December 2022) (**Nature Positive Plan**).

(b) The absence of a legislated target for biodiversity protection and restoration in accordance with the *Convention on Biological Diversity* (**CBD**) does not provide certainty to policy makers, businesses, investors and community sectors, and does not align the Draft Bill with Australia's international law commitments.[7]

(c) The provisions with respect to cancellation and excluded biodiversity projects lack the necessary detail to effectively guide the public, potential proponents and investors in those circumstances. This uncertainty does not give effect to rule of law principles, including that new laws should promote certainty and clarity, and promote transparent outcomes.

(d) Providing the Clean Energy Regulator (**CER**) with the responsibility of compliance and enforcement is questionable, given the CER's lack of resources to undertake this function and lack of expertise in assessing biodiversity outcomes and the findings of the recent Independent Review of Australian Carbon Credit Units (**ACCUs**) (the **Chubb Review**).[8]

(e) The membership structure for the Nature Repair Market Committee (**Committee**) could be qualified to strengthen the integrity and expert implementation of the Committee's functions.

(f) The lack of a requirement to consult with Indigenous communities and Traditional Owners on proposed methodology determinations or biodiversity assessment instruments does not have regard to the role that indigenous knowledge can play in helping to protect and manage biodiversity.

5. The AEPLG would welcome the opportunity to continue to engage with the Department as the reforms develop further.

The Law Council's Policy Framework

6. This submission is informed by the Law Council's Climate Change Policy and Policy on Sustainable Development.[9]

Climate Change Policy

7. The Climate Change Policy includes a commitment from the Law Council to advocate on federal climate change legislation on behalf of the legal profession and sets out three key principles for doing so.

8. The three key principles are:

(a) Australia's international law obligations with respect to climate change should be fully implemented domestically and should represent Australia's highest possible ambition (**implementation of international law obligations**);

[7] *Convention on Biological Diversity*, opened for signature 5 June 1992, [1993] ATS 32 (entered into force 29 December 1993) (**CBD**).
[8] Ian Chubb et al, *Independent Review of ACCUs* (Australian Department of Climate Change, Energy, the Environment and Water, 2022) (**Chubb Review**).
[9] Law Council of Australia, *Climate Change Policy* (November 2021); Law Council of Australia, *Sustainable Development Policy* (September 2019) (**Sustainable Development Policy**).

(b) Australia's response to climate change should give effect to rule of law principles, including that new laws in this area should promote certainty and clarity, and promote transparent outcomes (**rule of law principles**); and

(c) Australia's response should be fair and equitable and should promote public confidence (**a fair and equitable response**).

9. The principles are set out in full on pages 10–11 of the Climate Change Policy.

10. The AEPLG acknowledges that the Draft Bill is not specifically climate change legislation. However, it notes the Law Council's position in the Climate Change Policy that climate change and biodiversity conservation are inextricably linked:

> *Australia must also comply with other environmental treaties that are inextricably linked to the UNFCCC, particularly, the UN Convention on Biological Diversity, requiring a national biodiversity strategy and action plan; and the UN Convention to Combat Desertification, requiring measures to address desertification*.[10]
>
> …
>
> *Governments and regulators have taken steps in various ways to take into account the physical and transition risks of climate change. For example, climate change considerations are now incorporated in many assessment and decision making processes for water resource planning, biodiversity conservation, environmental impact assessment and planning and development. Financial regulators and the Australian Treasury are seeking to understand the impact of climate change on financial stability and the broader economy.*[11]

Policy on Sustainable Development

11. The Policy on Sustainable Development includes a commitment from the Law Council to advocate for the consistency in the application of sustainable development across jurisdictions and sets out nine key principles that comprise sustainable development.

12. The nine key principles are:

(a) *Natural resources should be exploited in a manner which is sustainable or prudent or rational or wise or appropriate* (**sustainable use**);

(b) *Effective integration of economic, environmental and social considerations in the decision-making process* (**integration**);

(c) *If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation* (**precautionary principle**);

(d) *The present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations* (**intergenerational equity**);

[10] Ibid [19].
[11] Ibid [28].

(e) *People within the present generation have equal rights to benefit from the exploitation of resources and from the enjoyment of a clean and healthy environment* (**intragenerational equity**);

(f) *Conservation of biological diversity and ecological integrity should be a fundamental consideration in all resource management and planning decisions* (**conservation of biological diversity and ecological integrity**);

(g) *Environmental costs should be internalised into decision-making for economic and other development plans, programs and projects likely to affect the environment* (**internalisation of environmental costs**);

(h) *The global dimension of environmental impacts of policies and actions should be considered* (**global dimension to implementation**); and

(i) *Decision-making about development that affects the environment or involves the exploitation of natural resources should respect, protect and fulfil human rights* (**interdependence of environmental protection and human rights**).[12]

13. The Draft Bill aims to "to facilitate the enhancement or protection of biodiversity in native species in Australia".[13] Accordingly, the objective of the Draft Bill correlates with a number of the principles from the Policy on Sustainable Development, including regarding sustainable use, conservation of biological diversity and ecological integrity, and interdependence of environmental protection and human rights.

Context

14. The *State of the Environment Report 2021* found that "[o]verall, the state and trend of the environment of Australia are poor and deteriorating".[14] With biodiversity in decline and the number of threatened species increasing, it is clear that environment across Australia is feeling significant stress.[15] Climate change, habitat loss and degradation, and invasive species were highlighted in the *State of the Environment Report 2021* as the key threats to Australia's biodiversity.[16]

15. Australia's obligations in relation to conserving biological diversity arise principally from being a signatory to the CBD.[17] As a party to the CBD, Australia has obligations to, among other things:

(a) establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity (Article 8(a));

(b) regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use (Article 8(c));

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[12] Sustainable Development Policy [4]-[6].
[13] Australian Department of Climate Change, Energy, the Environment and Water, *Nature Repair Market Bill 2023 - Exposure Draft* (December 2022) ss 3(a) (**Draft Bill**).
[14] Creswell, Janke and Johnston (n 1) 10, 12.
[15] Murphy and van Leeuwen (n 1) 7.
[16] Murphy and van Leeuwen (n 1) 8.
[17] As variously outlined in the Law Council of Australia Legal Practice Section's submission to the Parliamentary Senate Standing Committees on Environment and Communications on *Australia's Faunal Extinction Crisis*, 10 September 2018: 3505 - Australia's faunal extinction crisis.pdf (lawcouncil.asn.au)

(c) promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings (Article 8(d));

(d) rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia through the development and implementation of plans or other management strategies (Article 8(f)); and

(e) subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices, and encourage the equitable benefits arising from the utilization of such knowledge, innovations and practices (Article 8(j)).

16. The Commonwealth Government is responsible for ensuring that Australia's international legal obligations are effectively implemented and delivered through domestic law. In relation to biodiversity conservation, the EPBC Act is the principal tool used to achieve this and requires the Minister to not act inconsistently with the CBD in exercising her or his powers under the Act.

17. The EPBC Act, as the primary source of federal environmental regulation, has been criticised for its operative failure to arrest biodiversity decline.[18] Notably, the Samuel Review highlighted that investment in environmental restoration is required to reverse environmental decline and that attracting private sector investment is crucial in addressing the shortfall in restoration funding.[19]

18. Separately, the Commonwealth Government has recently committed to a new global biodiversity framework and specific conservation and restoration targets under the CBD.[20] Compliance with Australia's international law obligations is an important aspect of upholding the rule of law.

19. The AEPLG recognises that the Department has expressed an intention in its *Nature Positive Plan* (2022) to address the deteriorating state of the environment through a series of legislative reforms, of which the Draft Bill forms part.

Headline Views

20. The AEPLG draws particular attention to the following key issues and recommendations in relation to the Draft Bill.

Nature Positive Plan

21. The Draft Bill should expressly incorporate the reforms and principles in the *Nature Positive Plan*, including that the operation of the NRM must align with the proposed National Environmental Standards, and aim to achieve the proposed conservation planning outcomes stated therein. Further, the Draft Bill should require or recommend cooperation and consultation with the existing and long-established Threatened Species Scientific Committee established under the EPBC Act. The AEPLG submits that these changes would more appropriately integrate the NRM

[18] Murphy and van Leeuwen (n 1) 9.
[19] Samuel Review (n 2) 8.4, 8.4.2.
[20] United Nations Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, UN Doc CBD/COP/15/L.25 (18 December 2022) (**Global Biodiversity Framework**).

with the broader federal environmental law framework, give increased weight to the proposed reforms and provide an opportunity to achieve the biodiversity objects stated in the Draft Bill.

30 x 30 targets

22. As a party to the CBD, Australia has committed to the *Kunming-Montreal Global Biodiversity Framework*, which sets ambitious global targets to "…by 2030, at least 30 per cent of terrestrial, inland water, and of coastal and marine areas [are] effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures",[21] and "ensure that by 2030 at least 30 per cent of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration" (collectively, the **30 x 30 targets**).[22] The AEPLG submits that the Draft Bill should make an explicit reference to the 30 x 30 targets to provide a clear link between the framework for the NRM in the Draft Bill and Australia's international obligations and commitments.

The Clean Energy Regulator is not the appropriate regulator

23. Compliance and enforcement of the NRM should be the responsibility of a regulatory body with the appropriate expertise, such as a Commonwealth Environment Protection Authority. While the AEPLG accepts that aligning the NRM with the existing ACCUs market would deliver greater incentive for investment and co-benefits for biodiversity and climate change, the AEPLG submits that the CER, in its current form, is not sufficiently equipped or aligned in its purpose to be responsible for compliance and enforcement of the biodiversity outcomes which underpin the effectiveness of the NRM. In making this recommendation, the AEPLG has taken into account:

    (a) the Chubb Review, which found that "[t]he CER acts in a complex arena and its primary role in the ACCU scheme has been blurred by responsibilities added to its brief" and "[i]n the Panel's view, whatever positives may have been intended, a serious downside has been the perception that the CER has too many roles and could be, or is, or is just thought to be, conflicted because of that range of responsibilities".[23] The AEPLG notes the finding that the CER's "brief should be simplified and the role of the CER clarified", and the recommendation that CER's remit be confined to project monitoring, compliance and enforcement, and providing transparent project and scheme information.[24] It is important to bear in mind that the Draft Bill contemplates the achievement of both biodiversity outcomes and the creation and operation of a certificate trading market. Whilst the CER has the capability and experience to undertake the latter, the AEPLG holds the view that, in its current form and having regard to the findings of the Chubb Review, the CER is not best placed to achieve the biodiversity outcomes which are the objective of the Draft Bill. In the AEPLG's view, it is important to ensure that the NRM can achieve the ambitious objects of the Draft Bill, while allowing the CER to effectively perform its primary role in the ACCU scheme; and

[21] Ibid, Target 3.
[22] Ibid, Target 2.
[23] Chubb Review (n 8) 6.
[24] Ibid.

(b) the current scope of the *Clean Energy Regulator Act 2011* (Cth) (**CER Act**) is too narrowly defined to include the compliance and enforcement functions in the Draft Bill.[25] It is important that the NRM and the achievement of positive outcomes for biodiversity is central, and not ancillary, to the operation of the proposed trading market. While the CER Act permits the Regulator "to do anything incidental to or conducive to the performance" of the functions conferred upon it, it is difficult to see how tasking the CER to regulate all aspects of the NRM would facilitate the purpose of the NRM to achieve biodiversity outcomes.

The NRM Committee

24. The appointment of Committee members should be qualified by prescribing the number of Committee members that can be drawn from a particular field of expertise or mandating that appointments to the committee must reflect a variety of representatives of the fields of expertise, as stated in the Draft Bill, at any given time.[26] This would also better ensure that the Committee is equipped with the breadth of expertise necessary to carry out its important functions under the Draft Bill, and promote accountability in the decision-making process through diversity of expertise.

25. The AEPLG suggests that, for the reasons given below, Indigenous knowledge and ecological science are two fields where expertise is critical to the successful operation of the NRM Committee. Each of these fields should be represented by a member with appropriate expertise.

26. As currently drafted the Minister cannot make a methodology determination unless the NRM Committee advises that it is satisfied that the determination complies with the biodiversity integrity standards[27] and the NRM Committee must give reasons why it is so satisfied[28]. This is a key threshold determination upon which the integrity of the whole system depends. A methodology determination complies with the biodiversity integrity standards if it meets the requirements of paragraphs 57(1)(a)–(i) of the Draft Bill. As the name "biodiversity integrity standards" suggests, applying the biodiversity integrity standards requires a fundamental understanding of biological or ecological science.

27. The AEPLG notes that, in terms of being eligible to be a member of the Committee, the Draft Bill only requires (among other things) for a person to have, to the Minister's satisfaction, "a substantial experience or knowledge; and significant standing" in the field of expertise of "Indigenous knowledge relevant to the functions of the Committee."[29] The AEPLG submits that the Draft Bill falls short in this regard by not requiring a Committee member to be a person who, to the Minister's satisfaction has "substantial experience or knowledge and significant standing" in matters relevant to the scope of the Draft Bill and who identifies as Indigenous. This change would align with recommendations made in the Samuel Review and align with the outcome sought in the recommended National Environmental Standard for Indigenous Engagement and Participation in Decision-Making that:[30]

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[25] *Clean Energy Regulator Act 2011* (Cth) s 12.
[26] Draft Bill (n 13) ss 197-198.
[27] Ibid s.47(3).
[28] Ibid s.54(3).
[29] Ibid s 198(2).
[30] Samuel Review (n 2) Recommendations 5 - 8 and as detailed in Section 2.

Indigenous Australians are empowered to be engaged and participate in decision making, and their views and knowledge are respectfully and transparently considered in the legislative and policy processes that support the protection and management of the environment [under the EPBC Act].

The NRM and Indigenous consultation

28. The Draft Bill should be amended to introduce a requirement to at least consult with appropriate or relevant Indigenous communities and Traditional Owners on proposed methodology determinations or biodiversity assessment instruments under the Draft Bill. In places where native title or cultural heritage rights are likely to be affected, the agreement processes must be observed, and early engagement encouraged. Having regard to their intimate traditional ecological knowledge and cultural and spiritual connection to land and waters, the importance of full and proper engagement with Aboriginal and Torres Strait Islander peoples on environmental matters cannot be overstated.

Some Indigenous interests are not recognised in the Draft Bill as "eligible interests"

29. In the AEPLG's view, the UN Declaration on Rights of Indigenous People (**UNDRIP**)[31] is an authoritative international standard informing the way governments across the globe should engage with and protect the rights of Indigenous peoples.[32] Article 19 of the UNDRIP provides that States shall consult with indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[33] This principle should be reflected by a requirement to obtain the consent of Indigenous individuals and groups with "eligible interests" in land within the meaning of clauses 89–92 of the Draft Bill.

30. The Draft Bill should, but does not currently, recognise as "eligible interests" the interests of registered Indigenous claimants under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Land Rights Act 1983* (NSW) where the claim has not been determined. These interests amount to an inchoate right to the land.[34] These claimants may be prejudiced if there is a registered biodiversity project put in place over the land and their interests in the land are not recognised. In New South Wales, the AEPLG understands that the relevant Minister's consistent policy is not to deal with land while it is subject to an undetermined claim without the consent of the relevant claimant(s).

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[31] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) ('**UNDRIP**').
[32] See Media Release of 8 July 2022 https://www.lawcouncil.asn.au/media/media-releases/australia-must-formally-adopt-un-declaration-on-rights-of-indigenous-people; and see Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia, Senate Legal and Constitutional Affairs References Committee. 24 June 2022 found at https://www.lawcouncil.asn.au/publicassets/fbfd761e-43fe-ec11-945c-005056be13b5/2022%2006%2024%20-%20S%20-%20Inquiry%20into%20the%20Application%20of%20the%20UNDRIP%20in%20Australia.pdf
[33] UNDRIP, article 19.
[34] For New South Wales, and by analogy in the Northern Territory, see ***Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act*** (1993) 79 LGERA 430, 433–4 (Stein J).

Draft Rules to accompany Draft Bill

31. The Department should make available for consultation the rules referred to in the Draft Bill. In the Draft Bill's current form, the provision in respect of cancellation and excluded biodiversity projects lacks the necessary detail to effectively guide the public, potential proponents and investors.

NRM should not become a biodiversity "offset" scheme

32. The Australian Government's *Nature Positive Plan* suggests that the proposed Commonwealth Environment Protection Authority may allow certain types of nature repair market projects to be used to meet approval and/or offset obligations (such as those identified as 'like for like' projects certified through the nature repair scheme).[35] The AEPLG submits that it would be inappropriate to allow the use of such projects and biodiversity certificates issued under the Draft Bill as compliance offsets for biodiversity damage. This would undermine the integrity and effectiveness of the NRM to achieve its stated objective "to facilitate the enhancement or protection of biodiversity in native species in Australia" and would not deliver a nature positive outcome.[36] It could also lead to a biodiversity offset market that was by driven by biodiversity damage, the antithesis of the market that the government is hoping to tap. A carbon offsets scheme is qualitatively different and not comparable with a biodiversity "offset" scheme.

Comments on specific sections

Section 3

33. The AEPLG acknowledges that section 3 embeds the enhancement and protection of biodiversity in native species in Australia in the Draft Bill. However, the AEPLG suggests that the term 'restoration' be included in the section 3(a) object "to facilitate the enhancement or protection of biodiversity in native species in Australia". This amendment would better reflect the 30 x 30 targets and highlight the importance of restoring the degraded features of the environment.

Section 13

34. The AEPLG understands section 13 of the Draft Bill to provide the CER with the discretion to require further information from an applicant in relation to an application to register a biodiversity project pursuant to section 11. Notably, if an applicant fails to provide the information within the period specified in the notice, the CER may refuse to consider the application.

35. The AEPLG queries whether the discretion for the CER to specify in the notice the period in which the request must be complied with, in the absence of any legislative direction in relation to the minimum time period, could lead to unreasonable time limits being placed on requests for further information under section 13 of the Draft Bill.

36. The AEPLG recommends that the Draft Bill specify the minimum time period within which a notice can require the applicant to provide the information, such as a minimum period of 20 business days.

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[35] Nature Positive Plan (n 6) 22.
[36] Draft Bill (n 13) s 3(a).

Section 18

37. The AEPLG notes section 18 of the Draft Bill and the proposed requirement for written consent from relevant interest-holders before a biodiversity certificate can be issued for a biodiversity project. It is also noted that relevant-interest holders for the purpose of section 18 includes fee simple interest holders, Crown lands Ministers, native title bodies and Aboriginal land councils.[37]

38. The AEPLG supports the implementation of the principle of free, prior and informed consent of Indigenous communities contained within UNDRIP,[38] and recognises the importance of full and proper engagement with Aboriginal and Torres Islander peoples on environmental matters.

39. It is critical that any consent process under section 18 be informed by the core characteristics of 'free', 'prior' and 'informed' to ensure that the process taken to obtain consent from Indigenous communities is a true reflection of the principle.[39]

40. As stated earlier in this submission, the AEPLG considers that there are further opportunities for the Draft Bill to provide for more meaningful and full engagement with Indigenous communities in relation to biodiversity restoration, enhancement and protection. Some of those opportunities are identified later in this submission.

Section 33

41. Section 33 of the Draft Bill provides for a biodiversity project to be an "excluded biodiversity project if it is a project of a kind specified in the rules". There is some ambiguity as to exactly what will be an "excluded biodiversity project' and the way in which the Minister will assess and quantify whether there is a 'material adverse impact' on one of the variables listed under section 33(2) of the Draft Bill.

42. The AEPLG submits that the uncertainty about what types of projects will be excluded limits the ability of potential project proponents to begin preparing for and engaging with the NRM which could delay the achievement of positive outcomes for biodiversity.

43. The AEPLG suggests that the assessment of "material adverse impact" in subsection 33(2) of the Draft Bill should be clarified.

44. The AEPLG recognises that further guidance might be contained within the unreleased rules associated with the Draft Bill and the AEPLG would expect the opportunity to be consulted on the rules once a draft has been finalised.

Section 47

45. The AEPLG submits that the procedure for making a methodology determination is sound in principle. However, it submits that section 47 of the Draft Bill could be strengthened to ensure that methodology determinations are geared towards achieving the best outcomes for biodiversity and reflective of the objects of the Draft Bill.

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[37] Ibid ss 89-92.
[38] UNDRIP, art 32.
[39] See, *UN Permanent Forum on Indigenous Issues (UNPFII) Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent and Indigenous Peoples,* UNPFII 4th Sess, UN Doc E/C.19/2005/3, (17 February 2005), [46].

46. The AEPLG notes that pursuant to s 47(1)(a)(i) of the Draft Bill the Minster "must have regard to … whether the determination complies with the biodiversity integrity standards". The AEPLG submits that this does not create a sufficiently robust framework for ensuring that a methodology determination complies with the biodiversity integrity standards. Rather, the AEPLG recommends that requiring the Minister "to be satisfied … that the determination complies with the biodiversity integrity standards" would be more appropriate.

47. The AEPLG submits that the lack of a requirement to consult with the Threatened Species Scientific Committee when making a methodology determination is a missed opportunity for meaningful information and expertise knowledge sharing and likely to result in less than ideal outcomes for Australia's threatened species and ecological communities, which are under significant stress.[40] The AEPLG notes that the *Statement of Environment Report 2021* found that:[41]

> *In June 2021, more than 1,900 Australian species and ecological communities were known to be threatened and at risk of extinction.*
>
> *…*
>
> *Our continent supports nearly 600,000 native species, and a very high proportion of these are found nowhere else in the world (Cassis et al. 2017). For example, about 85% of Australia's plant species are endemic, and Australia is home to half of the world's marsupial species.*

48. The lack of a requirement to restore, enhance or protect threatened species, including matters of national environmental significance listed under the EPBC Act, has the potential to derail the effectiveness of the regime in terms of achieving positive biodiversity outcomes and protecting the Australian species and ecological communities known to be threatened or at risk of extinction.

49. Additionally, the AEPLG submits that the lack of a requirement to consult with Indigenous communities and Traditional Owners when making a methodology determination, or the biodiversity assessment instruments proposed to be made under section 59 of the Draft Bill, is another missed opportunity for meaningful information and expertise knowledge sharing.

50. In 2020, the Law Council of Australia made a submission to the Department of Agriculture, Water and the Environment in relation to the 'Statutory Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)' (**Submission to the Statutory Review of the EPBC Act**). Paragraph 159 of that submission stated:

> *Traditional land management practices and caring for country will vary from place to place and across the various different kinds of environment. The incorporation of traditional land management practices needs to be cognisant of these variances across the Australian landscape and, in order to achieve this, appropriate engagement and consultation with Traditional Owners is necessary. Whilst many of the activities could be categorised in fire management and flora and fauna care, these need to be incorporated in any land management plans and strategies. The unique traditional ecological knowledge of Traditional Owners has been curated over many thousands of years.*

[40] Submission to the Parliamentary Senate Standing Committees on Environment and Communications on *Australia's Faunal Extinction Crisis*, (n 14), paragraph 30, page 10.
[41] Murphy and van Leeuwen (n 1) 12, 14.

51. In turn, the Samuel Review found that:[42]

> *The EPBC Act heavily prioritises the views of western science, with Indigenous knowledge and views diminished in the formal provision of advice to decision-makers. This reflects an overall culture of tokenism and symbolism, rather than one of genuine inclusion of Indigenous Australians.*
>
> *While individuals may have good intentions, the settings of the EPBC Act and the resources afforded to implementation are insufficient to support effective inclusion of Indigenous Australians in the processes for implementing the Act. The cultural issues are compounded because the Act does not have the mechanisms to require explicit consideration of Indigenous community values and Indigenous knowledge in environmental and heritage management decisions. Although national protocols and guidelines for involving Indigenous Australians have been developed (AHC 2002; DoEE 2016), resourcing to implement them is insufficient and they are not a requirement.*

52. The AEPLG submits that, having regard to their intimate traditional ecological knowledge and cultural and spiritual connection to land and waters, Indigenous communities and Traditional Owners should be fundamental to the decision-making processes under the Draft Bill, including by requiring decision-makers to respectfully consider Indigenous views and knowledge when preparing methodology determinations under section 47 of the Draft Bill.[43]

Section 57

53. The AEPLG welcomes paragraph 57(1)(a) of the Draft Bill. Requiring that a biodiversity project results in the enhancement or protection of biodiversity that would be unlikely to occur if the project was not carried out is crucial to achieving positive biodiversity outcomes. Given the criticism of the potential double counting of offsets in the Samuel Review, this requirement for 'additionality' in the Draft Bill is important.[44]

54. The AEPLG suggests that the assessment of "significant adverse impact on biodiversity in native species" in paragraph 57(1)(b) of the Draft Bill should be clarified. In its current form, how the impact would be measured is uncertain. The AEPLG recognises that further guidance might be contained within the unreleased rules associated with the Draft Bill. The AEPLG would welcome the opportunity to comment on the proposed rules once a draft has been finalised.

Section 70

55. In its Submission to the Statutory Review of the EPBC Act, the Law Council noted in paragraph 169:

> *The common law, and statute law in Australia, has long recognised and protected private property rights. These private property rights now regularly fall into conflict with the EPBC Act, and State and Territory legislation relating to the protection of flora, fauna and ecological communities. With the growing protection of our environment it is timely to consider compensating private land owners when parcels or tracts of their land are sterilised from farming practices, or development, so as to maintain Australia's biodiversity. If suitable compensatory provisions cannot be made via offsets, 'carbon sequestration and vegetation / biodiversity offsetting*

[42] Samuel Review (n 2) 2.2.1.
[43] See for instance, Samuel Review (n 2) Recommendation 5.
[44] Samuel Review (n 2) 8.3.2.

> *programs', then private landowners should be compensated for the contribution they are making to the preservation of biodiversity within Australia. Compensation is paid by the Commonwealth, and the States and Territories, via various legislation, for the compulsory acquisition of land for a public purpose. It is time the Commonwealth considered introducing a compensatory regime to private landholders where, for the good of all Australians, their land is dedicated to the protection of our biodiversity.*

56. The AEPLG notes that in addition to section 70 of the Draft Bill, sections 72–74 provide the basis for landholders to be compensated through the obtainment of a biodiversity certificate which as personal property can be sold on the NRM.

57. The AEPLG is of the view that the requirements for the issue of a biodiversity certificate in section 70(2) of the Draft Bill provides the framework for achieving positive biodiversity outcomes in a way that can adequately compensate private landholders for the contribution.

Section 84

58. The AEPLG welcomes section 84 of the Draft Bill and the proposed ability for the Secretary to conduct a biodiversity conservation purchasing process, and recognises that this process could effectively incentivise investment in biodiversity from the private sector. Stimulating private sector investment in the NRM is fundamental to its success, however the Samuel Review found that:[45]

> *Government must lead investment in nature capital and deliver the mechanisms including the legal, governance and institutional foundations required to support private-sector investment and leverage public investment in restoration.*

Sections 94–95

59. The AEPLG supports the concept of making entries or notations in or on title registers or other documents kept by the relevant land registration official that indicate whether the relevant parcel of land is subject to a registered biodiversity project and a biodiversity maintenance area declaration. However, the AEPLG submits that the uncertainty of whether the project or maintenance area will be entered or noted on the parcel of land in the relevant register does not promote transparency or create a reliable system of information.

60. The AEPLG suggests that there should be a positive obligation imposed on the nominated person of a registered biodiversity project compelling the nominated person to notify the relevant land registration official of the project area so that the registered land registration official can make an entry or notation in or on title registers or other documents that indicates the existence of the project.

61. In the case of biodiversity maintenance areas, the AEPLG submits that a positive obligation should be imposed upon the CER compelling the CER to notify the relevant land registration official of the maintenance area so that the registered land registration official can make an entry or notation in or on title registers or other documents that indicates the existence of the maintenance area.

[45] Ibid 8.4.2.

62. The AEPLG submits that introducing the positive obligation to provide notice to the relevant land registration official upon registration of the project or declaration of the maintenance area would more adequately align sections 94–95 to the object of the Draft Bill “to contribute to the reporting and dissemination of information related to the enhancement or protection of biodiversity in native species in Australia”.