



Environmental
Defenders Office

Submission on the Discussion Paper - Nature Repair Market

27 September 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:

Nature Repair Market team
Department of Climate Change, Energy, the Environment and Water

Lodged online

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Acknowledgement

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations peoples. We acknowledge that not all First Nations peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

INTRODUCTION

EDO welcomes the opportunity to make a submission on the *Discussion Paper - Nature Repair Market (Discussion Paper)*.¹

As indicated in our earlier submissions on the development of the Nature Repair Market,² EDO supports investment in environmental restoration and funding for landholders across Australia for biodiversity stewardship. As a tool for supporting this, the Nature Repair Market, established by the *Nature Repair Act 2023 (Nature Repair Act, or Act)*, must deliver actual and timely environmental outcomes consistent with the objects of the Act. The Rules underpinning the Act, which further the design and operation of the Market, are a key component in ensuring environmental outcomes are achieved.

Our submission responds to a selection (but not all) of the questions set out in the Discussion Paper, under its key themes:

1. Biodiversity Projects
2. Biodiversity Certificates
3. The Register
4. Assurance and Notification

We note that the Discussion Paper is not exhaustive. There are other rule making powers in the Nature Repair Act not addressed in the Discussion Paper (for example, in relation to notification requirements, relinquishment notices, and variation of methodology determinations etc). While the Discussion Paper indicates that the Department welcomes comments on any rule making power in the Act, it does not clearly state whether further consultation will be undertaken on any other components of Rules currently in development.

Further, while the Discussion Paper provides an outline of what may be included in the Rules, further consultation on draft Rules, once developed, will allow stakeholders the opportunity to engage on the important detail and drafted provisions of the Rules.

We strongly encourage the Government to consult on full set draft Rules in due course.

¹ [https://storage.googleapis.com/files-au-climate/climate-au/p/prj2e537a410bf1c54f46e44/page/Nature Repair Market Discussion Paper Final 1 .pdf](https://storage.googleapis.com/files-au-climate/climate-au/p/prj2e537a410bf1c54f46e44/page/Nature%20Repair%20Market%20Discussion%20Paper%20Final%201%20.pdf)

² See:

- EDO, Submission on the Nature Repair Market Bill, 3 March 2023, available at <https://www.edo.org.au/wp-content/uploads/2023/03/230303-Nature-Repair-Market-Bill-EDO-submission.pdf>
- EDO, Submission to the Senate Standing Committee on Environment and Communications on the Nature Repair Market Bill 2023, 1 June 2023, available at <https://www.edo.org.au/publication/submission-to-the-senate-standing-committee-on-environment-and-communications-on-the-nature-repair-market-bill-2023/>

RESPONSE TO SELECTED DISCUSSION PAPER QUESTIONS

1. Biodiversity Projects

1.1 Project registration

Should existing projects be eligible to participate in the Nature Repair Market?

Existing projects should only be eligible to participate in the Nature Repair Market where they can demonstrate that the biodiversity outcomes delivered by the project are not already recognised and receiving benefit elsewhere (e.g. under another Scheme). Otherwise, a project would be 'double dipping' and receiving multiple benefits for the same outcomes.

The Discussion Paper indicates that projects could be 'transferred' or 'stacked' under the Nature Repair Market. To avoid double dipping it must be clear that:

- Any project that is transferred to the Nature Repair Market must not have received, or otherwise forego, any benefit already received, in order to receive the benefit of a Biodiversity Certificate.
- Any project that is stacked must not be receiving multiple benefits for the same outcomes. For example, a project may be able to receive Australia Carbon Credit Unit's (**ACCUs**) under the *Carbon Credits (Carbon Farming Initiative) Act 2011* for the carbon benefits it delivers and also be eligible for a Biodiversity Certificate under the Nature Repair Market for the Biodiversity Benefits. However projects that have been carried out under the Carbon + Biodiversity Pilot, and which have already received a benefit (i.e. a Biodiversity Payment Offer for the biodiversity outcomes delivered by the project), should not then be eligible to be registered and receive a Biodiversity Certificate under the Nature Repair Market (as the biodiversity outcomes of the project have already received a benefit).

Do you agree that each registered project must include activities beyond those required under a Commonwealth, State or Territory law?

Yes. In order to be eligible to participate in the Nature Repair Market, a registered project must include activities beyond those required under a Commonwealth, State or Territory law. This would be consistent with the first Biodiversity Integrity Standard in section 57(1)(a) of the Nature Repair Act, which provides that a biodiversity project result in enhancement or protection of biodiversity in native species that would be unlikely to occur if the project was not carried out.

1.2 Types of projects unable to participate in the scheme

Should the listed project types be excluded from the Nature Repair Market?

Yes, the project types listed in the Discussion Paper should be excluded from the Nature Repair Market.

- *Projects that are the planting of a species in an area where it is a known weed species:* Weed species are a biosecurity risk and a threat to native species. They can undermine the achievement of biodiversity outcomes. It is appropriate for these types of projects to be excluded from the market.

- *Projects that involve the establishment of a project on land that has been subject to illegal clearing of a native forest, or illegal draining of a wetland:* We agree that excluding such projects may ensure that land is not intentionally degraded to allow registration of a biodiversity project. It will also ensure that a landholder does not benefit from undertaking an illegal activity. We do not agree that a timeframe should be applied, after which a project on the cleared or drained area could be registered to restore the ecosystem. Restoration of an illegally cleared or drained area should be a remedial requirement following prosecution for illegal actions, and therefore would not be additional to what may be required by law.

1.3 Transitioning for varied or ceased methods

Should registered projects be required to transition to new or varied methods? What exceptions, if any, should be allowed?

Consistent with the findings and recommendations of the *2023 Review of the Carbon Credits (Carbon Farming Initiative) Act 2011*,³ we support the proposal that if a method is varied under the Nature Repair Act, projects under that method would generally be required to transfer to the varied method. This recognises that methodologies are updated from time to time, to correct errors and reflect advancements in the science. Updating methodologies is an important integrity tool allowing improvements to ensure methodologies and project registered under them are able to deliver genuine biodiversity outcomes. Requiring projects to update accordingly helps maintain Market integrity.

Exemptions to the requirement to transfer to new or varied method must be strictly limited, and should only be allowed in the case of projects that can demonstrate that biodiversity outcomes are being achieved. If a project cannot demonstrate this and is unable to transfer to a new or varied method, then it may be appropriate for relinquishment requirements to be activated.

2. Biodiversity Certificates

Do you agree with the proposed content of the biodiversity certificate?

We generally agree with the proposed content of a Biodiversity Certificate. We suggest the Biodiversity Certificate should link to the relevant project entry on the Register so additional information can be obtained if desired.

What specific project attributes should be included on a Biodiversity Certificate?

One of the key criticisms of establishing a Nature Repair Market, is how users would be able to understand and compare biodiversity outcomes across projects and certificates. The proposal to set and describe project attributes is intended to address these concerns. The Discussion Paper explains that project attributes could provide the potential to describe the biodiversity outcome of a project through a standard set of attributes, allowing buyers to compare different types of

³ <https://www.climatechangeauthority.gov.au/sites/default/files/documents/2023-12/2023%20Review%20of%20the%20Carbon%20Credits%20Act%202011%20-%20publication.pdf>

biodiversity projects and make informed decisions about the comparative value of Biodiversity Certificates.

The proposed project attributes set out in the Discussion Paper are a useful starting point for discussion. One additional attribute that could be considered is assessment of actual changes against expected benefits. In terms of threats, it would be useful to also consider a risk assessment of threats that are not currently present but have the potential to arise. The Department should consider the input from scientific experts in finalising suitable project attributes.

3. The Register

Do you agree with the proposed project information and certificate information to be included on the Register?

As noted in the Discussion Paper, the Nature Repair Act requires the CER to keep a Register on its website. The Act establishes some of the content that must be on the Register about biodiversity projects and certificates, with additional information to be prescribed by the Rules or a method.

In general, we agree with the Project Information (set out in section 3.1 of the Discussion Paper) and Certificate Information (set out in section 3.1 of the Discussion Paper) proposed to be included on the Register.

Notably, it appears that this information is to be entered into the Register in a format to be determined. There does not appear to be any requirement in the Act for specific documents or decisions to be made available on the Register. In order to improve transparency and allow relevant stakeholders and the broader community to understand if projects are compliant and delivering biodiversity outcomes, we agree that the Rules should require that certain documents submitted, or decisions made, under the Act to be made available on the Register. For example, Table 4 proposes that a link to electronic versions of project plan be included on the Register. Similarly, the Discussion Paper indicates that biodiversity project reports are intended to be made available through the Register, and it is proposed to include links to those reports on the register.

4. Assurance and Notification

4.1 Biodiversity project reports

Do you agree with the proposed content for Category A biodiversity project reports?

In general, we agree with the proposed content for Category A biodiversity project reports.

Should a Category B biodiversity project report be required every 5 years?

We support the proposal that a Category B biodiversity project report be required every 5 years. As noted in the Discussion Paper, this would support the power in the Act for the Clean Energy Regulator (CER) to consider cancellation of a registered project 5 years after its registration, where the project has not commenced or is unlikely to result in issuing of a biodiversity certificate. It may also inform the need for other appropriate action under the Act, including audits, or assist in ensuring compliance with notification requirements.

Notably, the Discussion Paper does not propose content for Category B biodiversity project reports and suggests this will continue to be considered as the methods are developed. There should be further consultation on this before the Rules are finalised.

4.2 Audits

Do you agree with the proposed requirements and contents of an audit report at the time of certificate issuance?

We agree with the proposed requirement to require an audit report to accompany the initial Category A biodiversity project report provided at application for a Biodiversity Certificate for all biodiversity projects. This is an important mechanism that can help safeguard the integrity of the Market.

We do not agree that an appropriate exemption would be ‘where the method provides an exemption from an audit at application’. Without clear limitations on the scope of what a method may exempt, this is too broad and may lead to methods overriding audit requirements with no justifiable reason.

Without further detail, we also have concerns with the proposal for an exemption from audit requirements where an agreement under section 104A exempts the project from requiring an audit report at application. We have overarching concerns about section 104A of the Act, which provides for alternative assurance mechanisms. There are few restrictions on how this provision may be used, and it has the potential to undermine the more rigorous provisions of the Act. Section 104A(1)(c) requires a written agreement made under section 104A to contain one or more assurance measures, where each measure is of a kind prescribed by the Rules. The Discussion Paper does not provide detail to the types of assurance measures that may be prescribed by the Rules.

What factors should determine the number and timing of audits for Category A or B biodiversity project reports? Should the CER have authority to set additional audits requirements, or should these be limited to proponent consent? Under what circumstances should the CER require an audit with the next biodiversity project report?

Audits are a useful safeguard mechanism to ensure projects are meeting relevant requirements and can sure up integrity of the Market. Therefore, it may be appropriate for an audit to accompany all biodiversity project reports. If this is not implemented, then the Rules should allow for triggered audits, where the CER can give the project proponent notice of requiring an audit to accompany a biodiversity project report. The CER should also be able to set additional audit requirements.

4.3 Notification – Significant Reversal

Do you agree with the proposed definitions of significant and not significant reversals of biodiversity outcomes for notification?

The definitions of significant and not significant reversals are key elements of the framework and something that we originally argued should have been included in the Act itself. It is useful to now see detail of these definitions in the Discussion Paper.

Significant reversal

As outlined in the Discussion Paper, it is proposed to define a reversal of biodiversity outcome to be a significant reversal for notification, if:

- the size of the project area in which the reversal occurs is at least 10% of the total project area; or
- the effect on the project area is important, notable or of consequence to the biodiversity outcome to which the project relates.

It is unclear if the terms ‘important’, ‘notable’ or ‘of consequence’ will be further defined, or if further guidance will be made available, especially given the Discussion Paper indicates that those terms are drawn from *Significant Impact Guidelines for Matters of National Environmental Significance*⁴ which provides detailed guidance for decision makers under the *Environment Protection and Biodiversity Conservation Act 1999*. It is also unclear how the proposed requirement that the project proponent must have regard to the context or intensity of the event or conduct will be incorporated into the Rules. Given the importance of these definitions and the role the relevant provisions play in safeguarding biodiversity outcomes, there needs to be sufficient clarity around the definitions and further guidance where relevant.

No significant reversal

As outlined in the Discussion Paper, it is proposed to prescribe that a reversal was not a significant reversal for notification:

- where less than 5% of the total project area is affected,
- the effect on the project area in which the reversal occurs is minor and likely to be resolved within a short period of time and without the need for any actions/intervention by the project proponent, or
- it involves an action that is consistent with a variation to the registered biodiversity project that has been approved by the CER and taken effect.

We do not agree that ‘not a significant reversal’ should include ‘where less than 5% of the total project area is affected’. An arbitrary % figure has no scientific basis. It would be useful to understand how the 5% and 10% figures were determined in the context of these definitions. Depending on the size of the entire project this may be a large area, or, irrespective of size, there may be circumstances where the effect on the project area is important, notable or of consequence to the biodiversity outcome - for example, if that 5% of total area happens to include a substantial percentage of all hollow-bearing trees. We suggest removing the 5% of the total project area criteria, noting that if the effect is minor it would be deemed not significant under dot point two in any case, and would not otherwise be deemed to be significant unless it meets the definition of significant reversal proposed. If the ‘5% of total area’ is to be retained, it could perhaps be qualified, for example ‘where less than 5% of the total project is affected and there are no obvious markers of change or no other ecosystem health issues observed’. Additionally, for areas between 5% and 9%, there should be a clear oversight mechanism to closely monitor biodiversity outcomes and respond if reversal becomes significant.

⁴ https://www.dcceew.gov.au/sites/default/files/documents/nes-guidelines_1.pdf