Senate Standing Committees on Environment and Communications

Submission to Inquiry on:

Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023

Photo credit: the author, Blue Mountains World Heritage Area

Submission author:

Dr Peter Burnett
ANU College of Law
[redacted]

31 May 2023

Preliminary Matters and Overview

I make this submission in response to the Committee's Inquiry into the Exposure Draft Nature Repair Market Bill 2023 (NRM Bill) and Nature Repair Market (Consequential Provisions) Bill 2023 (CP Bill).

I am an Honorary Associate Professor at the ANU College of Law, researching in the fields of environmental law and policy. I have a doctorate in this field and a master's degree in Public Law; I held a range of senior executive positions in the federal and ACT environment departments between 1996 and 2013, including several First Assistant Secretary positions responsible for environmental policy and regulation.

I have used the following shorthand terms in this submission:

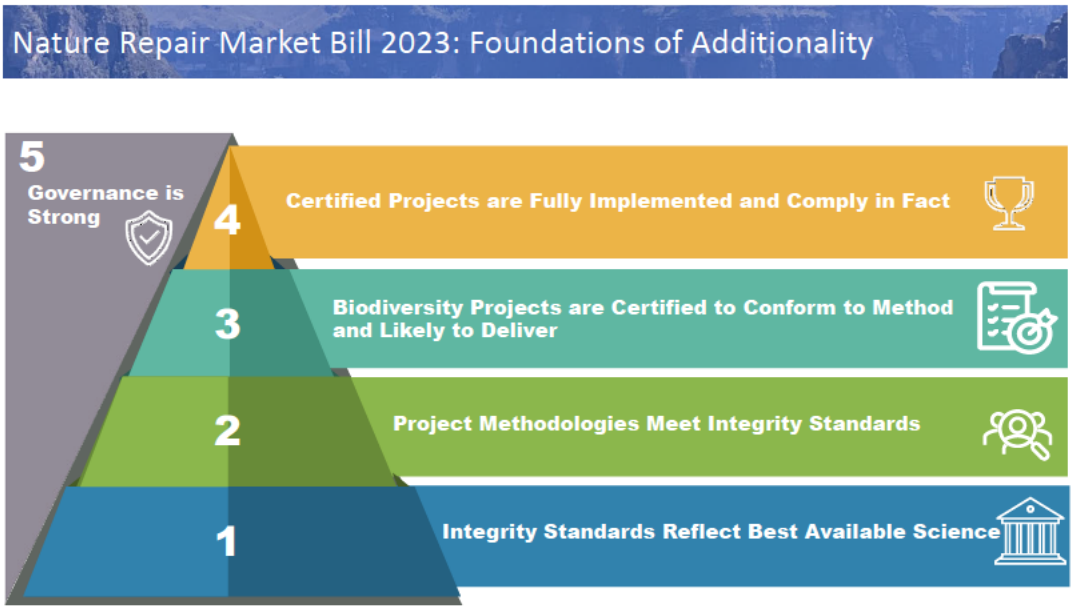
'NRM Committee' for the Nature Repair Market Committee proposed under the NRM Bill
'Regulator' for the Clean Energy Regulator
'Scheme' for the scheme proposed for enactment by the Bill

The Scheme is directed to a goal that projects certified under the Bill achieve their intended additionality, ie that they enhance biodiversity to the full extent proposed in the project design and as certified by the Regulator in conformity with a methodology that in turn meets integrity standards. I support the general intent of the Bill and the concept of paying primary producers to conserve and restore biodiversity.

While I largely confine my comments to the design of the Scheme as reflected in the Bill, I make the further preliminary comment that, in the absence of significant investment by government, I would expect demand for projects to be limited. Without some form of incentive or compulsion, the business case for the private sector to participate in the Scheme appears limited to increasing social licence, philanthropy and acquiring biodiversity offsets. In this regard I am sceptical of the figure cited by the Government from a report by Price Waterhouse Coopers, which estimates the value of private biodiversity, conservation and natural capital investments in Australia, in 2050, at $78 billion, around nine times the $8.5 billion estimate for government expenditure and subsidies in the same year.[1] Noting that the report does not identify a client, perhaps the report was intended to encourage future business for the firm?

In my view the Scheme rests on five foundations, as illustrated in Figure 1.

[1] Price Waterhouse Coopers Australia (2022) *A nature-positive Australia: the value of an Australian biodiversity market*, 15.



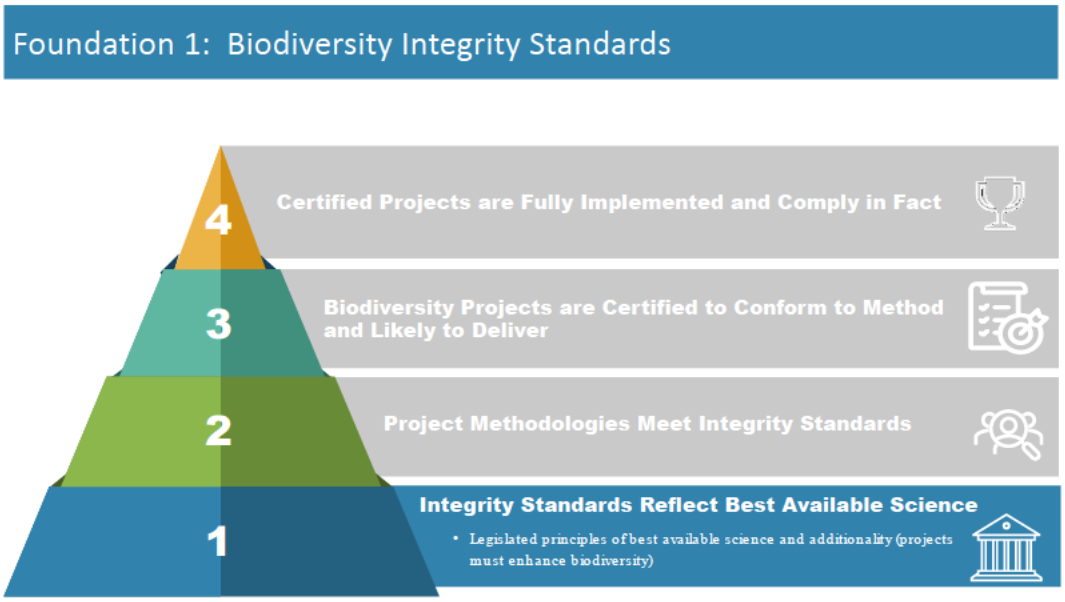
These foundations are:

- statutory biodiversity integrity standards based on best available science;
- biodiversity project methodologies that meet the integrity standards;
- certification of biodiversity projects as conforming to methodologies and sufficiently implemented as to be likely to deliver;
- full implementation of projects in compliance with their certification; and
- strong governance that delivers: role separation, including independence of expert advice; transparency; accountability; and dynamic review

I argue below that the Bill lays these foundations to varying degrees but does not develop them to full effect. I address the issues arising from this in order of concept rather than order of sections. Where relevant, I have taken into account the Government's *Nature Positive Plan* of December 2022 and the recommendations of the *Independent Review of Australian Carbon Credit Units* (Chubb Review), noting that the Government has endorsed the Chubb recommendations in principle and announced its intention to align this bill with them.

I would also make the general observation that a scheme such as this is directed to achieving two related objectives, the enhancement of biodiversity and the facilitation of markets in biodiversity by ensuring the integrity of those markets. The first objective is directed to the public interest while the second addresses both public and private interests. I think it important to keep in mind that the Scheme will only be successful if it advances and protects both public and private interests.

Biodiversity Integrity Standards (Part 4, Div 3)



The Biodiversity Integrity Standards would be set by Parliament and provide the primary foundation for the entire scheme. The essence of the standards as drafted is that a project carried out in accordance with the relevant methodology should be designed to enhance or protect biodiversity in a way that can be measured, assessed and verified. Clause 57 provides that a methodology determination complies with the standards if certain requirements are met; one of those requirements is that a methodology must be supported by 'clear and convincing evidence'.

General

The standards would be more readily identifiable if they were stated directly: ie. in the form 'the standards are …' rather than 'a methodology determination complies with the standards if …' A further provision could then provide that methodologies must comply with the standards.

Recommendation 1.1

Draft clause 57 in the form 'The biodiversity integrity standards are …' and then provide that a methodology must comply with the standards.

Enhancement or Protection

The standards and the objects refer to enhancing or protecting biodiversity. Although the terms 'enhanced' and 'protected' are not defined, biodiversity would presumably be 'protected' if a loss of biodiversity, due to human activity, were *avoided*.

The problem with such 'avoided loss' is that it requires one to consider whether and when loss would occur - ie to consider a counterfactual situation. To justify *compensating* someone on the basis of an avoided loss that would be *human-induced*, that loss must be *objectively likely*. The only conclusive evidence of likely human-

induced loss is that a person has obtained a specific regulatory approval to initiate the loss; and the only conclusive evidence that such a loss has been avoided is that the person has *surrendered* that approval. To avoid 'gaming' of the Scheme, such approvals should have been obtained before the Scheme was announced and be likely to be acted on in the near future.

However, the number of persons who could satisfy these criteria is likely to be very small. Given this; the fact that 'avoided loss' credits or offsets do not deliver additionality; and consistent with the government's stated intention in the *Nature Positive Plan* and its response to the Chubb Review to move away from avoided loss offsets; it would enhance the credibility of the scheme if avoided loss projects were ineligible.

On the other hand, active *conservation* of existing biodiversity, which may be under threat from natural processes such as the spread of weeds and pests, is quite consistent with an overarching objective of enhancing biodiversity. I suggest therefore that the bill be amended to provide for the 'enhancement' (only) of biodiversity, which would be defined to include the taking of active measures to conserve existing native species such as fencing or weed removal.

Recommendation 1.2
Amend the bill, to provide for the 'enhancement' of biodiversity rather than 'enhancement or protection' and define enhancement to include the taking of active measures to conserve existing native species such as fencing and weed removal.

Objectivity and Best Available Science
There are three problems with the approach in clause 57 to evidence.

First, several paragraphs refer to project design rather than to the likelihood of projects achieving their designed outcomes. This might be argued to make the designer's subjective *intent* relevant to the standard, whereas clearly a standard should be objective. To make it clear that this is the case, the paragraph should instead refer to the approval of a methodology on the basis that projects which conform to the methodology are *likely* to achieve the enhancement specified in the method.

Second, in setting standards the likelihood of a proposed methodology achieving its intended additionality should not be based on 'evidence' (which implies that the Committee must directly evaluate existing on-ground experience, of which there may be none) but on *knowledge*, in the form of relevant scientific results published in the peer-reviewed literature ('best available science'). The effect of this modified requirement is that any view taken by the Committee must be based on what is accepted by scientists in the relevant fields, rather than just their own views.

The precedent for this proposal is the legislative history of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Carbon Farming Act). In its original form, s 133 of the Carbon Farming Act required that the Emissions Reduction Assurance Committee (ERAC, corresponding to the NRM Committee in the scheme here) apply 'relevant scientific results published in peer-reviewed literature'. This was replaced with the current requirement for 'clear and convincing evidence' in 2014. The rationale for this amendment was that it would contribute to 'streamlining' the process of determining methodologies and provide 'greater flexibility', but in my view the effect of the amendment was to weaken the principle that science-based standards should be based on the best available science, which would be found in the peer-reviewed literature.

Third, the clause makes no reference to enhancement being measurable, when measurability is critical to assessing enhancement.

Recommendation 1.3
Amend clause 57 to base the standard on the likelihood that projects conforming to a methodology will achieve a measurable enhancement of biodiversity.

Recommendation 1.4
Amend para 57(1)(e) to provide that a methodology complies with the standards if it is supported by best available science, defined as 'relevant scientific results published in peer-reviewed literature'.

Default Permanence Period

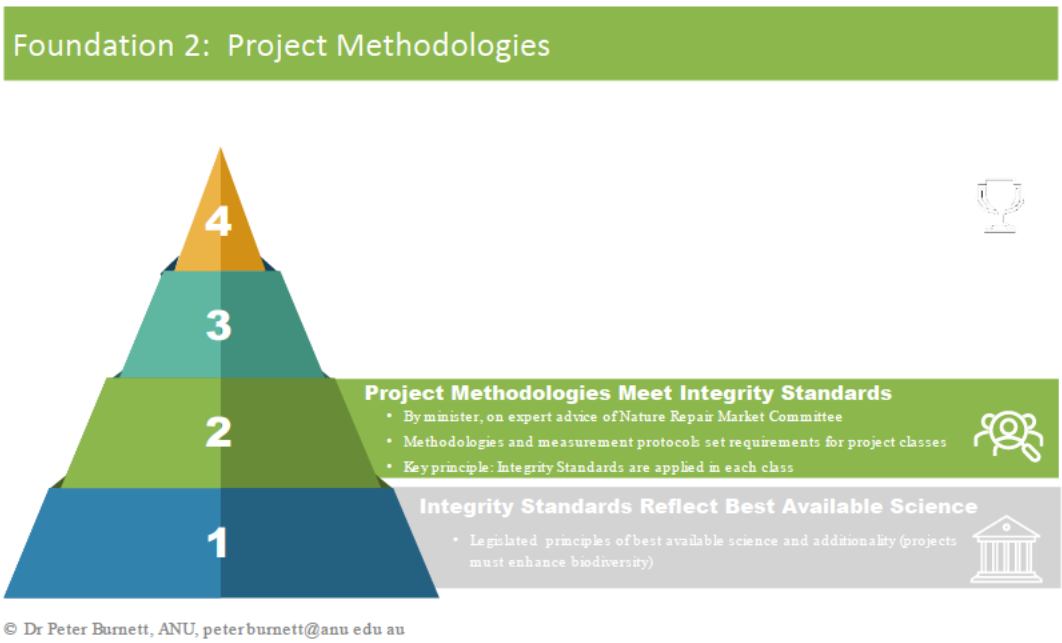
Clause 34 provides appropriately that the permanence period for a project is the period in the relevant methodology determination, *if* the determination deals with that issue. In the absence of a permanence period under a methodology, the default permanence period is 25 years. This is, in effect, a standard.

In my view this is too short. To ensure that additionality reaches its full potential (eg when seedlings grow to mature trees); is *meaningful* (by enduring); and that the application of the scheme is cost-effective, it should last for a very substantial term. The default period should be 100 years; this would still allow a methodology to set a different period where appropriate, although I would all propose that the minimum such period be 50 years, as anything less than this is making a contribution to biodiversity too small to justify the application of public resources through the Scheme.

Recommendation 1.5
Replace clause 34 with a default standard permanence period for projects of 100

years; where the methodology sets the permanence period, the minimum period should be 50 years.

Project Methodologies



Procedure for Making a Methodology

In general, the minister determines methodologies with the advice of the NRM Committee. In this regard, the drafting of clause 47 needs clarification: subclause 1 appears to contemplate that the minister could determine a methodology without the advice of the Committee, while subclause 3 implies that this may not be what is intended.

Because methodologies are purely technical and rely on expert advice, I propose that the substance of the clause be that the minister may only make a determination *on the advice* of the Committee (ie in a form recommended by the Committee). She may however decide not to make the recommended determination for policy reasons (para (1)(b)(i)). In other words, while the Minister should decide *whether* to make an instrument; she should either accept or reject the expert advice of the Committee, but have no power to adopt it *selectively,* possibly on political grounds. This helps to ensure appropriate *role separation*. (This is a general point — I make a related recommendations below.) However, if the minister had technical concerns, she could raise these with the NRM Committee, who could then consider whether to amend their advice.

Further, I do not think it is good administrative law practice to confer discretion on a

decision-maker to consider 'other matters as the Minister thinks relevant'. If there are other relevant considerations, they should be listed in the bill.

Recommendation 2.1

Amend clause 47 to provide that the minister may only make a methodology determination on the advice of the NRM Committee, but retain her capacity to decide not to make the recommended determination for the policy-related reasons in para (1)(b)(i), or to raise technical concerns with the Committee, who could then consider whether to amend their advice. Omit para (1)(b)(ii).

Biodiversity Assessment Instruments

Part 4 Division 4 provides for 'biodiversity assessment instruments', which appear to be concerned with consistency in the application of methodologies.

The terminology in this division is confusing. Biodiversity assessment instruments relate mostly to the measurement or evaluation of change in biodiversity rather than 'assessment'. Further, a standardised approach to technical issues is commonly referred to as a protocol. I therefore suggest the 'biodiversity assessment instruments' become 'biodiversity measurement protocols'. (To the extent that the minister may wish to make rules going beyond such technically-based protocols, she has a rule-making power under clause 237.)

Recommendation 2.2

Amend 'biodiversity assessment instruments' to 'biodiversity measurement protocols'

Clause 59 provides for the minister to make these instruments 'having regard to any advice' from the NRM Committee and to 'such other matters as the Minister thinks relevant':

As argued above in relation to methodology determinations, on expert technical matters such as this the minister should either accept or reject the advice of the NRM Committee, to maintain separation of roles. (There is no problem with role separation however if the minister raises technical concerns with the Committee and they decide to amend their advice.)

Again, I do not think it is good administrative law practice to confer discretion on a decision-maker to consider 'other matters the Minister thinks relevant'. If there are other relevant considerations, they should be listed in the Bill.

Recommendation 2.3

Amend clause 59 to require the Minister to make instruments on the advice of the Committee, but allow her to decide not to make an instrument, or to raise technical concerns with the NRM Committee, who could then consider whether to amend their advice. Also, omit para 59(1)(b) or replace it with a list of other *specific* matters which the minister should consider.

Clauses 47 and 64 makes it clear that only the Minister can initiate advice from the Committee on the making, amendment or revocation of a methodology or biodiversity assessment instrument. Because these instruments are of a purely technical nature, and because the Committee has more general roles under clause 195 of advising the minister about biodiversity projects and reviews of methodology determinations, in my view the Committee should also be able to advise the minister about biodiversity assessment instruments, including the need for new, amended or replacement instruments, of its own motion.

Recommendation 2.4

The Committee should be able to advise the minister about methodologies or biodiversity assessment instruments/measurement protocols (including to propose a new, amended or replacement instrument) either of its own motion, or at the minister's request.

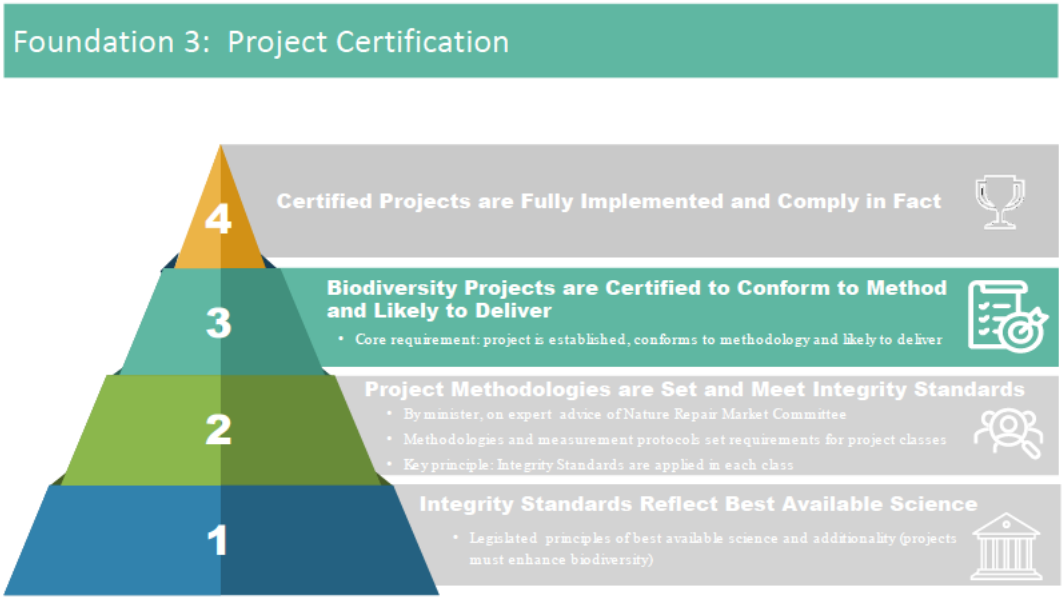


Figure 4

Biodiversity Projects are Certified to Conform to Method and Likely to Deliver

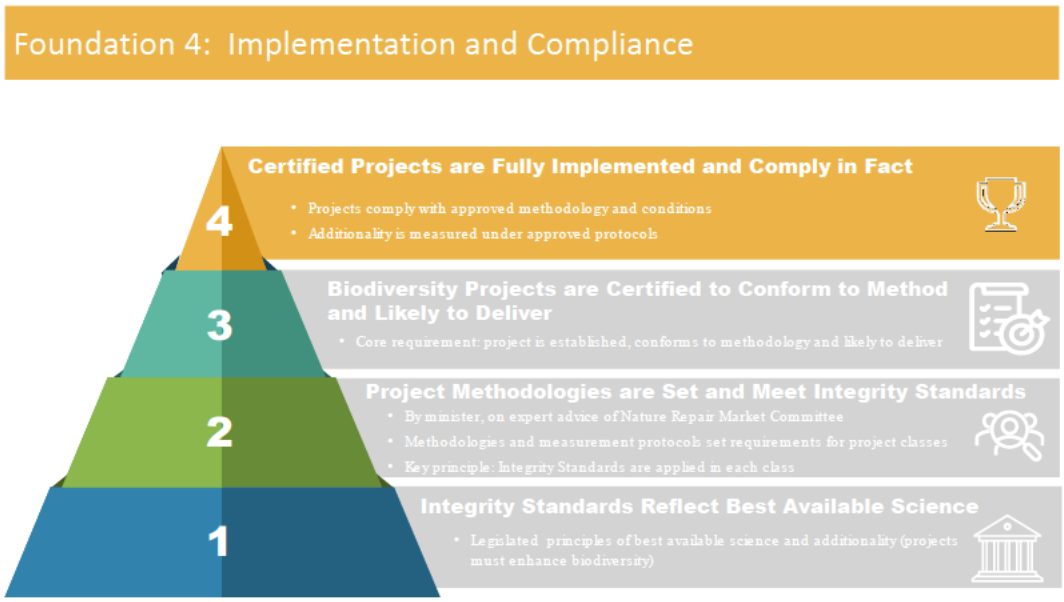
Auditing of Projects

Various provisions, eg Part 5 Division 2 relating to the issuing of biodiversity certificates, require an audit. In each case the auditor must be a 'registered greenhouse and energy auditor', a term defined in section 7 by reference to the same term as defined in the *National Greenhouse and Energy Reporting Act 2007*. This is confusing. In my view the bill should provide instead for the registration of 'biodiversity auditors', whose qualifications must be relevant to the functions of auditors under the Act.

Recommendation 3.1

Include provision to register appropriately qualified 'biodiversity auditors' for the Scheme.

Certified Projects are Fully Implemented and Comply in Fact



Monitoring and Reporting Requirements (Part 9)

Broadly, the Bill requires proponents to report at prescribed intervals after registration, and after certification on an up-to-five yearly basis (or other period as agreed). In my view this will not provide a sufficient flow of information on the success of the Scheme. Projects can fail to meet expectations for a variety of reasons, yet achieving and maintaining full additionality is central to achieving both the public and the private benefits of the Scheme, while a high level of assurance that projects are being implemented as approved is vital to the integrity of the market. Consistent with the object of the scheme to contribute to contribute to building the knowledge base concerning biodiversity (cl 3(d)), it would also be appropriate to provide for monitoring and reporting of Scheme outcomes overall.

I propose that Part 9 be expanded or supplemented by a new part requiring that the Regulator develop a rolling program of monitoring and auditing, and to implement that program once it has been approved by the minister. The program should be developed on the basis that it would provide the Regulator with sufficient information, first to be able to evaluate the Scheme's progress against its objects and second to undertake a credible program of compliance and enforcement.

The functions of regulator should be expanded accordingly. Under clause 219, the Regulator has a function of monitoring compliance with the Scheme under clause 219,

(which, confusingly, is headed as 'miscellaneous functions of the Regulator') but is not given the function of enforcing it. The Regulator's functions should be expanded to include enforcement and their monitoring and audit powers should be broad enough to support this function. Further, the Bill should make it clear that the staff of the Regulator are eligible for appointment as biodiversity auditors to assist in the performance of this function.

Recommendation 4.1
Amend or supplement Part 9 to require that the Regulator develop a rolling program of monitoring and auditing, and to implement that program once it has been approved by the minister. The bill should require the Regulator to develop the program on the basis that it would provide them with sufficient information, first to be able to evaluate and report on the scheme's progress against its objectives and second to implement a credible program of compliance and enforcement.

Recommendation 4.2
Amend clause 219 to make it clear that the Regulator's functions include compliance and enforcement as well as monitoring and clarify that that suitably qualified staff of the Regulator are eligible for appointment as biodiversity auditors.

Significant Reversal of Outcome (Part 9 Division 3; Part 13 Division 2)
Clause 109 requires a project proponent to notify the Regulator on becoming aware of a 'significant reversal' of the biodiversity outcome to which the project relates. Clauses 146 and 147 then allow the Regulator to give a proponent a notice to relinquish the biodiversity certificate; if the reversal is not the proponent's fault, the proponent must be given time to mitigate the reversal.

'Reversal' is undefined and on its dictionary sense of a change to an opposite course is too narrow. The bill should also be concerned with a failure to achieve, additionality, eg through deliberate or unintended delay. 'Loss or impairment of additionality' would be a more accurate term than 'reversal'.

Recommendation 4.3
Replace references to significant biodiversity 'reversal' with 'significant loss or impairment of additionality'.

Audits (Part 11)
This part provides for two kinds of audits, 'compliance' audits and 'other' audits.

The Regulator may initiate a compliance audit only if he or she suspects a contravention of the Act, in which case he or she may direct the proponent to underake an audit. The proponent is able to seek reimbursement for the cost of the audit. An 'other' audit under cl 122 is defined by reference to compliance with the Act

but, given that cl 121 is based on suspicion of non-compliance, it is presumably intended for use in routine assessment of compliance. Strangely, the Regulator appoints the auditor for an 'other' audit but a proponent under suspicion appoints their own auditor.

A single power to audit for compliance with the scheme would be sufficient to support both an ongoing audit program and the ability to audit reactively in response to suspected non-compliance. In all cases the Regulator should appoint the auditor. The Regulator should also have the capacity to use their own officers to do an audit, so the Bill should make it clear that appropriately qualified officers can be appointed as biodiversity auditors.

Recommendation 4.4
Remove the term 'miscellaneous' from the heading to clause 219.

Recommendation 4.5
Support the Regulator's responsibilities for monitoring and compliance with a single wide audit power as described above and remove clause 121 (power to direct audit).

Recommendation 4.6
Make it clear that suitably qualified officers in the Office of the Regulator are eligible to be appointed as auditors.

Establishment of Accounts
The establishment and development of biodiversity projects, and the additionality attributable to those projects, are ideally suited to be recorded in natural capital accounts that comply with international statistical standards — the UN System of Environmental-Economic Accounts (SEEA). Such accounts would for example record the growth of seedlings to maturity as natural capital formation, and record the additional services to humans at maturity as flows of ecosystem services. Beyond the accuracy and rigour brought by accounts, their auditability would further strengthen the integrity of the scheme.

The bill should include a requirement that the Regulator record transactions relating to projects using SEEA-compliant accounts.

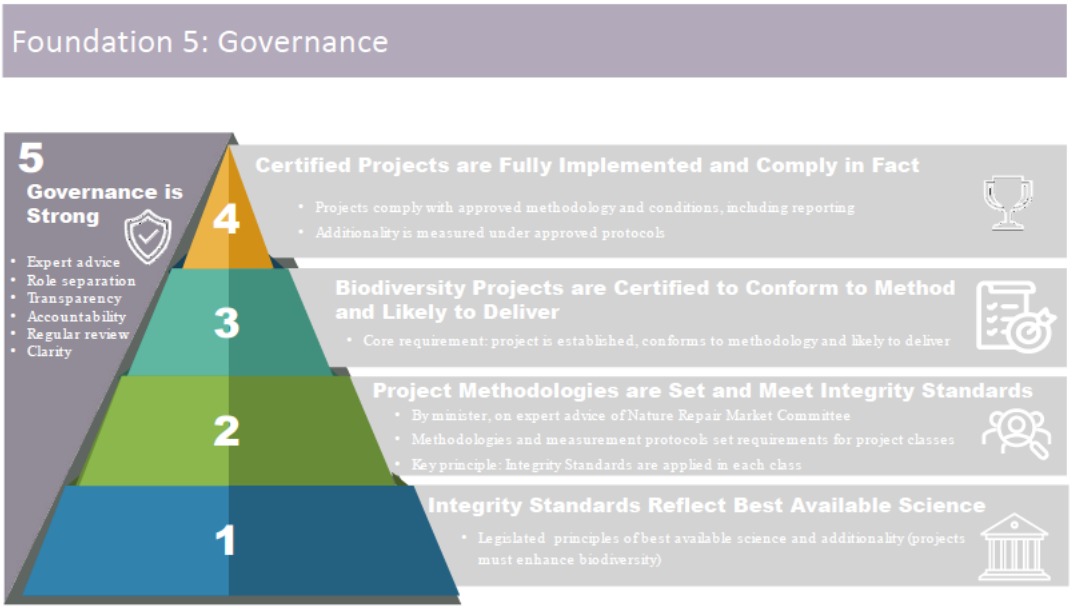
Recommendation 4.7
Include in the bill a requirement that the Regulator record transactions relating to the establishment, development and monitoring of projects in SEEA-compliant natural capital accounts.

There should also be provision for the Regulator to publish such accounts; and to assist relevant agencies, including the ABS and the Environment Department/proposed EPA, in the analysis of the accounts for the purposes of evaluating Scheme implementation and effectiveness.

Recommendation 4.8

Include a requirement that the Regulator co-operate with relevant agencies, including the ABS and the Environment Department/proposed EPA, in the analysis of the accounts for the purposes of evaluating Scheme implementation and effectiveness and publish that analysis.

Foundation 5 Governance



© Dr Peter Burnett, ANU, peterburnett@anu edu au

Nature Repair Market Committee (Part 19 Division 2)

It is essential for Scheme credibility that there be complete and visible role separation between the Minister, who is responsible for policy and oversight of Scheme implementation; the NRM Committee, which is responsible for expert advice on, and review of, methodologies; and the Regulator, who is responsible for most aspects of Scheme implementation. (I have already argued that the NRM Committee should be able to be proactive, able to advise the Minister on their own motion rather than in response only to ministerial request.)

To ensure the Committee is fully independent of government, government sector employees (eg CSIRO staff) should be ineligible for appointment to the Committee, not just to the role of Chair as provided by clause 198(3).

Recommendation 5.1

Replace sub-clause 198(3) with a requirement that Government sector employees (eg CSIRO staff) are not eligible for appointment to the Committee.

Transparency is also critical for Scheme credibility. The Committee should, with a deliberative exception to cover the formulation of advice to the Minister, and her consideration of it, operate in a fully transparent manner. It should be required to prepare an annual report to the minister. It should also be required to publish advice it gives to the Minister, once the Minister has taken the decision to which the advice relates, or within 3 months, whichever is earlier. It should also routinely publish submissions it receives on draft methodologies; reviews it conducts of methodologies; and the minutes of its meetings (subject to the advice exclusion).

Recommendation 5.2
Amend the bill to provide for the Committee to prepare an annual report, and to publish advice, reviews, submissions and minutes as proposed above.

Accountability and review
Methodologies last as long as the period specified in the methodology itself; if no period is specified, the methodology is ongoing (clause 50). By clause 54, it is the Minister rather than the Regulator who initiates the making and variation of methodologies, although under clause 195 the Committee has power to review methodologies. Presumably the intention is that the Committee would conduct reviews and provide them to the Minister, who would then decide whether to change or replace the methodology.

It is important to the integrity of the Scheme that methodologies not be allowed to get out of date and that the Minister not be able to prevent timely reviews that may be politically inconvenient. There should therefore be a default sunset period in each methodology, say 10 years (with an exception where the Committee forms the view that there have been no material changes in circumstance to warrant a review). The Scheme should also require the Committee to develop and publish an ongoing program of methodology reviews and to submit, with reviews, with any recommendations for change to methodologies.

Recommendation 5.3
Amend clause 50 to provide for a default sunset period of 10 years for a methodology determination (the Minister could extend this period on advice of the Committee). Also include a clause in Part 19 to require the Committee to prepare, publish and implement a review plan, and to submit reviews to the Minister with any recommendations for change to methodologies.

Regulator
Part 5 (Biodiversity Certificates) provides for the Regulator to issue certificates. The Regulator is defined to be the Clean Energy Regulator. For clarity, credibility and effectiveness the functions conferred on the Regulator by this bill should be reflected in the terminology of associated legislation. As a result, the *Clean Energy Regulator Act 2011* should be amended to include the nature repair market function in the title. (I have already argued that separate provision should be made for biodiversity auditors, rather than providing for greenhouse and energy auditors registered under the *National Greenhouse and Energy Reporting Act 2007* to be qualified to conduct biodiversity audits.)

Recommendation 5.4
Amend the *Clean Energy Regulator Act 2011* to include the nature repair market function in the title.

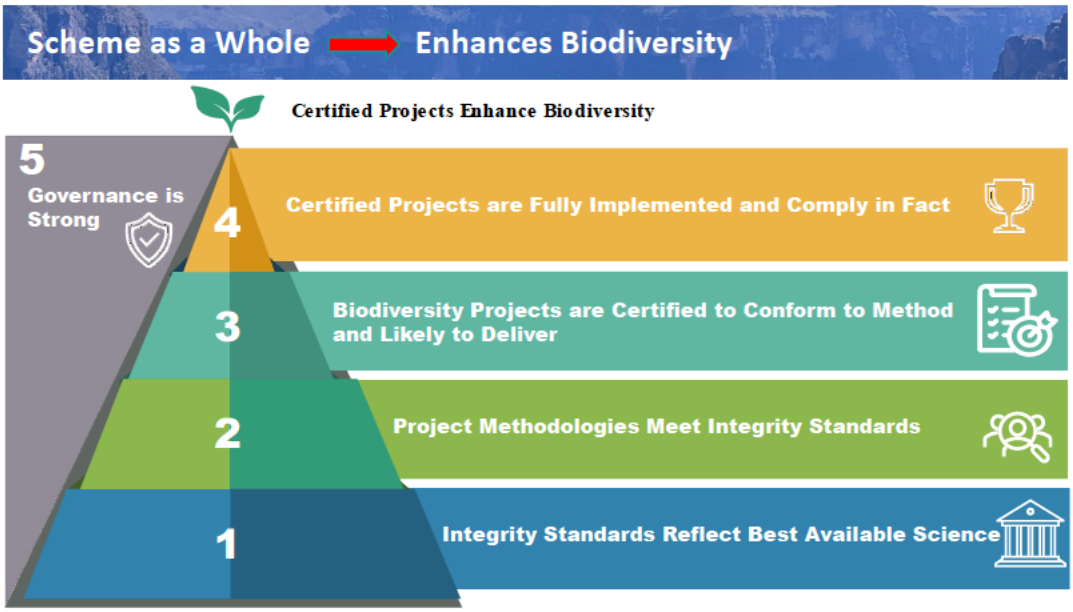
Clarity and Tradability

A scheme such as this which creates a new and artificial form of property is naturally hard to understand. The Bill contributes to that difficulty by calling the new unit of property a biodiversity 'certificate' rather than a 'credit'. A certificate is physical evidence of the property rather than the property itself. While I recognise that, unlike carbon credits, units of biodiversity cannot be fully interchangeable due to the wide variety of species and ecological attributes to which an individual unit might apply, it would nevertheless make it easier to aggregate or disaggregate projects for trading if they were divided into a standard units of one hectare. This would also increase the parallels between the Scheme and the scheme under which Australian Carbon Credit Units (ACCUs) are created and can be traded, which will ease administration.

Recommendation 5.5

Change the name of the unit from 'biodiversity certificate' to 'biodiversity credit' or 'Australian Biodiversity Credit Unit' (ABCU) and define a biodiversity credit by reference to both a hectare of land and the nature of the biodiversity it contains (which in turn will align with the methodology).

The Scheme as a Whole Enhances Biodiversity



Include principles in bill

The Bill rests on the five principles described in this submission but does not make this clear. Including a clause setting out the principles and requiring that the Act be interpreted so as to advance the Objects consistently with the principles would help ensure the Scheme achieves its objects.

Recommendation 6.1

Include a clause setting out the five principles described above and requiring that the Act be interpreted to advance the Objects consistently with these principles.

Excluded Projects (Part 2 Division 5)

While a power to make rules excluding projects is appropriate, several aspects are vague. The reference to the availability of water does not state to whom or for what purposes water should be available but presumably relates to water for existing consumptive uses; the concept of 'land access' for agricultural production is also somewhat ambiguous but presumably relates to the availability of land for agricultural production in the relevant area.

Recommendation 6.2

Amend para 33(2)(a) to refer to the availability of water 'for existing consumptive uses' and para 33(2)(f) to refer to 'the availability of land for agricultural production in the relevant area'.

Deposit of biodiversity certificates with regulator (including government as purchaser) (Part 12)

This Part allows people to voluntarily deposit biodiversity certificates with the Regulator, but seems unnecessarily complicated. Why does the Regulator need a discretion to approve the deposit? Anyone depositing a certificate is in effect donating biodiversity enhancement to the nation (or complying with a regulatory requirement for a biodiversity offset). Why not simply provide that a person may lodge a certificate with the Regulator, in which case it cannot be traded?

Recommendation 6.3

Amend part 12 so that it provides only that a person may deposit a certificate with the Regulator, in which case the certificate may not be further traded.