Committee Secretary
Senate Standing Committees on Environment and Communications
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19 June 2023

To the Committee,

Subject: Inquiry into the Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023 [Provisions]

The Central Land Council (CLC) welcomes the opportunity to provide a submission to the Committee's inquiry into the Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023 [Provisions].

This submission builds on our submission on the exposure draft of the Nature Repair Market Bill, submitted to the Department of Climate Change, Energy, the Environment and Water (DCCEEW) in March 2023. We invite the Committee to consider both our earlier submission (provided at **Attachment A**[1]) and this letter, which provides updated commentary on the bill and proposed market.

While there have been some improvements to the Bill, the majority of CLC's recommendations made in March remain. In particular, we wish to emphasise:

- Our concerns with the consent provisions in the Bill.
- Other concerns that relate to the rights and interests of Aboriginal and Torres Strait Islander peoples.
- The need for stronger environmental laws and continued public investment in Indigenous-led land management as the most effective and efficient means to improve biodiversity outcomes, and protect the interests of and provide economic opportunities for Aboriginal and Torres Strait Islander peoples.

The Nature Repair Market has the potential to make a positive contribution to the protection of our ecosystems, and create important economic opportunities for Aboriginal and Torres Strait Islander peoples on their country. However, this will require:

- Very careful market design supported by well-designed legislation.
- Appropriate and adequately resourced regulatory arrangements.
- Resourcing to support the participation of Aboriginal and Torres Strait Islander peoples in the new market.
- A continued commitment by government to increase public investment in protecting the environment and strengthen legal protections for the environment and Aboriginal and Torres Strait Islander cultural values.

[1] Also available on the CLC website.

About the CLC

The CLC is a Commonwealth corporate entity established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA), with statutory responsibilities for Aboriginal land acquisition and land management in the southern half of the NT. The CLC's functions include ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region as to appropriate legislation concerning their land.

The CLC's area of responsibility spans 780,000 square kilometres – an area almost the same size as New South Wales. Of this, more than half (417,318 km^2) is Aboriginal land under the ALRA. In addition, Aboriginal people's rights have been asserted and won under the *Native Title Act 1993* (NTA) and the CLC is a Native Title Representative Body (NTRB) established under the NTA for the southern portion of the NT. Additionally, Aboriginal people have succeeded in obtaining rights to small areas of land known as Community Living Areas, which are excised from pastoral leases. The map at **Appendix A** of our March 2023 submission illustrates the varied land tenures that exist across our region.

Through our elected representative Council of 90 community delegates, the CLC represents the interests and aspirations of approximately 20,000 traditional landowners and other Aboriginal people resident in our region. Further information about CLC is provided in our March 2023 submission.

1) Concern with consent provisions

The Nature Repair Market Bill 2023, as introduced into Parliament, significantly amends consent provisions in the earlier exposure draft bill. The CLC set out concerns regarding consents in our March 2023 submission on the exposure draft (p.14-15). **These concerns remain relevant. As currently drafted, the Bill does not adequately protect the rights and interests of various Aboriginal land rights [redacted]ve title holders.**

[redacted]kes the following recommendations for the Committee's consideration:

> **Recommendation 1:** The up-front consent provided to native title holders in section 15(6) should be extended to Aboriginal land rights land holders and other Aboriginal and Torres Strait Islander tenure holders.

This is discussed at **recommendation 12** of our March 2023 submission. As proposed, section 15 may allow someone with a pre-existing lease, agreed some time ago, to exploit a new benefit that was not contemplated or specifically agreed to by Aboriginal land rights land holders (or holders of other Indigenous tenures who may have entered into arrangements), as the requirement that the terms of the lease "are consistent" with the project, is too imprecise. The bill should amend and extend the up-front native title consent provision to also apply this consent requirement to Aboriginal land rights land (and other Indigenous tenures elsewhere in Australia).

Broadening this up-front consent requirement will ensure parties to existing land use arrangements come together and agree about the project and any updated benefits given the new opportunities created by the proposed Nature Repair Market. Not extending this consent right has the potential to disadvantage Aboriginal and Torres Strait Islander tenure interest holders who have negotiated existing leases and land access arrangements in good faith.

Recommendation 2: The removal of native title holders from the class of persons who hold an 'eligible interest' under the bill (by deleting previous section 91 in the exposure draft bill), and related inclusion of a new section 18A (creating a separate requirement for consent from a registered native title body corporate, which can be deferred) is not acceptable.

The CLC recommends that:

a) native title holders be reinstated in the class of persons who hold an eligible interest in land (Part 7, Division 2),

b) new section 18A be removed, and

c) the Bill take a consistent approach to the findings of the Chubb Review and remove the option for conditional registration of biodiversity projects on native title areas.

The removal of native title holders from the class of persons who hold an 'eligible interest' under the bill (by deleting previous section 91 in the exposure draft bill), and related inclusion of a new section 18A (creating a separate requirement for consent from a registered native title body corporate, which can be deferred) is not acceptable. These changes are a significant departure from the exposure draft bill.

Further, the introduction of new section 18A directly contradicts the findings of the recent Inquiry into Australian Carbon Credit Units (Chubb Review). Recommendation 11 of the Chubb Review contends that the option to conditionally register ACCU projects on native title lands should be removed. The basis for these significant changes to the Bill is unclear. Removing native title holders from the class of persons who hold an 'eligible interest' risks inadvertent and adverse consequences under subordinate rules and methodologies (such requirements to notify or obtain consents from eligible [redacted]er circumstances). For example, under the CFI Act rules, a 'project area' may be consent of holders of an eligible interest in the area have been obtained (see Credits (Carbon Farming Initiative) Rule 2015).

Recommendation 3: The definition of 'project proponent' be amended to more adequately protect the rights of Aboriginal land rights landholders. This could be done by aligning with the approach taken under the *Carbon Credits (Carbon Farming Initiative) Act 2011*.

The CLC remains concerned that the definition of 'project proponent' under the Bill departs from the approach taken under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act). One of the key benefits of the approach under the CFI Act (and related rules) is that if a person responsible for carrying out a project ceases to be the Project Proponent (as defined), including due to a loss of the legal right to undertake the project, there is a process for the Regulator to revoke the project. This provides landholders, including Aboriginal land rights landholders, farmers and others, with some comfort in relation to material consequences for a Proponent's breach of land access and use arrangements for a project.

The alternative approach taken under the Nature Repair Market Bill, requires satisfaction of requirements under section 15(6) as a pre-requisite to approval of a biodiversity project (rather than defining a Project Proponent to be the person who i) is responsible for carrying out the project, and ii) has a legal right to undertake the project).

This approach under the Bill does not provide the same comfort, particularly when combined with the narrower basis on which the Regulator may cancel (revoke) a project under section 30 (if a proponent dies or ceases to exist).

2) Further opportunity to strengthen protection of rights and interests of Aboriginal and Torres Strait Islander people

2.1 Objects of the Bill

In our March submission, the CLC made the recommendation that an additional object should be added to the legislation (see p.13-14 and **recommendation 9** in March 2023 submission):

> *(e) to acknowledge, support and protect the rights and interests of Aboriginal and Torres Strait Islander people and promote opportunities for Aboriginal and Torres Strait Islander people to participate in the enhancement or protection of biodiversity and the associated market.*

The amended objectives now include at section 3(d) to:

> *(i) support and promote the unique role of Aboriginal persons and Torres Strait Islanders in enhancing and protecting biodiversity in native species in Australia; and*
> *(ii) enable the use of the knowledge of Aboriginal persons and Torres Strait Islanders related to biodiversity in native species in Australia, guided by the owners of that knowledge.*

These amended objectives have partially addressed CLC's recommendation, but they still fail to [redacted]he unique and manifold *rights and interests* of Aboriginal and Torres Strait [redacted]tion to biodiversity in Australia (not just the role they play), nor do they explicitly [redacted]boriginal and Torres Strait Islander people *benefit* from the market.

Recommendation 4: That the objects of the Act are further strengthened to explicitly recognise and promote the *unique rights and interests* of Aboriginal and Torres Strait Islander people in enhancing and protecting biodiversity in native species in Australia, and promote the participation of Aboriginal and Torres Strait Islander people in biodiversity

2.2 Consideration of cultural impacts in making methodology determinations

While cultural impacts are now included as a matter that may be considered by the Minister in making and varying a methodology determination, it is disappointing that this remains discretionary, as does consideration of significant adverse environmental, agricultural, economic and social impacts (see section 47(1)(b)(i) and section 48(2)(b)(i)). The CLC reiterates our view that it should be a mandatory requirement of the Minister to have regard to these matters (see p.18 and **recommendation 17** of March 2023 submission).

Recommendation 5: It should be mandatory, not discretionary, for the Minister to have regard to significant adverse cultural impacts on Aboriginal and Torres Strait Islander peoples' rights and interests when making or varying methodology determinations (see sections 47(1)(b)(i) and 48(2)(b)(i)).

2.3 Cultural heritage

In our March 2023 submission, the CLC recommend that the definition of 'regulatory approval' be amended to explicitly refer to cultural heritage (as a relevant law of a State, Territory or Commonwealth) and also refer to a plan, agreement or sacred site clearance, to ensure that any requirements for a sacred site clearance, cultural heritage management agreement or plan are captured by the definition (p.15, recommendation 14). This has not been adopted.

Recommendation 6: The definition of 'regulatory approval' should be amended to explicitly refer to cultural heritage.

2.3 Indigenous representation on the Nature Repair Market Committee

The CLC's recommendations in relation to the Nature Repair Market Committee have not been addressed. These are discussed on p.11 and **recommendations 5 and 6** of our March 2023 submission.

Given the stated objects of the Act to support and promote the unique role of Aboriginal and Torres Strait Islander peoples in enhancing and protecting biodiversity in native species in Australia (noting earlier comments in relation to strengthening these objects), it is disappointing that there is no requirement for Aboriginal and/or Torres Strait Islander-identified positions on the Committee (section 198).

Recommendation 6: The Nature Repair Market Committee should include at least two (male and female) *mandated* Aboriginal and/or Torres Strait Islander-identified positions.

Recommendation 7: An Indigenous sub-committee of the Nature Repair Market Committee should be established that is geographically representative to provide ongoing guidance to the Committee.

2.4 Resourcing the participation of Aboriginal and Torres Strait Islander people

As highlighted in our March 2023 submission (p.11, **recommendation 3**), the speed with which the legislation has been developed has compromised the quality of engagement with Aboriginal and Torres Strait Islander peoples. The Federal Government must ensure that Aboriginal and Torres Strait Islander peoples are more fully engaged in the design, implementation and ongoing operation of the market from this point onwards.

In particular, the CLC recommends that Federal Government resource a First Nations Engagement Strategy to both promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design and beyond.

Recommendation 8: The Federal Government should resource a First Nations Engagement Strategy to promote understanding of the market and facilitate the informed input of Aboriginal and Torres Strait Islander people and the organisations that represent them in the next phase of market design and beyond. This should include resourcing the participation of land councils, other Indigenous representative bodies, and relevant Indigenous land and sea networks.

Further, as discussed on p.12-13 of our March 2023 submission (**recommendations 7 and 8**), while the co-design of methodologies with Aboriginal and Torres Strait Islander peoples is welcome (proposed in the policy documents accompanying the exposure draft of the bill[2]), the timeframes and process for this is unclear. The CLC recommends dedicated resourcing of Aboriginal and Torres Strait Islander groups to facilitate co-design for biodiversity methods, include funding for traditional owner co-designed case studies to test and inform this work. On p.12 of our March submission we discuss the co-benefits of prioritising the development of desert methodologies in particular.

In our March 2023 submission we also recommended that the Federal Government make resources available to traditional owners who wish to consider and develop biodiversity projects, acknowledging that the resources required for methodology and up-front project development are beyond the means of most Indigenous groups, often necessitating partnerships that would diminish the benefits to the group.

Recommendation 9: That the Federal Government resource Aboriginal and Torres Strait Islander groups to co-design biodiversity methodologies. Consideration should be given to geographic representation and the CLC proposes at least one methodology development project be undertaken in Central Australia, with CLC as a key partner. Methodology development must capture cultural as well as environmental goals.

Recommendation 10: The Federal Government should make resources available to traditional owners who wish to consider and develop biodiversity projects, demonstrating commitment to the prioritisation of Indigenous-led land management and acknowledging the particular challenges and inequity in the 'playing field' of potential project proponents.

3) [redacted] increased public investment to protect nature

[redacted] the Federal Government acknowledge the scale of the challenge we face in [redacted]tion crisis, protecting threatened species, and restoring biodiversity. The establishment of a Nature Repair Market to facilitate private investment in biodiversity protection and enhancement is one strategy that, if well designed and regulated, may be effective over the long term to address these challenges.

As discussed in our March 2023 submission (p.10, **recommendations 1 and 2**), it does not, however, diminish the need to strengthen our environmental laws, nor does it diminish the need for ongoing and increased government investment in land management, particularly Indigenous-led land management.

The CLC welcomes the Federal Government's commitments made in the *Nature Positive Plan* (2022), and substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) should remain a priority. The establishment of Environment Protection Australia (EPA) is a positive step towards this, however we suggest that the establishment of the Nature Repair Market may be premature in the absence of fulsome reform of the EPBC Act, which could enable regulatory oversight of the market by the new EPA (likely a more appropriate body than the Clean Energy Regulator), and alignment with the proposed National Environmental Standards.

[2] See DCCEEW website.

In relation to resourcing, the CLC anticipates that the Government will need to allocate significant funding and resources to implement the proposed nature repair market. It is critical that funds applied to the implementation of the nature repair market are adequate and newly allocated, to ensure that the Government is not detracting or reallocating funds from other programs that support Indigenous conservation programs and partnerships, or conservation projects more generally. It would be counterproductive to biodiversity goals reallocate focus and resources, rather than increase effort and resources across the board.

Recommendation 11: The establishment of a nature repair market does not diminish the need to strengthen our environmental laws. Substantive reform of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) should remain a priority for the Federal Government.

This must include the establishment of legally enforceable National Environmental Standards, an independent and well-resourced national Environmental Protection Agency, the expansion of the water trigger, and strong national protections for First Nations cultural heritage.

Recommendation 12: The establishment of the market does not diminish the need for ongoing and increased government investment in land management for conservation, particularly Indigenous-led land management. There must also be adequate, newly allocated funding for the implementation of the Nature Repair Market (including assistance with early consent processes).

Thank you for considering our submission. If you wish to discuss any aspects of our submission further, please contact Nicola Flook, Senior Policy Officer at nicola.flook@clc.org.au.

Regards,

[redacted]

Lesley Turner
Chief Executive Officer