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## Submission re Nature Repair Market Exposure Draft

Submission from:

The Green Institute Ltd

Tim Hollo

Executive Director

GPO Box 557

Canberra, 2601

e: [tim.hollo@greeninstitute.org.au](mailto:tim.hollo@greeninstitute.org.au)

### The Green Institute submits that:

- **The ecological crisis is a human crisis and a top priority:** All government policy, but most particularly environmental policy, must be grounded in the understanding that our society and economy are part of the natural world, their health and resilience entirely dependent on a healthy natural world, and that the ecological collapse that human activities have already begun threatens our very survival. The protection and rehabilitation of ecosystems must, therefore, be treated as a top priority for government.
- **A market instead of public investment reveals a failure of prioritisation:** The justification for this proposed market is that government cannot afford the public investment required in order to protect and repair ecosystems. The sums involved, dwarfed by government spending on tax cuts for the wealthy, defence materiel, and even subsidies for fossil fuels, make a mockery of that claim. This reveals that the health of the ecosystems on which our existence depends is a low priority for government – a shocking indictment, especially given government rhetoric to the contrary.
- **The market is a complex and inefficient solution:** Public financing of crucial projects is more efficient than market solutions. The fact that this exposure draft is a 240 page bill which would entail massive administration costs highlights this inefficiency. Markets are also a fundamentally extractive tool, enclosing the natural world as property and extracting value from it. This is at odds with any attempt to protect nature.
- **Offsets or simply greenwashing?** The government has been careful to avoid describing this proposed market as an offset scheme, presumably understanding that public confidence in offsets has collapsed following evidence that such schemes have failed and been abused. However, the widespread assumption is that the market will become part of an offset scheme, to be introduced later. In the absence of such a scheme, the only conceivable market for biodiversity certificates is from businesses seeking to burnish their problematic reputations through greenwashing.



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- **Rights of Nature:** Around the globe, there is growing recognition that the natural world should not be seen purely in terms of its value to humanity, but that it has intrinsic worth. Animals, plants, habitats and ecosystems have a right to exist, and human society will be far better off for respecting those rights and learning to live balancing our own rights and desires with those of nature. If the government truly wishes to protect and restore the natural world, and wishes to play a leadership role in policy innovation in the space, it should set aside plans to introduce a market and instead legislate to introduce legal rights for nature.

## **Extended comments**

The Green Institute welcomes the opportunity to make a submission to this exposure draft. However, we are concerned that the consultation is asking the wrong question.

The question should not be whether the design principles for a nature repair market are good, but whether the approach is the right one. It clearly is not.

## **Ecological crisis, human crisis, top priority?**

It is clear that Australia's ecological systems are deteriorating, and rapidly approaching breaking point, as detailed in the 2021 *State of the Environment* report.<sup>1</sup> These details were not news. The *Australia's Environment 2019* report from the Australian National University<sup>2</sup> is just one of numerous highly credible scientific reports in recent years detailing an appalling downward trajectory for Australia's environmental indicators, including soil quality, rainfall, biodiversity, temperatures, plant growth, tree cover and river flows. These measures show ecologies in crisis, with very real impacts on human health, mental health, and quality of life. The CSIRO's *Australian National Outlook 2019*<sup>3</sup> similarly sets out a grim downward trend in ecological health, with substantial existing impacts on agriculture and the capacity to sustain our population.

The environmental catastrophes we have seen in recent years highlight the fact that "the environment" is not something separate from humanity. A healthy environment is not an optional extra we can negotiate away in favour of more development or swifter economic growth. The floods destroying homes and taking lives across the east coast; the bushfire smoke smothering Australia's major cities; the drought and collapsing soil quality endangering our capacity to grow food; the coral bleaching damaging human livelihoods, well-being, and seafood stocks; the novel Coronavirus triggering the worst economic collapse

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<sup>1</sup> Department of Climate Change, Energy, The Environment and Water, *State of the Environment Report 2021*, <https://www.dceew.gov.au/science-research/soe>

<sup>2</sup> *Australia's Environment 2019*, Australian National University, <https://www.wenfo.org/aer/>

<sup>3</sup> CSIRO, *Australian National Outlook 2019*, <https://www.csiro.au/en/Showcase/ANO>



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since the Great Depression; all these demonstrate that we cannot continue to pretend that we are disconnected from the natural world or in any way immune to the effects of its ill-health. The environment is the air we breathe, the water we drink, and the soil in which we grow our food. It is our only home.

We can ill afford to damage it – and hence ourselves – any more than we already have.

How, then, should we judge a government that declares protection of the environment to be a priority and then cries poor when asked to find the funds to do the work, and outsources the work to a complex and inefficient market?

The Green Institute strongly encourages the government to abandon this approach, which has been proven to be deeply problematic,<sup>4</sup> and instead prepare to make major public investments in protecting and rehabilitating ecosystems, underpinning by a legislative framework that introduces legal rights for the natural world.

## **Rights of Nature**

The concept of legally instituted Rights of Nature was first introduced into modern legal thought through a 1972 article by Professor Christopher Stone called “Should Trees Have Standing?”<sup>5</sup> The paper challenged the idea that the natural world, that trees, should be treated as objects only in the eyes of the law – as property. The environment, in this view, consists not just of “natural resources” or “ecosystem services” for human use, but of living entities which themselves have a right to exist and to be respected by our legal systems.

Policy, theory and jurisprudence around Rights of Nature have grown dramatically in the intervening half century, often drawing on and based around Indigenous worldviews and political movements. In Australia, Dr Peter Burdon at the University of Adelaide and Dr Michelle Maloney at the Australian Earth Laws Alliance have championed the idea and detailed both its legal basis and how it could be implemented.<sup>6</sup>

While the most famous examples of existing legal rights for nature include New Zealand’s allocation of rights to the Whanganui River, and Bolivia and Ecuador’s constitutional “Rights of Mother Earth”, there are numerous local examples, including even across the United States of America, of legal recognition that the

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<sup>4</sup> Yung En Chee, “Would a nature repair market really work? Evidence suggests it’s highly unlikely”, *The Conversation*, February 21, 2023, <https://theconversation.com/would-a-nature-repair-market-really-work-evidence-suggests-its-highly-unlikely-199975>.

<sup>5</sup> Christopher Stone, “Should Trees Have Standing? Towards Legal Rights For Natural Objects”, (1972) 45 *Southern California Law Review* 450.

<sup>6</sup> P Burdon (Ed), *Exploring Wild Law: The Philosophy Of Earth Jurisprudence*, Wakefield Press, 2011; Peter Burdon, Wild Law And The Project Of Earth Democracy, in M Maloney And P Burdon (Eds), *Wild Law In Practice*, Law, Justice And Ecology, Routledge Press, 2014.



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natural world, specific natural phenomena, and certain ecosystems, have inherent legal rights.<sup>7</sup>

Former Western Australian MLC, Diane Evers, has introduced a Bill, *The Rights of Nature and Future Generations Bill 2019*, into the Western Australian parliament which would enshrine the legal right for the natural world and its constituent ecosystems to exist, require government to act to protect it, and introduce stiff penalties for breach.<sup>8</sup> The Blue Mountains City Council in 2020 announced plans to integrate Rights of Nature into their planning and operations.<sup>9</sup>

While a detailed examination of the possibility of a full regime of Rights of Nature is beyond the scope of this submission, not least since the Commonwealth lacks a Bill of Rights, the concept is legally mature enough to be introduced in normative terms.

The Green Institute contends that work should begin now to insert into national environment laws, as an object of the Act, acknowledgement that the natural world has its own inherent right to exist, and that it is not simply resources or services for the benefit of human society and economy.

A Rights of Nature approach would be an exciting demonstration of Australia's innovative and committed leadership to protect nature. Importantly, it stands in direct contradiction to a market approach – if the natural world has legal rights, it cannot also be tradable property.

## **Offsets or greenwashing?**

The government has been at pains to carefully avoid any use of the word “offsets” in the presentation of this “Nature Repair Market”. This is understandable, given the particularly poor reputation offsets enjoy in the carbon space, and even more for biodiversity.<sup>10</sup>

However, questions are being asked as to how a market for biodiversity credits makes sense in the absence of an official offset scheme.

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<sup>7</sup> See M Maloney, “Rights of Nature, Earth democracy and the future of environmental governance”, in T Hollo (ed), *Rebalancing Rights: Communities, Corporations, and Nature*, The Green Institute, 2019, <https://www.greeninstitute.org.au/wp-content/uploads/2019/03/Green-Institute-Publication-Rebalancing-Rights.pdf>

<sup>8</sup> D Evers, *Protecting Nature for Future Generations is Only Right*, media release, November 13, 2019, <https://www.dianevers.com.au/protecting-nature-for-future-generations-is-only-right/>

<sup>9</sup> No author given, “Blue Mountains council resolves to integrate Rights of Nature into operations and planning”, *Blue Mountains Gazette*, April 15 2020, <https://www.bluemountainsgazette.com.au/story/6721668/blue-mountains-council-resolves-to-integrate-rights-of-nature-into-operations-and-planning/>

<sup>10</sup> Polly Hemming, “Why a biodiversity nature market doesn’t work”, *The Saturday Paper*, December 10-16, 2022, <https://www.thesaturdaypaper.com.au/environment/2022/12/10/why-biodiversity-environment-market-doesnt-work>



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The Green Institute notes that offset schemes, always a questionable model for biodiversity where one ecological community can never be said to replace another “like for like”, have failed and been abused. Offsets rely on a hard baseline to determine additionality, and this is effectively impossible to prove. The drift towards post-approvals undermines credibility even further. And the language in the exposure draft requiring the Minister to “have regard to” integrity standards when establishing a method does not inspire confidence.

The same concerns exist for any scheme to establish tradable certificates, whether or not they are called offsets.

If indeed a formal biodiversity offset scheme is not envisaged, and this market is not to interact with state-based biodiversity offset schemes, the question becomes – what possible market exists for these credits? If a corporation is behaving as a responsible environmental steward, it has no reason to purchase such credits, and any voluntary market in such a space would be marginal at best.

The larger possible market would be for corporations which know that their environmentally destructive behaviour is harming their reputation, damaging their customer base and their share price. In these circumstances, the provision of a “Nature Repair Market” is effectively government-sponsored greenwashing – providing somewhat credible cover to corporations to burnish otherwise problematic reputations.

## **Recommendation: start again**

The Green Institute submits that, for the above reasons, the government should set aside plans to establish a Nature Repair Market and instead prepare to make major public investments in protecting and rehabilitating ecosystems, underpinning by a legislative framework that introduces legal rights for the natural world.