



Nature Repair Market Team
Ngunnawal Country
John Gorton Building, King Edward Terrace
Parkes ACT 2600, Australia

3rd March 2023

Dear Nature Repair Market Team,

Re: Submission on the National Repair Market Bill Exposure Draft

The Federation of Victorian Traditional Owner Corporations (the Federation) is a state-wide body advocating for the rights and interests of Victorian Traditional Owner Corporations. We welcome the opportunity to make a submission to provide feedback on the National Repair Market Bill Exposure Draft (NRM Bill) and its potential opportunities and impacts on the interests of Victorian Traditional Owners.

This submission makes the case for embedding the recognition of Traditional Owner rights, responsibilities and interests as the foundation of the NRM Bill. It sets out key issues and risks to the interests of Victorian Traditional Owners of such a regime, followed by a series of key recommendations for amendments to sections of the NRM Bill to address these.

We conclude that the ability of the Nature Repair Market to generate substantial positive outcomes for Victorian Traditional Owners will be dependent these amendments being adopted, on concurrent amendments to the Victorian Government's Traditional Owner Settlement Act 2010 (Vic) provisions, and ensuring that Commonwealth funding of Traditional Owner's Caring for Country initiatives through this mechanism are additional to other funding streams that enable Traditional Owners to be leaders in the enhancement and protection of biodiversity.

We would welcome the opportunity to provide further contributions and advice in progressing with the design and implementation the Nature Repair Market.

Yours sincerely

Paul Paton
Chief Executive Officer
Federation of Victorian Traditional Owner Corporations

Nature Repair Market Bill Exposure Draft

Submission to: Nature Repair Market Team, Department of Climate Change, Energy, Environment and Water

Prepared by: Federation of Victorian Traditional Owner Corporations

Date: 3rd March 2023

1. INTRODUCTORY STATEMENT

The Federation of Victorian Traditional Owner Corporations (**the Federation**) is a state-wide body advocating for the rights and interests of Victorian Traditional Owner Corporations. We welcome the opportunity to make a submission to provide feedback on the National Repair Market Bill Exposure Draft (**NRM Bill**) and its potential opportunities and impacts on the interests of Victorian Traditional Owners.

This submission makes the case for embedding the recognition of Traditional Owner rights, responsibilities and interests as the foundation of the NRM Bill. It sets out key issues and risks to the interests of Victorian Traditional Owners by such a regime, followed by a series of key recommendations for amendments to sections of the NRM Bill to address these. We conclude that the ability of the Nature Repair Market to generate substantial positive outcomes for Victorian Traditional Owners will be dependent on concurrent amendments to the Victorian Government's *Traditional Owner Settlement Act 2010 (Vic)* (**TOSA**) provisions, and ensuring that Commonwealth funding of Traditional Owner's Caring for Country initiatives through this mechanism are additional to other funding streams that enable Traditional Owners to be leaders in the enhancement and protection of biodiversity.

Key Recommendations:

- Include a separate Object in the Act to recognise Traditional Owners as custodians of Country, and to support and promote their continuing role in caring for Country.
- Expressly provide that Aboriginal Title as provided for under the TOSA has the same status as Native Title for the purposes of the NRM Bill.
- It should be mandatory for Traditional Owner engagement, co-benefits and adverse impacts to be included as an attribute of Biodiversity Certificates, as a principle for conducting Biodiversity Conservation Contract purchasing processes, and as a consideration in making methodology determinations. Adverse impacts should be defined to include impacts on Indigenous cultural heritage.
- Include provisions in the Bill that enable projects not based on offsetting to be undertaken under the NRM Bill.
- It should be mandatory that the Nature Repair Market Committee includes First Nations representatives to ensure methodologies include Indigenous Land Management practices and address the management of impacts on Indigenous cultural heritage.

2. BACKGROUND

Land Justice Context

The Country, lands, waters and biodiversity that the proposed NRM Bill seeks to repair is, was and always will be that of Australia's First Peoples. The proposed Bill seeks to create a property right and enable the development of a market to trade an asset that has never been ceded by Traditional Owners, an asset that without the dedicated work, care and investment of Traditional Owners over millennia to cultivate it, would not exist. The NRM Bill should reflect symbolically and practically that Australia's First Peoples have never ceded sovereignty. As such, the Bill should systematically seek to maximise the benefit to and involvement of Australia's First Peoples in the healing and caring for Country that this Bill has the potential to encourage.

The use of Native Title and 'Land Rights Land' mechanism in the NRM Bill to allocate rights and interests will leave many of Australia's First Peoples to be excluded, and without support to overcome this, unable to participate in the market in any meaningful way. Further, Victorian Traditional Owners face different sets of challenges in having land rights recognised than in other parts of Australia. Determinations under *the Native Title Act 1993* (Cth) (**NTA**) in Victoria have been limited due to the history of land dispossession and the systematic dismantling of culture. The colonial project in Victoria has also seen approximately 65% of the state being covered by freehold title.

As a response to this disproportionate effect on Victorian Traditional Owners, the Victorian government established the TOSA as an attempt to remedy the situation and provide the State's Traditional Owners with equivalent rights and subsequent opportunities as Traditional Owner groups in other parts of Australia with NTA recognition.

As part of the TOSA process, the State requires that Traditional Owner groups settle any current and future claims under the NTA in exchange for the State-based Aboriginal Title over agreed Crown lands. For Commonwealth legislation to treat Aboriginal Title as a lesser form of land title than that recognised under the NTA further adds to the disproportionate effect of colonisation in Victoria and further entrenches disadvantage for Victorian groups in relation to land justice.

Only 6 of 11 Traditional Owner groups that have been formally recognised in Victoria have had land rights recognised under either NTA or TOSA. Traditional Owner Groups are still in the process of negotiating outcomes under these regimes and these rights can be expected to continue to evolve during the lifetime of projects that access the Nature Repair Market (**NRM**).

Victorian Traditional Owner Caring for Culture Obligations and Aspirations

Australia's Traditional Owners are recognised as custodians of Country with a unique inherent relationship with and responsibility to care for Country in various pieces of Commonwealth and State legislation, including the NTA, TOSA and the *Environment Protection and Biodiversity Conservation Act 1999*. The *United Nations Declaration on the Rights of Indigenous People* and the *United Nations Convention on Biodiversity* further elucidate this and the right to make decisions on matters that affect their interests.

Victorian Traditional Owners have developed the *Cultural Landscapes Strategy*¹ (CLS) to set out a management paradigm underpinned by cultural values, practices, interests and knowledge connected to their Country, and of the elevation of their role in policy, planning and management of Country. It is an expression of Traditional Owner interests across all of their Country, whether or not they are formally recognised under existing state or Commonwealth legislation. Their rights and obligations, aspirations, capacities and strategies to practice self-determination in the revegetation and healing country sector are further set out in the². Victorian Traditional Owners have been actively building capacity to play a lead role in biodiversity enhancement and conservation. This is demonstrated in their efforts developing co-management plans for national parks and state reserves with government agencies; establishing Indigenous Protected Areas; building their environmental services businesses and nurseries; expanding ranger programs; and growing the skill base of Traditional Owner personnel in the Caring for Country/Engaging in environmental restoration and biodiversity conservation work is seen as an opportunity to heal Country, increase access to land to implement Indigenous land management practices and provide opportunities for Traditional Owner community members to live and work on Country.

Issues and potential perverse outcomes for Victorian Traditional Owners resulting from the Nature Repair Market Bill

Limited procedural rights for Victorian Traditional Owners

The NRM Bill as it is currently written seems to privilege land rights recognised under the NTA. The Bill expressly provides that Native Title holders are deemed to be project proponents and provides procedural rights in relation to consent for NRM projects on their land.

These types of procedural rights and other deeming provisions should also accrue to holders of Aboriginal Title under the TOSA to ensure that any project is aligned with Victorian Traditional Owners' interests and that 'landholder nature plans' are consistent with their Caring for Country objectives for their Country area. This arrangement would effectively result in Traditional Owner groups without NTA recognition, as a result of being more severely impacted by invasion and colonisation, being limited in their potential to benefit from this Market, and having limited opportunities to ensure that land management actions undertaken under the NRM Bill are aligned with their cultural obligations to Care for Country. In many cases, Victorian Traditional Owner groups would need to rely on the Victorian government recognising procedural rights under the TOSA's Land Use Activity Regime for projects on public land. For projects on private land, the NRM Bill is not clear on the obligation for project proponents to consult Traditional Owner groups regarding their interests or negotiate benefit sharing agreements.

Risk of further alienating TOs from Country, Rights and Responsibilities

The NRM Bill creates a new property right in the form of Biodiversity Certificates which effectively rewards landholders for management actions that result in improved biodiversity outcomes. Not only will this allocate the unceded property of Traditional Owners to a property's title holder, but that the biodiversity 'assets' that exists in a particular location are substantially derived from Traditional Owners Caring for Country activities over millennia. There is no recognition or benefit accrued to Traditional Owners from this work over thousands of years embedded in this Bill.

¹ <https://www.fvtoc.com.au/cultural-landscapes>

² Right Plant, Right Way available at <https://www.anpc.asn.au/resources-page/7340-2/>

Perversely, there is potential for landowners that have financially benefitted from activities that have significantly degraded biodiversity to financially benefit from undertaking activities to repair this damage. There is also the need to ensure there are safeguards in the NRM scheme it does not inadvertently incentivise destructive activities by landowners in advance of engagement in the market.

Risk of distortion of Commonwealth funds being channelled to support Traditional Owner Caring for Country efforts

The NRM Bill establishes the Biodiversity Conservation Contract mechanism as a means of the Commonwealth government funding conservation efforts. If Victorian Traditional Owners have only a limited ability to access the market as project proponents, then this could result in a distortion in the Commonwealth's resourcing of Traditional Owner conservation efforts with the bulk of the funds flowing to northern Australia with a larger extent of Native Title Land, and to other non-indigenous groups with the capacity and access to capital to develop NRM projects. Adequate consideration of the implications of this are required and to be accounted for through a land justice lens to ensure Traditional Owners who have experienced the greatest dispossession are not disproportionately affected again by this program.

Commonwealth funds used for the NRM scheme should be new and additional to existing programs supporting Traditional Owner Caring for Country efforts such as the Indigenous Protected Area (IPA) program. IPAs are 50% of the National Reserve System yet receive significantly less per hectare than other protected areas already. Additional funds should be made available to enable Traditional Owners to access capital and build capacity to be project proponents and compete with other stakeholders on an equal footing.

Inconsistency of offsetting with Caring for Country philosophy

Some Victorian Traditional Owner Groups have expressed that a barrier to them deriving benefits from the NRM are their concerns regarding the concept of offsetting, and whether this is consistent with their Caring for Country obligations. Finances derived from the Market, if based on offsets, would be the result of damage done to Country in another location and may not result in a net benefit regarding healthy Country.

Restrictiveness of legal mechanisms used to secure permanence of enhancement and protection actions.

In Victoria, the Conservation Trusts Act establishes the mechanism for Conservation Covenants, which have commonly been used as a legal mechanism to ensure permanence of biodiversity enhancement and protection actions on freehold title land. These restrictive mechanisms are perpetual and do not currently align with nor enable Traditional Owners ways of healing Country or conducting significant cultural practices. The application of such restrictive mechanisms in Victoria may therefore be a significant barrier to Traditional Owner co-benefits from projects under the NRM Bill unless there is flexibility in how biodiversity certificates are secured to land, and there is support concurrent support for the reform of the Conservation Trusts Act. This particularly pertinent in Victoria given the high percentage of the state covered by freehold title.

3. SPECIFIC RECOMMENDATIONS FOR AMENDMENTS OF ELEMENTS OF THE BILL

Below we highlight a number of sections of the NRM Bill that we recommend should be amended to elevate the recognition of Traditional Owner cultural responsibilities to Care for and speak for Country, and the ability of Victorian Traditional Owners to access potential benefits that may result from the implementation of the Bill.

1. Objects of the Act

The Federation recommends a separate Object of the Act be added to recognise that biodiversity at any location is the result of Traditional Owners Caring for Country for time immemorial, and Traditional Owners as custodians of Country, not merely as one category of market participant as is currently stated in the Act. This could be stated as: *Support and promote Traditional Owners' ability to continue to fulfil their cultural obligation as custodians of Country, through advising, implementing and benefiting from actions for the enhancement and protection of biodiversity.* The inclusion of such an Object should be reflected in later provisions of the Act and be a guide to the Act's five-yearly review.

2. Clearly define status of Aboriginal Title as provided for in the Traditional Owner Settlement Act 2010 (Vic) for the purpose of the NRM Bill

The Bill is not clear in relation to the various categories of land tenure held by parties on behalf of First Nations people and the rights and obligations that attach to each category. We suggest that as a fundamental principle, 'Aboriginal Title' granted to Traditional Owner Group Entities pursuant to the TOSA should be treated in exactly the same way as 'Native Title'.

The grant of 'Aboriginal Title' is a negotiated settlement of any and all claims by that group pursuant to the NTA. Victorian groups that enter Recognition and Settlement Agreements with the State should not, as a matter of principle, be entitled to any lesser suite of rights under the Bill than those groups that have, effectively, settled native title claims through the Federal Court process.

The definition of 'Native Title' should, for the purposes of the Bill, expressly include any other form of title recognised or granted by a State or the Commonwealth as part of any settlement of current and/or future claims under the NTA.

This amendment of the definition of land rights land should also be applied to the provisions in the Bill relating to 'Eligible person', 'Project Proponent', 'Project Area' and 'Eligible Interests'. An alternative would be to expressly reference Victorian 'Aboriginal Title' throughout the relevant provisions. This would enable a Traditional Owner Group Entity to have the same 'right to consent' as both a Prescribed Body Corporate and an 'Eligible Interest' as defined in the Bill.

3. Considering Traditional Owner impacts and co-benefits in making methodology determinations

In the current version of the Bill, there is no provision to expressly consider impacts on Traditional Owners with interests in a project area beyond considering social impacts. We recommend that it should be mandatory for the Minister to consider cultural and other benefits for and adverse impacts on Traditional Owners interests likely to result from undertaking a project that is covered by the methodology determination, alongside compliance with biodiversity integrity standards. The Bill should subsequently include a definition of adverse impacts on Traditional Owner interests to ensure doing no harm, and this should include potential impacts on Aboriginal cultural heritage. This should not be limited to impacts on 'Land Rights Land', to recognise *a priori* rights of indigenous people and unceded sovereignty and the continuing evolution of various forms of indigenous land and sea rights during the lifetime of projects that can be expected.

4. Traditional Owner co-benefits as mandatory attribute of Biodiversity Certificates

Information regarding the extent of Traditional Owner engagement in the planning and implementation of projects and associated co-benefits must be included as an attribute on certificates for projects on all tenure types. This would incentivise best practices of engaging Traditional Owners in projects as it would be expected to add value to price of a certificate. It would be a mechanism to ensure Traditional Owners have the ability to assert their cultural responsibility to Care for Country and benefit from the wealth generated from a property right dependent on biodiversity which is a result of their care for Country for millennia. This should apply to all tenure types and would be a mechanism to leverage benefits from the scheme for Traditional Owners in parts of Australia with high proportion of freehold title that has extinguished land rights under Commonwealth and state laws.

5. Biodiversity Conservation Contracts

The degree to which a project enables Traditional Owner co-benefits should be included as a principle for conducting Biodiversity Conservation Contract purchasing processes, alongside consideration of value for money and maximising the enhancement and conservation of biodiversity as a result of the process (Section 84(2)). This should consider the degree to which Traditional Owners have been engaged in the planning of the project to ensure consistency with cultural obligations as custodians of Country, and will benefit from the implementation of the project, including the enhancement or protection of cultural landscapes and procurement opportunities in the implementation of a project.

6. A First Nations member of the NRM Committee should be mandatory.

As the bill currently reads (Section 198 (2)), it is only recommended that a member of the NRM Committee have 'Indigenous knowledge relevant to the functions of the Committee'. This should be amended so this is mandatory, and further we recommend that this representative should explicitly be defined to be a First Nations person(s), considering the role of the Committee in needing to understand the purported 'cultural value' within a project. It would be considered inappropriate for a non-First Nations "Indigenous expert" to be appointed in such a role. The Bill should explicitly set out how a broader set of NRM Committee will access a broader set of First Nations views, for example the establishment of First Nations subcommittee, to enable the consideration of differing regional interests, and alignment with the principle of Self-Determination as set on out in UNDRIP.

7. Include provisions in the Bill to enable projects not based on offsetting.

The Bill should include provisions that enable project proponents to nominate buyers of the Biodiversity Certificates which they produce and the conditions of sale. This should include the establishment of a register of actors who are able to purchase Biodiversity Certificates which includes their sustainability credentials, and the ability to embed in contracts for sale of Certificates limitations on on-selling. This transparency mechanism could enable participation in the market Traditional Owner groups who are opposed to offsetting due to perceptions of no net benefit for Country or harm to others' Country.

8. CLOSING REMARKS

The proposed Bill represents an opportunity to take steps towards a new relationship with Australia's First Peoples, recognising their rights and responsibilities in practice and law. However, without the above recommended amendments, the NRM could result in further alienating Victorian TOs from their rights and responsibilities to Care for Country, through creating a new property right to which they have limited ability to access, or may oppose due to the perception of inconsistencies with the ethos of Caring for Country. Even with these amendments Traditional Owners will face obstacles to engaging with and benefiting from the NRM, including having limited access to knowledge and capital to be able to initiate projects and compete with other actors operating in this space. We recommend that accompanying grant programs be established to create the enabling conditions for Traditional Owner groups to access the opportunities presented by the NRM. We also seek for Victorian Traditional Owners to be able to achieve substantial benefits from NRM there will need to be accompanying amendments to Victoria's TOSA and the Conservation Trust Act. We encourage the Commonwealth to support these efforts. This is not an exhaustive assessment and list of recommendations, we call on the Commonwealth government to devote the required time and resources to do a thorough assessment of potential perverse outcomes for Traditional Owners ability to exert their rights, sovereignty and cultural obligations to Care for Country, considering differing jurisdictional circumstances, and amend the Bill accordingly.