

12 April 2017

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email: ec.sen@aph.gov.au

Dear Sir/Madam

Submission on Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017

1. This submission has been prepared by the Australian Environmental and Planning Law Committee of the Law Council's Legal Practice Section (**the Committee**).¹ The Committee welcomes the opportunity to provide comments on the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 (**the Bill**).

Introduction

2. The Bill was introduced on 23 March 2017, one day before the Government's climate change policy review discussion paper was released. The timing of this Bill raises a question about why these quite significant changes need to be considered and addressed before the review has concluded (and indeed, before consultation on the discussion paper has concluded).
3. The Bill amends the Carbon Credits (Carbon Farming Initiative) Act 2011 (**CFI Act**) to:
 - (a) remove the obligation to obtain consent of eligible interest holders from existing area-based emissions-avoidance projects;
 - (b) clarify the consent rights of state and territory government Crown lands ministers and Commonwealth ministers for projects conducted on exclusive possession native title land that is Torrens system land or land rights land;
 - (c) provide for legislative rules or regulations to allow parts of a sequestration offsets project to be removed and credits surrendered for the carbon stored in that area;

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

- (d) ensure a sequestration project's net total liability under the scheme does not include credits issued for emissions avoidance, or credits that have already been relinquished;
 - (e) clarify that requirements to relinquish carbon credits if carbon stores are lost apply to sequestration projects that store carbon and avoid emissions;
 - (f) provide for projects to transfer between methods in order to move between emissions-avoidance and sequestration;
 - (g) ensure that relinquishment requirements apply to projects whose crediting period extends beyond their permanence period; and
 - (h) allow legislative rules or regulations to provide for the removal of regulatory approval or consent conditions on declarations obtained after the end of the first reporting period for the project.
4. The Minister for the Environment and Energy has described these amendments as minor, intended to remove regulatory burden and increase flexibility, particularly with respect to savanna fire management projects.
 5. The Committee submits that the amendments proposed are not minor. The amendments proposed:
 - (a) alter fundamental protections for Indigenous interest holders with respect to engagement with third parties undertaking projects on their traditional lands;
 - (b) alter the previous architecture of the CFI Act, to enable methodologies to address consent requirements for eligible interest holders;
 - (c) retrospectively adjust with project requirements, putting the majority of emissions avoidance (savanna fire management) proponents at a potential disadvantage; and
 - (d) introduce a mechanism for projects to transfer between types (emissions avoidance and sequestration, or vice versa).

Context

6. The Explanatory Memorandum (EM) for the Bill states that the Australian Government has contracted 178 million tons of emissions reductions, at an average price of \$11.83 (averaged across all Emissions Reduction Fund (ERF) auctions). However, the EM does not clarify that about 38% of all contracted emissions reductions (contracted Australian Carbon Credit Units (ACCUs) from emissions avoidance and carbon sequestration projects) remain subject to eligible interest holder consents. These eligible interest holders are typically third parties, who are outside the contracting relationship between the Clean Energy Regulator (Regulator) and ERF participant.
7. The uncertainty in relation to delivery of contracted emissions reductions (ACCUs) was created in 2014 when, by express intent, amendments to the CFI Act which introduced the ERF also changed the timing of consents from eligible interest holders.

8. Under the original CFI Act (which existed before the 2014 amendments), consent to projects was required at the time an application was made to register a carbon sequestration project. To encourage participation in ERF auctions, the 2014 ERF amendments enabled participants to register and bid into the ERF without obtaining eligible interest holder consents. The Regulator was given a clear discretion to approve ERF projects on a conditional basis. For conditionally registered projects, ACCUs would not be granted until consents were obtained; thereby creating a risk of default for successful bidders, unless they obtained all consents in time to deliver ACCUs in accordance with their ERF contracts.
9. The 2014 ERF amendments also broadened eligible interest holder consent to area-based offsets projects (defined to extend beyond carbon sequestration projects). This reflected the broadening of the nature of projects to be recognized under the ERF (beyond the land sector to manufacturing, energy efficiency, landfill and mine methane combustion).
10. The 2014 ERF amendments commenced over two years ago. Since the changes to consent requirements, there have been four ERF auctions. All of these auctions have been conducted under the current statutory framework, including emissions avoidance eligible interest consent requirements.

Indigenous People's Interests

11. Amendments to section 44 of the CFI Act are welcomed. Providing clarity that Crown land Ministers do not have eligible interest consent rights with respect to exclusive possession native title land is consistent with the operation of broader jurisprudence and the CFI Act generally.
12. However, the Bill removes a consent right for eligible interest holders (including native title holders) with respect to emissions avoidance projects under the CFI Act. In addition to general market consistency and integrity concerns associated with the alteration of a key statutory requirement after four auction cycles, the impact of removing a consent right for Indigenous interest holders is a significant issue.
13. Since the first consultations in relation to the CFI Act in 2009/10, the position of most native title holders and Indigenous land rights land holders has been that consent should be required for any land-based project that may interfere with their rights and interests. In effect, this applies to both sequestration projects (due to permanence obligations), but also emissions avoidance projects that may impair/interrupt co-existing rights and interests.
14. Section 45A CFI Act sets the expectation that native title holders are eligible interest holders for an area of land subject to native title that is within a carbon project area (irrespective of the type of area-based offsets project). Section 45A was included in the CFI Act as a result of amendments in the Senate by Senator Milne on behalf of the Australian Greens to the CFI Bill in 2011. Section 45A reflects the position of native title groups in Australia; that positive protections for native title are required in other legislation which creates incentives for third parties to use and benefit from activities on areas of traditional country. Key to the operation of section 45A is an area-based offsets project.

15. The definition of area-based offsets project under the CFI Act means an offsets project that is a sequestration offsets project, or an area-based emissions avoidance project.
16. There is an important distinction between native title rights and interests, and other legal or equitable interests that may be held in land. Native title is a unique interest in relation to land, which is not afforded the same protections as other interests in land or water (eg: cannot be registered on Torrens title). Activities such as savanna fire management have a clear capacity to interfere with Indigenous people's rights and interests in areas of their traditional country.
17. Exclusive possession native title holders should be afforded rights equivalent to other exclusive interest holders when it comes to third parties undertaking activities on land and waters. Removing the consent requirement for emissions avoidance projects places exclusive possession native title holders at a disadvantage to equivalent property interest holders, due to limited protections under general property law.
18. The unique nature of native title rights and interests, coupled with limited resources in the native title sector generally, means that the removal of a positive and pro-active obligation on project proponents to engage with native title holders as eligible interest holders, creates an unfair burden on native title holders. If the eligible interest holder consent requirement is removed from a sub-set of area-based offset projects, it will be incumbent on native title holders and their representative bodies to monitor registration of ERF projects and challenge a potential proponent's legal right to undertake a project on an ad-hoc basis.
19. The CFI Act contains examples of how other land management interests are protected by a specific statutory positive obligation. Section 23(1) (ga) provides special protection to non-proprietary management plans, such as regional natural resource management plans, by including a positive obligation trigger. In this example, section 23(1)(ga) requires an area-based carbon project proponent to ensure that an application for a project within a natural resource plan area is accompanied by a statement about whether the project is consistent with the plan.
20. It would be inconsistent to repeal emissions avoidance project consent requirements and not provide some form of pro-active statutory protection for exclusive and co-existing native title holders, with respect to area-based emissions avoidance projects.
21. The EM notes that the Government encourages proponents to consult with other persons with an interest in any proposed project area to ensure there is no dispute over who has the legal right for a particular project. However, the EM does not set out how the Government or Regulator provides this encouragement. The same approach (to encourage proponents to engage with eligible interest holders) is intended to apply to existing ERF contracting arrangements, however there are a significant number of conditionally registered projects, which have not been discussed with or notified to eligible interest holders.
22. The current consent provisions under the CFI Act provide a pathway for engagement and agreement about the impacts of third party proposals on Indigenous people's interests, particularly when the nature of the activity involved (fire) will influence the availability of flora, fauna, access to areas, sites, cultural areas, camping, and other rights and interests likely to form part of a native title determination. There are key differences between native title interests and other forms of legal/equitable interest in

land (such as mortgages/security), which warrant specific and proactive statutory engagement measures under the CFI Act.

ERF Auction Consistency and Integrity

23. The Bill raises a key ERF market design issue: the timing of eligible interest holder consents and the registration and contracting of 'conditional' projects. As at 24 March 2017:
 - (a) there are 80 registered savanna fire management projects. Of these 80, four projects have been revoked;
 - (b) of the 80 projects, 24 projects were registered with conditional consent (and have not yet obtained all relevant consents). One of these 24 projects has been revoked;
 - (c) of the 80 projects, 55 have been awarded ERF contracts. Of these 55 projects, 12 remain subject to eligible interest holder consents;
 - (d) the 12 conditional ERF contracted projects account for around 6.8 million tonnes of emissions reduction (ACCUs). These 12 projects are summarised in **Attachment A**; and
 - (e) the remaining 43 savanna fire management projects that have been contracted under the ERF are not subject to eligible interest holder consents.
24. The changes proposed under the Bill are retrospective. As a consequence, should the 12 existing conditionally contracted ERF savanna fire projects overlap with Indigenous interests, the Bill will enable a minority of project proponents to gain efficiencies that have not been available to other participants, with respect to obtaining the consent of relevant eligible interest holders (including native title holders).
25. In contrast, other proponents have taken the time and resourced engagement and agreement with relevant Indigenous interest holders and other eligible interest holders (to the extent required).
26. Eligible interest holder consents for area-based offset projects have been a clear statutory requirement since the ERF commenced in 2014. The Regulator has approved projects and awarded contracts on the condition that consents be obtained at a later date, before ACCUs can be issued. Clearly some ERF participants adopted an aggressive approach to a foreseeable project delivery risk, being the need to obtain consents.
27. All contracts for the past four auction cycles have been issued on the current statutory basis. To change this requirement now, impacts on the interests of Indigenous people, but also potentially disadvantages existing ERF participants and previous bidders into the ERF.

Recommendations

28. While other key amendments and clarifications proposed in the Bill are generally welcomed, there should be no change to the nature of consent requirements under the CFI Act ahead of the Australian Government's climate change policy review. Given the

complexity of the consent issues, this proposal should be more comprehensively reviewed as part of the Australian Government climate change policy review.

29. Should the Government progress the Bill as proposed, the timeframe and process for engaging with Indigenous interest holders should be extended.
30. Further, we recommend that amendments be made to the current Bill to, at a minimum, empower the Regulator to require consent or engagement as a discretionary condition with respect to emissions avoidance projects. This type of discretion could be used by the Regulator as part of the due diligence process and should be coupled with a requirement for project proponents to identify whether there are any land rights interests or registered native title determinations in the area in which a project is proposed (emissions avoidance or otherwise). If concurrent Indigenous interests exist, this mechanism would serve as a red-flag for the Regulator to determine the risk of any dispute about the carbon project proponent's legal right to carry out the project, and to make further inquiries to determine what, if any, consultation has taken place with other relevant interest holders.

Contact

31. The Committee would welcome the opportunity to discuss the submission further. Please contact Adjunct Professor Greg McIntyre SC, Chair, Australian Environmental and Planning Law Committee at mcintyre@iexpress.net.au in the first instance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Smithers', written over a horizontal line.

Jonathan Smithers
Chief Executive Officer

ATTACHMENT A

Carbon Abatement Contract ID	Contractor Name	Project(s)	Project ID	Volume of abatement committed under contract	Volume of abatement sold to the Commonwealth under contract	Duration of contract	Auction date
CAC182517	ALFA (NT) Limited	North East Arnhem Land Fire Abatement (NEALFA)	ERF106185	100,000	0	10	Nov-16
CAC-102333	Corporate Carbon Solutions Pty Ltd	CPC Savanna Burning Project	ERF102048	715,000	71,500 <i>It is unclear how ACCUs can be delivered to a project that has not satisfied consent requirements</i>	10	Nov-15
CAC125605	Country Carbon Pty Ltd	Limbunya & Maryfield Stations	ERF103014	111,000	0	10	Apr-16
CAC364817	Country Carbon Pty Ltd	Violet Vale Station	ERF103862	30,000	0	10	Nov-16
CAC463217	Country Carbon Pty Ltd	Stirling Lotus Vale	ERF101491	120,000	0	10	Apr-16
CAC778200	Country Carbon Pty Ltd	Moroak & Goondooloo Stations	ERF103036	43,200	0	10	Apr-16
CAC948203	Jawoyn Association Aboriginal Corporation	Jawoyn Fire 2	ERF102021	210,000	0	7	Nov-16
CAC903889	Kurrajong Partners Pty Ltd	Northern Savanna Project	ERF104944	5,000,000	0	10	Nov-16
CAC141634	LEWIS, JAMES BENJAMIN	Western Top End Fire Management Project Area B	ERF101662	190,000	0	8	Nov-16
CAC-102600	James Lewis	Western Top End Area C	ERF102075	24,000	0	7	Nov-15
CAC102597	James Lewis	Western Top End Fire Management Project Area A	ERF101660	160,000	0	8	Apr-16
CAC869799	M.D.H. PTY LTD	M.D.H. Savanna Burning Project	ERF104736	130,000	0	10	Nov-16