Submission 044
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NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Committee Secretary
House Standing Committee on Climate Change, Environment and the Arts
House of Representatives
PO Box 6021
Parliament House
Canberra ACT 2600

13 April 2011

To whom it may concern,

Submission: Carbon Credits (Carbon Farming Initiative) Bill 2011 ("CFI Bill")

We write with respect to the above legislation.

The New South Wales Aboriginal Land Council **("NSWALC")** has previously made a submission on the CFI Bill to the Department of Climate Change and Energy Efficiency **("the Department")** on 18 February 2011. We **attach** this again now and note that its contents remain relevant to our current submission. We respectfully ask that you consider our previous submission in conjunction with this one.

The NSWALC is a statutory body corporate, established under the *Aboriginal Land Rights Act 1983* (NSW) **("ALRA")**, and is a peak representative body for the 119 Local Aboriginal Land Councils **("LALCs")** set up under the ALRA. The NSWALC has, as one of its objectives (s105), the aim of improving, protecting and fostering the needs of Aboriginal people of NSW. To this end, it welcomes any legislation which recognises the needs of Aboriginal people and is beneficial in nature. It is, however, mindful to ensure new legislation does not inadvertently detract from the rights conferred on Aboriginal people under the ALRA.

The NSWALC has only very recently become aware that the CFI Bill has changed significantly since its previous submission, such that it now includes numerous provisions dealing with State and Territory land rights land. These amendments to the CFI Bill affect land held by an Aboriginal Land Council **("ALC")** which was vested or granted under the ALRA. Please note that the comments below are, due to time restrictions, high-level only, and the NSWALC may wish to make further comments in the future.

1. *Executive Summary*

The NSWALC is concerned, with regard to the CFI Bill, that:

Complexity as a result of definitions used

- The distinction between the definitions of freehold land rights land, land rights land and Torrens land under the CFI Bill is circular in respect of NSW land and as such, some provisions in the CFI Bill are unlikely to ever apply to NSW (sections 44(7) and (52));
- If this distinction is to be maintained, freehold lands rights land and land rights land (at least with respect to NSW) should be granted the same express rights under the legislation as apply to Torrens land (in particular with respect to eligible interests);

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Eligible interest excludes ALCs who have land vested in them

- The definition of eligible interest under Division 9 of the CFI Bill does not include land which is statutorily vested in an ALC in NSW under the ALRA, but where title not yet transferred. Such interests are not noted on the title or register. Therefore, an ALC with an interest in the land awaiting transfer from the Crown (which can take years) would not be required to be notified of or give consent to a carbon sequestration project on their land, even though the land is vested in the ALC pursuant to the ALRA;
- The definition of "Crown Lands" under the CFI Bill covers all ALC land (including registered freehold Torrens land) in NSW, such that the Crown Lands Minister has an eligible interest in all ALC owned land and the ALCs have none;

Conflict between the ALRA and Commonwealth law

- By vesting the above mentioned decision-making power in the Crown Lands Minister, the CFI Bill conflicts with the provisions of Division 4 Part 2 of the ALRA and gives the Minister decision-making power which he or she does not have under the ALRA with respect to ALC land.

The NSWALC respectfully submits that Parliament should address these concerns by:

- Reviewing the definitions of freehold land rights, land rights land, Torrens land and Crown land, since land granted to ALCs under the ALRA fits the definition of all these types of land, yet these definitions are applied separately throughout the CFI Bill, resulting in circularity with respect to ALC land in NSW;
- Ensuring that where rights are given to freehold Torrens holders under the legislation, that land vested in ALCs in NSW is granted the same rights, ie, under Division 9 and s27(4)(g) and s27(5) of the CFI Bill;
- Ensuring all ALC land owners in NSW (of both Torrens land, old system land and statutorily vested land not yet transferred) are eligible persons under the CFI Bill;
- Ensuring that the CFI Regulations or the CFI Bill expressly exclude ALC land in NSW vested under the ALRA from the definition of Crown Land; and
- Ensuring that the decision making powers of the Crown Lands Minister under the CFI Bill with respect to ALC land in NSW does not exceed or conflict with the powers granted to the Minister under the ALRA.

We expand on the above issues below.

2. *Distinction between freehold land rights land, land rights land and Torrens land*

The ALRA is beneficial legislation which requires claimable Crown land in NSW to be vested in ALCs. Once transferred, land is held as freehold and registered under the Torrens system, though dealing with land is subject to the provisions of the ALRA (please refer to our previous submission for an explanation of this).

With regard to the CFI Bill, the NSWALC queries the need for a distinction to be made in the legislation between regular freehold Torrens land and freehold land rights land. It is not clear what Parliament seeks to achieve by making this distinction in the legislation, at least with respect to its

application in NSW. As noted above and in our previous submission, ALC land transferred under the ALRA is freehold Torrens land, subject only to the provisions of the ALRA. As far as NSWALC understands, these provisions do not explain the distinction drawn in the CFI Bill between freehold land rights land and freehold Torrens land.

The NSWALC is concerned that making a distinction between freehold land rights land and Torrens land may result in confusion in the interpretation and application of the CFI legislation and work to the unintentional detriment of Aboriginal people in NSW who could benefit from this legislation. Whilst it understands other states and territories in Australia may have systems which distinguish freehold land rights land from Torrens freehold land, this is not the case in NSW.

If it is Parliament's intention to maintain this distinction in the legislation between these terms, NSWALC submits that the terms should be used consistently throughout the legislation, so that where provisions confer rights and responsibilities on Torrens land, these are also expressly made to apply to freehold land rights land and land rights land.

For example, under s27(4)(g) of the CFI Bill, a declaration of a carbon sequestration offset program can only be made if the project area relates to land which is either Torrens land or Crown land (s27(5)). If a distinction is to be drawn between Torrens land and freehold land rights land throughout the legislation, section 27(5) should also expressly apply to freehold land rights land for clarity.

Similarly, Division 9 dealing with eligible interests applies only to Torrens land and Crown land and should again apply expressly to freehold land rights land and land rights land.

The differences in the definitions of "freehold land rights land" and "land rights land" under the CFI Bill is also liable to create confusion. Both cover freehold estates. It is not clear to NSWALC why the definition of "land rights land" needs to include freehold estates under subsection (a) of the definition, when this is already covered under "freehold land rights land".

For example, s44(7) of the CFI Bill applies only where land is land rights land *and* not freehold land rights land. Torrens land transferred under the ALRA to an ALC falls under both definitions (since the land would be a freehold estate granted under a law designed to benefit Aboriginal people, being land falling under subsection (a) of both definitions), so s44(7) is circular and cannot operate with respect to this land.

However, even if there were a situation where a parcel of land was "land rights land" but not "freehold land rights land" in NSW, it is not clear why (under s44(7) of the CFI Bill) the Minister should become the eligible interest holder in lieu of any Aboriginal freeholder of the "land rights land". The NSWALC is concerned that this provision could potentially detract from the rights of Aboriginal freehold owners of land to give consent to projects affecting their land by placing sole decision making power in relation to the land back into the hands of the Government.

Further, as discussed below, since the definition of Crown Land in the CFI Bill also captures all ALC land, the definitions of different types of land as currently drafted are liable to create even more confusion, since ALC land fits under the definitions of freehold land rights land, land rights land, Torrens land and Crown Land, and all these terms are used separately throughout the legislation.

For example, section 52 of the CFI Bill requires that if the administrator of the CFI scheme makes a declaration under s25 in relation to a project over land which is freehold land rights land *and* Crown land *and* not Torrens system land then the Crown Lands Minister must be notified. ALC land granted

and transferred under the ALRA is likely to fall within the definition of Crown land (see further below) and freehold land rights land. However, it is also registered freehold Torrens land in NSW. This means that s52 cannot apply to this land and the drafting is circular in respect to NSW.

Again, even if it were the case that there is some freehold land rights land in NSW which is also Crown land but not Torrens land, the NSWALC does not understand why the freehold land rights owner should not also be notified of a s25 declaration, since a project occurring on freehold land rights land would also affect their rights and interests.

The NSWALC considers that the distinction between these definitions under the CFI Bill requires further consideration in terms of their application in NSW and amendments to clarify these issues.

3. *Eligible Interest Holders*

The NSWALC understands that the CFI Bill provides that those with eligible interests in the land must consent to a project on the land and must be notified of any declaration made in relation to a project occurring on the land (s27). However, as the NSWALC understands, a line is drawn between legal estates and interests and unregistered or equitable interests, so that only those with a legal estate or interest are required to consent to the project.

The explanatory memorandum dealing with Indigenous land provisions of the CFI Bill states, at paragraph 1.41, that:

"Eligible interest holders on Torrens system land include, for example, registered interests...but would not include unregistered interests...On Crown land, ***legal*** *interests or estates derived from the Crown are recognised as eligible interests..."* (emphasis added).

Further, paragraph 1.42 of the explanatory memorandum states that:

"Interests in land rights land will be an eligible interest similar to other land interests. Therefore, the holders of land rights land will generally need to consent to projects on their land where others are undertaking projects".

The NSWALC is concerned about the practical implications of these statements. In practice, it is often the case that the actual legal transfer of land granted to an ALC under the ALRA can be an extremely lengthy process (usually because of the requirement to survey the land first). Currently, as the NSWALC understands, there are around 300 parcels of land in NSW where land has been vested in an ALC but the transfer of the title has not yet occurred. These may include parcels of land covering large areas which would be ideal for carrying out carbon farming projects. The NSWALC anticipates that this number will increase in the future as more claims are made and granted.

The ALRA caters for these situations by providing, under s40(2), that land is "vested" in a ALC if an ALC has a legal interest in the land, or the land is subject to a land claim and the Crown Lands Minister is satisfied the land is claimable or the Court has ordered land be transferred to an ALC, but (in any of these cases) the title has not yet transferred. In these cases, there is no notation at all made on the title of the fact that the land is legally "vested" in the ALC, and as such, the title for such land only shows the State of NSW as the registered proprietor, and any other prior (and no longer relevant) legal interest holders (ie, those subject to a previous Crown lease).

This means that:

- With regard to paragraph 1.41 of the explanatory memorandum, an ALC in whom land is vested but not yet transferred will not have a registered "legal" interest in Crown land and will therefore not have an eligible interest under Division 9 of the CFI Bill (indeed, prior Crown lessees still on the title, for example, could be eligible interest holders instead);
- It is not entirely accurate to assert (paragraph 1.42 of the explanatory memorandum) that "interests in land rights land will be an eligible interest similar to other land interests", because Division 9 only caters for registered interests and not unregistered interests, even though unregistered land rights land is statutorily "vested" in an ALC under s40(2) of the ALRA; and,
- Ultimately, an ALC with an interest in the land awaiting legal transfer is not required to be notified of, or give their consent to, carbon projects affecting their land under the CFI Bill. This leaves ALCs in the unsatisfactory position of receiving no notice or having no right of consent in relation to carbon projects that will affect, and may significantly impact, land they own.

The NSWALC urges Parliament to provide protection through the CFI Bill for ALCs whose land is "vested" in them under the ALRA, but whose interest is not shown on the title of the land.

Further, the NSWALC is also concerned that at present eligible interests provided for under Division 9 of the CFI Bill only cover Torrens land and Crown land. The wording of the legislation at present appears not to include old system title which has not yet been converted to Torrens land, but which may still constitute freehold land.

As submitted above, if it is Parliament's intention to maintain the distinction between land rights land, freehold land rights land and Torrens land, then it is imperative that Division 9 of the CFI legislation contain express provisions clarifying that land rights land and freehold land rights land holders (of registered or vested interests) also have an eligible interest (and that the Crown Lands Minister does not), such that they must give their consent to any proposed carbon farming projects on their land.

The NSWALC would urge Parliament to address these concerns through amendments to the legislation to ensure that all land rights land holders (including where land is vested but not transferred) be required to give their consent to carbon projects on their land.

4. *Powers of the Crown Lands Minister under the CFI Bill as an Eligible Interest under the ALRA*

The NSWALC is concerned that the CFI Bill gives the Crown Lands Minister extensive, or disproportionate, decision-making power with respect to land rights land, in that it exceeds the powers given to him or her under the ALRA, and conflicts with the regime for dealing with this land under the ALRA.

Section 44(4) states that for the purposes of the CFI Bill, the Crown Lands Minister holds the eligible interest in Crown Lands.

Crown Lands is defined to include land that is the property of a statutory authority of a State. Statutory authority means "an authority or body (including a corporation sole) established by or under a law of the Commonwealth, the State or the Territory (other than a general law allowing incorporation as a body or body corporate)". Sections 50(2) and 104(2) of the ALRA establish the NSWALC and LALCs respectively as bodies corporate. This means that ALCs are statutory

authorities under the CFI Bill, and land held by them is Crown Land. As such, the Crown Lands Minister holds the eligible interest in all ALC land under the CFI Bill, even if it is freehold Torrens land registered in the name of the ALC.

The NSWALC does not understand why Parliament would wish land which is registered as freehold Torrens land in NSW and held by ALCs to fall within the definitions of both Crown Land and Torrens land under the CFI Bill. Both types of land are treated differently and subject to separate provisions throughout the entirety of the CFI Bill. Both cannot apply concurrently; see, for example, s52 which applies to land which is Crown Land but not Torrens land.

The NSWALC considers that defining all ALC land as Crown Lands under the CFI Bill detracts from the rights of Aboriginal land holders conveyed by the ALRA to manage and determine their land themselves, for their benefit. It places decision making power with respect to Aboriginal land in the hands of Government, therefore taking away the most fundamental rights conferred by the ALRA.

5. ***Conflict between State and Commonwealth law***

Finally, the NSWALC is concerned that the CFI Bill as it currently stands conflicts with the operative provisions of the ALRA. Division 4 of Part 2 of the ALRA provides that where an ALC (including the NSWALC) wishes to carry out certain "dealings" on land vested in them under the ALRA, they must first gain the approval of the NSWALC through the process set out in the ALRA, or the dealing will be void (s42C(1) of the ALRA). Land dealings are defined in s40 and could potentially cover carbon farming projects (see our previous submission to the Department of Climate Change and Energy Efficiency dated 18 February 2011, **attached**).

If the Crown Lands Minister is the eligible interest holder of ALC land, then it could be argued that the CFI Bill as Commonwealth legislation is "covering the field" in respect of carbon farming projects, so that only the Minister's consent is required under s27 of the CFI Bill (and not the NSWALC's under the ALRA) to proceed with proposed carbon farming projects. In addition to potentially allowing for circumvention of the specific requirements of the ALRA, it also gives the Crown Lands Minister a decision-making power in relation to projects on ALC land that he or she does not have under the ALRA.

The NSWALC urges Parliament to address this issue by clarifying through the CFI Regulations (or the CFI Bill) that ALCs established under the ALRA are not statutory authorities for the purpose of the CFI legislation. Further, it urges Parliament to consider including provisions similar to those under s301 and 302 of the CFI Bill which state that the operation of the ALRA is not affected by the CFI legislation. As the NSWALC understands, it is not Parliament's intention to change or amend State land rights legislation, and as such, we would ask that Parliament express this through the legislation so as to avoid any legal uncertainty that may arise if there are inconsistencies between this legislation and State legislation.

Please contact me if you have any further queries or concerns with regard to our submissions.

Yours sincerely

Lila D'souza
Principal Legal Officer
NSWALC

Submission 044
Date received: 14/04/2011

NEW SOUTH WALES ABORIGINAL LAND COUNCIL
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18 February 2011

By email and by post

Jeremy Dore
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Dear Mr Dore

Submission response to the Design of the Carbon Farming Initiative ("CFI") Consultation Paper (the "consultation paper") and draft legislation

I write with regard to the CFI consultation paper and accompanying draft legislation. I refer to our recent telephone discussions in relation to the consultation paper and thank you for agreeing to accept our comments on the CFI consultation even though the response date has passed.

Background
The NSW Aboriginal Land Council (**NSWALC**) is a statutory body corporate, set up under the *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**). NSWALC is the peak representative body for the 119 Local Aboriginal Land Councils (**LALCs**) operating in NSW, also set up under ALRA. NSWALC aims to protect the interests and further the aspirations of its members and the broader Aboriginal community.

The ALRA is a compensatory regime that empowers NSWALC and the network of LALCs to acquire land (by claim over certain Crown Land or by purchase), deal with land and maintain and enhance Aboriginal culture, identity and heritage. As a consequence, LALCs have landholdings all around NSW.

NSWALC is concerned to ensure that the CFI proposals enhance the rights of NSW Aboriginal land holders and do not detract from any rights granted to Aboriginal people under the ALRA or inadvertently conflict with the provisions of the ALRA.

Indigenous land and the CFI
I note with interest the section of the Consultation Paper which states that "*some Indigenous lands are not readily comparable to freehold title (eg, Crown reserves) and there may be uncertainty in these cases as to the capacity of Indigenous people to participate in the scheme*".

I am not sure exactly what the Department means by this statement, and would appreciate your clarification in this regard. I note for your information that:

- land acquired or granted to Aboriginal land councils under the ALRA is registered freehold Torrens title land. As such, (subject to the points below) the registered freehold owner has the same rights to deal with the land as any freeholder in NSW has;
- to acquire or be granted the land, Aboriginal people do not have to prove any existing connections with the land as they would under the native title system;

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- the ALRA does, however, set out some additional requirements for LALCs that are landholders to follow before they are able to "deal" with their land (note this is a defined term, see section 40 of the ALRA). For example, NSWALC must approve all land dealings proposed by itself and as the peak body for LALCs, and has certain consultation obligations (see Part 2 Division 4 sections 42C-G);
- however, land council land can only be compulsorily acquired by a new Act of Parliament (see section 42B of the ALRA), unlike normal freehold land; and
- whereas native title rights usually give way to freehold rights, land granted to a LALC under a land claim that was lodged after November 1994 will be granted as a freehold title subject to a native title notation on the title (see section 42 of the ALRA).
- under section 42 of the ALRA, an Aboriginal land council is prohibited from dealing with any land vested in it which is subject to undetermined native title rights and interests. In order to obtain a native title determination, the Federal Court must make a finding about the existence of native title. If native title rights are found to exist on the land, any land dealing by a land council must not conflict with the native title rights.

Comments on the draft legislation

In light of the above, we assume that for land council land, the draft CFI legislation would work so that if the land is not the subject of a native title application (assuming that carbon farming would fall within the definition of "land dealing" under ALRA, see further below) and all other legislative requirements were met then the land council could seek approval to be recognised as an offset entity and carry out a project.

If the land were subject to native title rights, the native title holders would be considered to have a "legal" and therefore "eligible" interest in the land under section 42 of the draft CFI legislation. This would not remove the rights of the land council to otherwise apply to carry out the project, provided all requirements relating to other eligible interests in the land were met.

Please let us know if this understanding is not correct.

As stated above, the term "deal with land" is defined under section 40 of ALRA and all land dealings must be approved by NSWALC. "Deal with land" covers a broad range of actions including creating or passing a legal or equitable interest in land, entering into biobanking and conservation agreements under other legislation, execution of instruments relating to land and making a development application in relation to land. Carbon farming projects are not expressly referred to in the definition of land dealing. However, assuming that at least some of these projects will require a development application to be made, it is possible that such projects will be subsumed within the meaning of this term.

This will have the consequence that any NSW land council whose land is subject to a native title notation where there is no determination of the native title claim will not be able to carry out any offset project under the CFI legislation, in accordance with section 42 of the ALRA. To ensure legislative consistency between the CFI legislation and ALRA, the Department may wish to consider whether it is necessary to include provision in the CFI legislation to deal with this situation.

If possible, we would very much appreciate the opportunity to review the draft sections of the CFI legislative provisions dealing with native title interests/Indigenous land, once they are available, to ensure they do not conflict with the provisions of ALRA.

Fit and Proper person test

I also wish to note our concern to ensure that the fit and proper person test relating to offset entity recognition provided for under section 53 of the draft CFI legislation (and, related to this, the cancellation provisions under section 54) does not prejudice Aboriginal land owner applicants.

I understand from our discussions via telephone on 16 February 2011 that this unlikely, given that:

- under these sections the Administrator must only "have regard" to the factors listed (and any other relevant matters) and is not bound by them having occurred;
- that any issues an applicant may have relating to this test could be raised through the application process;
- that the decisions of the Administrator are able to be reviewed by the Administrative Appeals Tribunal;
- that the Administrator may, as a matter of practical administration of the scheme, give applicants the chance to respond to any concerns they may have prior to making a decision (though I note this does not appear to be expressly provided for in the draft legislation); and
- that the list of matters to be considered relating to body corporate applicants appears to target executive officer conduct exclusively, implying that if there has been an offence committed in the past, but the executive body has since changed, that this should not impede any body corporate applications to gain recognition as an offset entity.

Again, please let us know if this understanding is not correct.

Yours faithfully

Lila D'souza
Principal Legal Officer