



Carbon Farming Initiative Amendment Bill 2014

Senate Standing Committees on Environment and Communications

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Executive Summary

The submission makes the following recommendations:

- In order to better protect the rights of eligible interest holders and to protect against unnecessary public expenditure, existing requirements under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act) that require the consent of eligible interest holders to be demonstrated as part of the 'eligible offsets project' application should be retained.

Alternatively, satisfying the requirement for eligible interest holder consent to be demonstrated should be a pre-cursor to any involvement in a carbon abatement purchasing process.

- The ERF Bill should be amended to allow well researched and scientifically sound proposals for methodologies to be put forward by members of the public. Further statutory 'filtering' mechanisms could be used to ensure the time and resources of the ERAC are used efficiently. This would enable innovative research and development and entrepreneurial scientific opportunities to continue in the carbon and climate change area.
- The ERF Bill should be amended to permit applications for merits review to be made to a Tribunal by persons or groups who are affected by a decision to make, vary or revoke a methodology.
- The ERF Bill should be amended to clarify the newness' and/or 'government program' requirements. These have the potential to disadvantage members of the community, and in particular Aboriginal and Torres Strait Islander communities, who are pursuing carbon market opportunities. The 'government program' additionality requirement should be further refined, narrowed or removed, and land management projects undertaken by Aboriginal and Torres Strait Islander communities under government programs should be dealt with expressly in the legislation.
- The Bill should be amended to permit subsequent crediting periods after the first crediting period has expired, if the project continues to pass refined additionality requirements and meets other relevant criteria.

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to the inquiry by the Senate Standing Committees on Environment and Communications into the Australian Government's Emissions Reduction Fund (ERF) Carbon Farming Initiative Amendment Bill 2014 (the ERF Bill).
2. This submission has been drafted for the Law Council by the Australian Environment and Planning Law Group in the Legal Practice Section of the Law Council. The views expressed rely on the expertise and experience of senior lawyers practising in the field of environmental law.

Eligible interest consent changes

3. The ERF Bill proposes to alter the timing for eligible interest holders to consent to proposed offsets projects. The ERF Bill proposes to change the timing of this consent requirement, making it a potential condition on an eligible offsets project declaration.
4. Under the existing Carbon Farming Initiative (CFI), 'eligible interest' consent must be demonstrated as part of the application process for a declaration that a proposal is an 'eligible offsets project', capable of generating carbon units for sale. An eligible interest holder, a fee simple or freehold owner (for example where a lessee proposes a project), a mortgagee, a Crown land minister, or a native title holder.
5. The change enables a proponent to participate in a carbon abatement purchase process, and be a party to a carbon abatement contract with the Commonwealth, without the consent of key interest holders. While this is intended to streamline the application process, it defers a real risk that contracting parties will not be able to obtain eligible interest holder consent.
6. Postponing the consent requirement until after a proponent has participated in and been awarded a contract for emissions reductions, increases the risk profile for the contracting parties. Enforcement of these obligations will involve public money in the event that the proponent cannot 'make good' and acquire units to fulfil contractual requirements.
7. This risk can be avoided by maintaining existing requirements for eligible interest holder consent to be demonstrated as part of the 'eligible offsets project' application phase. Alternatively, satisfying this requirement should be a pre-cursor to any involvement in a carbon abatement purchasing process.
8. Requiring up-front satisfaction of this requirement better protects the rights of eligible interest holders and better protects against unnecessary expenditure of public money.

Changes to additionality and methodology development

Methodology determinations

9. The approach to the development of methodologies has also changed significantly from the current CFI arrangements.
10. Under the existing CFI and proposed ERF system, a proposed offsets project must meet a number of criteria in order to be declared an eligible offsets project. These criteria include that the project be covered by an appropriate methodology.

11. The CFI framework establishes opportunities for 'ground up' innovation. A person can apply for endorsement of a proposal for a methodology determination. However the ERF Bill will remove this ground-up approach and replace it with a 'top down' approach, whereby the Minister may make, vary or revoke a methodology. The Minister must seek advice from the Emissions Reduction Assurance Committee (ERAC) in undertaking these activities, which allows for limited public consultation. However, the process is controlled and determined solely by the Minister.
12. The ERF Bill will also repeal provisions enabling merits review of decisions relating to the endorsement of a proposed methodology. Endorsement decisions by the Domestic Offsets Integrity Committee and their review by a Tribunal, are integral to an accountable process of methodology endorsement and determination. The review mechanism provides a check or balance on an administrative process.
13. The ERF Bill removes the formal pathway for qualified groups or individuals to put forward credible, scientifically supported proposals for methodologies. While this may relieve some resources needed for assessment and endorsement of proposals, it creates a system that may inadvertently stifle innovation and research and development. Further, it is likely to make it difficult for some interest groups, organisations or classes of persons to ensure they have a timely pathway for participation in the ERF.
14. The explanatory memorandum (EM) for the ERF Bill states that methodology determinations will be developed by the Department of Environment 'in consultation with business, through technical working groups'. While the EM notes that 'the broader public will still have the opportunity to bring forward methodology proposals', this process is at best informal and unclear.
15. Further refinements should be made to the ERF Bill to allow well researched and scientifically sound proposals for methodologies to be put forward by members of the public. Further statutory 'filtering' mechanisms could be used in addition to that already proposed. Methodologies will only be approved where they count towards Australia's targets, to ensure the time and resources of the ERAC are used efficiently. This would ensure a means to continue innovative research and development and entrepreneurial scientific opportunities in the carbon and climate change area.
16. In addition, it is recommended that a merits review right in relation to decisions regarding methodologies be included in the ERF Bill for persons or groups who are affected by a decision to make, vary or revoke a methodology.
17. The Law Council's [*Policy Statement on Rule of Law Principles*](#) (2011) provides that:
 6. *The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law.*
 - d. *Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.*

Additionality

18. Another criteria that must be satisfied before a proposed offsets project can be declared an eligible offsets project under the ERF Bill is that it meets 'additionality requirements'.

19. The ERF Bill introduces new requirements for the recognition of eligible offsets projects; that it is new and does not receive funding from another state, territory or Commonwealth government program. These new requirements may affect the eligibility of project types that receive funding from other government programs that assist with the implementation of an emissions reduction project.
20. The Law Council is concerned by issues raised in relation to the new additionality requirements in submissions from the *National Indigenous Climate Change Project* and *Aboriginal Carbon Fund / Indigenous Carbon Projects* on, variously, the ERF Green Paper and White Paper/exposure draft legislation. These submissions note the creative and beneficial social and environmental enterprise that has developed around carbon market opportunities within Aboriginal and Torres Strait Islander communities. However, they also note risks to opportunities being pursued from proposed changes to additionality requirements.
21. Materials accompanying the release of the ERF Bill, including the EM, aim to allay concerns associated with these new hurdles. The EM notes that the Government 'anticipates' that projects could still receive assistance from the Green Army initiative or Indigenous ranger programs, however, further assurance is needed. The EM flags that the Regulator will issue a list of programs that 'typically' provide prohibitive levels of funding and proponents will need to choose whether to seek to apply under the ERF or one of the listed programs. Further, the EM notes that a project would lose its registration if the proponent later obtained further funding from a listed source. This listing mechanism is central to the transparency and certainty of the 'government program' additionality requirement.
22. An EM may be relied upon as an interpretation aid where the statutory language is uncertain. Therefore it is recommended that clarifications, such as the listing mechanism explained in the EM, be included as statutory explanations in the ERF Bill. In the absence of this clarity, there will be land management projects provided through some Caring for Country programs, Indigenous Protected Area arrangements, native title settlement agreements or other co-management or joint management arrangements established with state and territory governments that can be interpreted as falling short of the proposed 'newness' and/or 'government program' requirements.
23. The EM also states that the Regulator will require proponents to make a statement about the support received from other government programs as part of their application for project registration. It is likely that some funding arrangements, assistance and support agreements will be subject to confidentiality obligations, for example in the native title settlement context. Further, the proposed use of this information to add to the list of programs that will prohibit registration under the ERF arguably creates uncertainty for other accepted projects as the ERF evolves. For smaller land sector proponents, keeping track of funding over the life of a project in potentially compatible areas has the potential to consume additional resources, adding to the administrative cost of a project. It is recommended that the 'government program' additionality requirement be further refined, narrowed, or removed, to avoid unintended consequences, uncertainty and burdensome ongoing monitoring and reporting requirements.
24. While requirements in lieu of the express 'additionality requirements' can be reflected in methodologies, proponents have less control over the content and variation of methodologies for the reasons discussed above. Proponents are reliant on the priorities and discretion of the Minister to make any changes needed to methodologies. A short paper accompanying the ERF Bill states that this issue will be rectified as a matter of priority. The Bill can clearly be interpreted in a way that is detrimental for these programs and projects. It is suggested that these projects be

dealt with expressly in legislation (express inclusions or exclusions from consideration when determining additionality).

Crediting periods

25. The existing CFI framework enables proponents of registered projects to apply for subsequent crediting periods after the first crediting period has expired. Under the existing system, further crediting periods may be approved if the project continues to pass the additionality test and meets other relevant criteria. However, the ERF Bill proposes to limit crediting periods to one single period (with the exception of limited transitional projects, which may be capable of a short initial period, followed by a second crediting period).
26. This approach limits scope for establishing long term relationships and arrangements and could impact on the voluntary offsets market. The provision limiting crediting periods should be amended to allow further periods to be recognised.
27. As noted by the Carbon Market Institute (CMI) in its submission on the exposure draft bill, in the absence of method-specific crediting periods there is a potential mismatch between the effective abatement generating periods of many carbon abatement assets, and the single crediting periods as proposed in the ERF Bill. Limiting projects from generating Australian Carbon Credit Units (ACCUs) beyond these periods may influence the level of participation in the ERF and the general level of private sector investment in abatement projects.
28. The single crediting period (or two limited periods) approach could have a number of adverse consequences, including:
 - for ACCUs contracts already in place – the limiting nature of one crediting period could impact existing contracts and undermine the business case for future investment;
 - for any secondary voluntary market – limiting the crediting period may impact the formation and term of a liquid secondary market in ACCUs. An example identified by the CMI is a project with a single seven-year crediting period and a five-year ERF contract, which may only be able to generate a further two years' worth of ACCUs to supply to a secondary market. The viability of a secondary market has potential consequences for managing 'make good' requirements under ERF carbon abatement contracts; and
 - for existing projects, the transitional crediting periods do not provide the same level of certainty on which to establish longer-term relationships and arrangements. It is recommended that the ability to apply for subsequent crediting periods be reinstated with appropriate 'integrity' controls.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian state and territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executives members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.