Submission 006
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North Australian Indigenous Land and Sea Management Alliance

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Friday, 8 April 2011

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

Re: Standing Committee on Climate Change, Environment and the Arts

Dear Ms Morris

I am writing in response to your invitation of 1 April 2011 to make a submission on Bills presented on 24 March 2011 relating to the Carbon Farming Initiative.

I have attached a submission from the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) that draws on input from the Indigenous Land Councils who are partners in the Alliance.

I am grateful for the opportunity to put our views before the Committee and will be happy to provide additional information should the Committee require.

Yours Sincerely

Joe Morrison
Chief Executive Officer

Submission on laws relating to the Carbon Farming Initiative (CFI)
NAILSMA welcomes the CFI as essential and long overdue recognition of the role of land management in national and international climate change action. It offers opportunities for Indigenous people to respond to the very significant threats to their livelihoods and lands posed by climate change.

The CFI is a particularly welcome development for northern Australia because the north's Indigenous people have already taken important steps to demonstrate the skills and motivation to play a leading role. A well-designed CFI will consolidate the Indigenous role by providing formal recognition of carbon benefits from Indigenous land management practice, and provide opportunities for development of Indigenous enterprises in regions where there are few other opportunities.

But a number of CFI design features cause concern because they will weaken opportunities for participation by Indigenous landholders. Some of our concerns have been addressed in the government response to public submissions on the consultation paper issued by the Department of Climate Change and exposure draft of the *Carbon Credits (Carbon Farming Initiative) Bill* (CCCFI Bill), but some mismatch to north Australian conditions remains. Our submission focuses on those mismatches.

However, we should acknowledge that we are constrained in comprehensive assessment because drafts of regulations are unavailable. The Bills provide the basic structure of the initiative, but the rules that will decisively govern participation will often appear in regulations, which are yet to be released for public comment. It follows that our commentary on the Bills extends beyond their language into argument about options for regulations that we assume will be laid before Parliament within the next few months. This in turn requires us to have regard to statements of intent contained in the Explanatory Memoranda[1] and formal and informal statements from the relevant Minister and agency.

In addition to considering the structures and principles contained in the Bill, we urge the Committee to consider how the exercise of discretion in subordinate instruments might influence the ultimate workability of the initiative and hence its effectiveness, and to provide advice where warranted.

Rather than work sequentially through the Bills, we have chosen to highlight those matters of design that cause most concern and link them to relevant clauses and statements. We emphasise, however, that our capacity to examine the Bills at the level of detail necessary to understand fully linkages and interactions among different parts has been constrained by the limited time made available. Given tight timeframes and the complexity of issues, and despite the best efforts of relevant agency staff, consultation has in some matters verged on tokenistic.
We trust that the House of Representatives and Senate Inquiries will provide opportunities for more considered reflection on issues that are of greatest significance to Indigenous people.

<u>Treatment of Indigenous rights in land</u>
Indigenous people own about 20% of Australia's land mass - with a larger proportion in northern Australia: nearly 50% of land is Indigenous-owned in the Northern Territory and native title rights exist over much of the (pastoral) remainder. To secure maximum national benefit, the scheme must be well matched to the rights, interests and aspirations of Indigenous people.

[1] Minister for Climate Change and Energy Efficiency (2011) Explanatory memorandum: Carbon Credits (Carbon Farming Initiative) Bill 2011. Parliament of Australia. Accessed at www.aph.gov.au April 2011.

Rights of Indigenous people in land have been rendered extremely complex by legal compromises that seek to recognise connections with and dependence on land and formalise communal ownership, and where exclusive title has not been recognised, also protect the interests of non-Indigenous land users. Unfortunately, attempts to grapple with that complexity for the CFI have been only partially successful.

The Bill makes no special provisions for land ownership registered on title systems, as are most lands granted under State and Commonwealth Indigenous land rights law (the Northern Territory is covered by both Commonwealth and Territory law). The Explanatory Memorandum (clause 4.25) for the CCCFI Bill posits that landholders will be able to undertake projects "without reference to Ministers". The context of this statement implies that the reference to Ministers means Crown Lands Ministers, and that this freedom from the potential for another layer of approval should be welcome.

But this does not mean that the design of the CFI frees landowners of requirements to seek additional Ministerial or other approval under other law. For example, the Commonwealth *Aboriginal Land Rights (Northern Territory) Act* (ALRA) requires Ministerial approval for agreements affecting interests in land and running for more than 40 years. The definition of permanence of sequestration (100 years) will therefore require holders of ALRA title to seek Ministerial endorsement of their CFI projects. We return to this issue later in this submission.

In regard to Native Title land, when exclusive possession has been recognised, the registered native title body corporate will be taken to be project proponent (clause 46 of the CCCFI). Credits are to be held in trust by the native title body (clause 50 of CCCFI) to whom the traditional owners of the land must issue instructions which the native title body is obliged to observe. Landowners' capacity to operate their projects is subject to the action (or inaction) of the registered native title body.

Such an arrangement is perhaps workable when the relevant body corporate is well established and familiar with the demands created by operating a complex business. But where experience and skills are less highly developed, there is great scope for confusion, conflict and poor performance. Whilst we acknowledge that the particulars of Indigenous land interests create great challenges for transactions that require clear property rights, we consider the present proposals too rigid. The Bill should be amended to provide alternative structures for project proponents, where sought by the common law (traditional) owners.

In addition and arguably more importantly, existing provisions do not require consent from native title interests having various use and access rights, which might be substantially affected by management for carbon farming. We submit that all recognised native title holders should have a right of consent and access to benefits of carbon farming schemes.

We note that the Department of Climate Change proposes additional consultations on consent issues, which will presumably require amendments to the present Bill and coverage in regulations.

We seek widening of any consultations to include, in addition to rights of consent and access to benefits, greater flexibility to nominate other suitable bodies as project proponents to act on behalf of traditional owners may be required.

Permanence

The 100 year permanence rule as put in the consultation paper and explanatory memorandum for sequestration (a century or nothing) is illogical and ill-matched to Australian conditions, particularly in northern Australia. The rule determines that a landowner who actively sequesters carbon for (say) several decades and up to 99 years has contributed nothing to emissions management in that period, an unsustainable proposition.

The 100-year permanence requirement is apparently based in part on market disdain for temporary credits under the Clean Development Mechanism and the like, but these are very short term and poorly designed and marketed. In any event, establishing in law a requirement to predict the optimal management of land for carbon benefits a century is an extreme over-reaction to the flaws in some international alternatives to rigid interpretations of permanence. It is disappointing that no effort appears to have been made to develop more realistic options, of which there are many, including better designed long-term (but not permanent) credits and arrangements for "collective permanence" rather than site by site assessment.

It is unreasonable to require disadvantaged Indigenous landholders holding communal title who wish to access the relatively modest returns of a voluntary carbon market to limit forever options on use of their principal asset. For Indigenous communities the symbolism of "locking up" the principal asset forever to benefit present owners while creating financial liabilities for several generations of their descendants will, in our view, substantially limit participation. It is also at odds with the present attitude of government to Indigenous obligations to pursue sustainable development. That conflict is illustrated by the disparity between the 100-year commitment required under the Bill and a 40-year limit on the power of Indigenous Land Trusts to enter agreements affecting land under other federal law in the *Aboriginal Land Rights (Northern Territory) Act*.

Clause 87 of the CCCFI Bill would appear to permit specification of shorter periods in regulations, but there is no indication of the conditions under which this discretion might be exercised.

To encourage participation of Indigenous landholders, provisions for security of sequestration should be changed to recognise commitments exceeding (say) 20 years at a lower price than "permanent" credits. Such schemes will require careful design to ensure that the incentives are sufficient to increase the amount of secure long-term carbon sequestration in landscapes. But the benefits of increased participation will more than justify the effort.

The CFI legislation is about voluntary markets. The acceptability of very long-term sequestration credits should be determined by those markets, not by an arbitrary definition of forever. Indigenous landholders have shown through the West Arnhem Land Fire Abatement Project (WALFA) that they can generate carbon credits that offer important co-benefits in biodiversity protection and social development in remote regions[2]. These and similar credits are likely to be unusually attractive in voluntary markets.

[2] Russell-Smith J, PJ Whitehead and PM Cooke (eds) (2009). Culture, ecology and economy of fire management in northern Australia: rekindling the *wurrk* tradition. CSIRO Publishing, Melbourne. 386 pp.

Additionality and conservation

In the DCCEE consultation paper, the position was taken that any site receiving support for conservation works supported by contract would be ineligible to participate in the CFI. This has caused and will continue to create uncertainty and lead to rejection of State, Territory and Commonwealth conservation initiatives that may compromise CFI eligibility.

Government has undertaken to "clarify the interaction between the (CFI) and pre-existing landscape restoration and conservation activities". The offer of clarification is welcome, but we are disappointed that the opportunity was not taken to correct errors in the consultation paper with a clear positive statement of direction (as was done for treatment of projects increasing agricultural productivity). The fact that an extraordinarily inequitable position was taken in the original consultation paper weakens confidence outcomes from further consultation. It is essential that clarification should go beyond pre-existing projects to cover treatment of future projects. DCCEE staff have indicated that more considered approaches will be possible with the dropping of a financial additionality test and substitution of the "common practice" test (Clause 41 of the CCCFI), but ambiguity remains.
NAILSMA seeks amendment to the Bill to require that regulations and methodologies must:

- Recognise clear differences between the demands made by targeted conservation actions and the complex task of managing carbon dynamics in extensive landscapes
- Ensure that carbon projects that draw on and complement biodiversity and resource conservation measures will be welcomed and indeed treated favourably
- Ensure that communities contributing to national conservation goals through arrangements like Indigenous Protected Areas and other conservation agreements will not be punished by denial of access to the CFI.

We note that favourable treatment of projects delivering multiple benefits through diverse funding including carbon markets will enable emissions reductions and sequestration to be delivered over huge areas of the rangelands where, for example, stand-alone savanna fire emissions abatement projects are likely to be marginal. It would be perverse for Australia to deny itself access to the multiple environmental and social benefits through widespread uptake of such projects by persisting with crude and technically flawed treatment of additionality.

Protection of native forests - avoided deforestation

NAILSMA welcomes recognition of the carbon biosequestration benefits of protecting native forests. It is untenable for Australia to promote avoided deforestration arrangements in other nations while failing to take action on its own soil. However, there are flaws in the proposals from an Indigenous landowner's perspective.

We have already noted the problems created by a fairy tale definition of permanence to secure sequestration. Those difficulties apply particularly to native forest protection projects (avoided deforestation).

In addition, the definition of native forest excludes much of the Australian landmass which support woodlands with nonetheless very substantial carbon storage capacity. We recognise that a definition of forest matched to Kyoto definitions is required to distinguish between Kyoto-eligible and non-Kyoto credits, but we are surprised by the failure explicitly to protect woodlands and shrublands from land clearing and other degradation in the same way as forests.

NAILSMA seeks change to the Bill to provide for treatment of protection of woodlands and shrublands in the same way as forests.

Recognition of ACCUs under a carbon price mechanism

We note that the role that credits created under the *Carbon Credits (Carbon Farming Initiative) Bill* will play in a compliance scheme is subject to further consultation. We consider it essential that such credits, irrespective of when they were generated, should be able to be offset against future liability provided they can be shown to have be generated consistent with a methodology ultimately approved under the CFI. We note that the Minister has indicated support for acceptance of CFI credits under a compliance scheme.

We propose that to avoid continued uncertainty, the status of CFI credits as usable to meet liabilities under a compliance scheme is included in the CCCFI Act. We note that the companion Bills appear to establish much of the administrative infrastructure that will be required for a compliance regime.

Backdating

The Act provides backdating of project declarations only to July 2010 (Clause 27(15) and (16)). A number of Indigenous savanna fire projects were operating in the Territory before this date. Establishment of those projects responded in part to signals from the Rudd Labor government that Indigenous participation would be facilitated. NAILSMA seeks capacity for further backdating of declarations of Indigenous savanna fire projects where evidence of abatement consistent with CFI methodologies is available.

Capping CFI credits

There has been public discussion (e.g. in Professor Garnaut's papers[3]) of the potential to restrict the number of CFI offset credits available. In the explanatory memorandum for the Bill it is suggested that processes have been designed to avoid "flooding the market" and depressing prices. We understand that there is no present government intent to place limits on CFI credits.

NAILSMA seeks assurance that there will be no arbitrary limits on the number of ACCUs issued. There should be no provisions in the Bill or regulations to provide for artificial constraint on supply. Risks of price fluctuation are better managed by scheme design to permit access of most credit types to larger overseas markets rather than restriction of supply.

[3] Garnaut R (2011) Garnaut climate change review - Update 2011. Update paper 6: Carbon pricing and reducing Australia's emissions. Accessed at www.garnautreview.org.au.

Time restriction on exchange of Kyoto ACCUs

We have assumed that the Bill's deadline (1 July 2013: Clause 157 of CCCFI Bill) for exchange of Kyoto ACCUs for assigned amount, removal or emissions reduction units is matched to the commitment period under the Kyoto Protocol. It is not clear, however, why law establishing arrangements that will not be reviewed until 2014 makes no provision for future exchanges for internationally recognised units NAILSMA seeks clarification of intentions post-Kyoto regarding exchange of ACCUs to provide access to international compliance markets and removal of time restrictions from the Bill. Such matters are better dealt with in regulations to take account of post-Kyoto agreements.

Recognition of other voluntary schemes

The CFI's tight restrictions on backdating are at odds with other international schemes like the Voluntary Carbon Standard. And it has been indicated that Australia would not take the action necessary to ensure additionality of credits issued under such schemes in respect of emissions counted towards Australia's Kyoto targets. The net effect is that Indigenous projects denied recognition of "old" credits under the CFI are blocked from pursuing other options on international voluntary markets. This is, in our view, unnecessary and inequitable.

NAILSMA seeks amendment of the Bill to:

- Provide for further backdating where it can be shown that the pre-existing project complied with CFI methodologies; and
- Facilitate access to other schemes like the VCS by providing for surrender of AAUs or other appropriate actions to ensure additionality.

About NAILSMA and its role in carbon pollution management

NAILSMA is an alliance of the Carpentaria Land Council Aboriginal Corporation, Northern Land Council and Balkanu Cape York Development Corporation. NAILSMA supports Aboriginal and Torres Strait Islander people in land and sea management across north Australia. Although the Kimberley Land Council (KLC) is not presently formally part of the partnership, NAILSMA also provides support to projects operated by the KLC in north West of WA.

NAILSMA and its partners' approach to management and development of the Indigenous estate recognises the need to connect country, people and their culture to economic opportunities. This approach, termed the 'Culture-Based Economy', focuses on linking customary activities with new and existing industries to create livelihoods meeting Indigenous aspirations for socioeconomic development and good management of their lands. Through a culture-based economy, Indigenous land owners and managers seek to generate incomes without compromising their customary obligations to lands and resources.

In this context, it will be obvious that the Carbon Farming Initiative (CFI), with its emphasis on markets for carbon offsets from management of land, stock and vegetation has the potential to be very important for north Australia's Indigenous people. It is critical to get the CFI right not only because the carbon economy is important in itself, but to set a framework for other opportunities in delivery of ecosystem services through well-designed market-based instruments. As a leader in recognition and development of commercial opportunities for Indigenous people in environmental services, NAILSMA welcomes the CFI. We will take every opportunity to work with governments and industry to develop the CFI's potential to deliver greenhouse gas abatement together with other environmental and social benefits.

Our response to the Carbon Farming Initiative is informed by:

- Features of the culture-based economy and the lens it provides for considering the CFI;
- Commitment made by the Labor Government to facilitate engagement of Indigenous people with carbon markets;
- Several years of direct experience in building and operating successful projects.

We also argue for direct connection of the CFI to social policy, particularly commitments to "close the gap". Closing the gap requires policy-makers in all sectors to deploy the programs for which they are responsible to address Indigenous disadvantage. Demonstrating that settings have been sensitive to Indigenous interests is a fundamental obligation, which should not be sacrificed for regulatory neatness or the easy option of adopting existing, often arcane international rules that will certainly change as the land management elements of international carbon policy mature.

Culture-based economy and carbon

The culture-based economy is based on the following premises:

- Indigenous engagement with the mainstream economy should be pursued vigorously and creatively
- Indigenous engagement with emerging economic opportunities, including delivery of environmental services, should be pursued in tandem with mainstream options
- In the short to medium term, creative and effective engagement with both mainstream and emerging economies should build on and be matched to community norms, customary interests, skills and capabilities

- Interactions that draw initially on customary interests, knowledge and skills can provide important pathways to rewarding engagement in a wider range of economic and employment activities
- Land and sea management are areas of highly developed customary interest, knowledge and skill and so should be particularly targeted for development of pathways to commercial opportunity.

The benefits of connecting Indigenous social policy and carbon policy have already been recognised by government in commitments repeatedly made to "facilitate the participation of Indigenous land managers in carbon markets"[4]. That commitment has been backed by very welcome funding to help develop a number of related projects in north Australia. However, aside from the inclusion of savanna fire management as one of the activities covered by the CFI, other aspects of the initiative show too little evidence of policy settings that offer particular encouragement for Indigenous participation.

We consider that there are many ways genuinely to facilitate participation and advance Indigenous economic development in alignment with government social policy, without threatening integrity of carbon farming schemes. Positive treatment of opportunities in northern Australia is needed to bring domestic policy into better alignment with sympathetic Australian treatment of related initiatives overseas[5].

Among the most obvious steps are to:

- Ensure that coverage of the CFI includes all activities in which Australia's Indigenous people have particular interests and skills
- Assign priority to developing frameworks (including methodologies) to advance options identified by Indigenous people as being of most immediate interest and greatest relevance
- Comprehensively recognise all interests in land, including native title interests;
- Avoid confounding public or private support for conservation initiatives on Indigenous land or for building general capability for economic development with funding for specific commercial activity in carbon markets.

[4] Page 6-64 in DCC (2008) Carbon Pollution Reduction Scheme: Australia's low carbon future. White Paper December 2008. Australian Government, Canberra.

[5] The International Forest Carbon Initiative's goal to provide "developing countries, and their forest-dependent Indigenous and local communities, with a real incentive to conserve their forests and meet their economic and development aspirations" (accessed at http://www.climatechange.gov.au/en/government/initiatives/international-forest-carbon-initiative.aspx on 30 December 2010) has no present domestic parallel.