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# australian network of environmental defender's offices

**Submission to the House of Representatives Climate Change, Environment and the Arts Committee Inquiry into Bills referred 24 March 2011 (Carbon Farming Initiative)**

**13 April 2011**

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Submitted to:

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## Executive Summary

ANEDO welcomes the opportunity to comment on the Carbon Credits (Carbon Farming Initiative) Bill 2011 (**the Bill**) and associated bills. The land sector provides an enormous opportunity to combat climate change, restore the landscape, improve biodiversity and support regional development all at the same time. The introduction of the Carbon Farming Initiative (**CFI**) is a welcome recognition of these opportunities and imperatives.

We recognise that the Government has taken some important steps to improve the CFI Bill since ANEDO last commented on the CFI. In particular, we note that the objects of the Bill (cl 3) have been amended to explicitly refer to increasing carbon abatement and protecting Australia's natural environment, that some of the more problematic elements of the additionality test have been removed (cl 41), and that a new facility for excluding certain environmentally problematic projects has been introduced (cl 56).

However, ANEDO still has some serious concerns about the CFI as currently proposed. If the Government does not get the design of the CFI right, it will not only miss a great opportunity, but also undermine many of the Government's other proposed climate policies (especially the carbon price). In the worst case scenario, a poorly designed CFI could actually lead to a net *increase* in greenhouse gas emissions. To ensure that does not happen, ANEDO recommends that the Government rethink several aspects of the CFI.

Our concerns and recommendations are set out under the following headings:

1. Choosing a carbon offset trading scheme for the land sector is problematic
2. A strong carbon price is needed to make the CFI work
3. The additionality test must be strengthened
4. The scientific credibility of offset projects must be guaranteed
5. Eligible offset projects must not have adverse environmental impacts
6. Offset projects that improve biodiversity outcomes must be prioritised
7. Permanence mechanisms must be strengthened
8. Review of the scheme must be strengthened

We would be happy to discuss our submission in further detail, and appear at any public hearings held by the Committee as part of this Inquiry.

**Summary of Recommendations**

**1. Choosing a carbon offset trading scheme for the land sector is problematic**

- Careful consideration be given to whether a carbon offsets trading scheme is the best way to encourage abatement in the land sector.
- Alternative mechanisms, like various types of carbon prices or funds, be considered instead of *or* as well as the CFI.
- The Government proceed carefully with the CFI, to minimise the inherent risks and weaknesses of carbon offset trading as much as possible.

**2. A strong carbon price is needed to make the CFI work**

- The carbon price should start high, to stimulate demand for Australian Carbon Credit Units (**ACCUs**).
- The Government should cap the number of offsets (including ACCUs) that can be used under the carbon price mechanism.
- To combat 'leakage', the Government should explore other ways of imposing a price on carbon pollution in the land sector.

**3. The additionality test must be strengthened**

- Replace the 'positive list' with case-by-case assessment of additionality, according to a simple test of 'would the abatement have occurred in the absence of the CFI'.
- If the 2014 review shows that this test is inhibiting participation in the scheme, introduce other, less time-intensive assessment methods.
- Positive incentives (for example, a fund) should be provided to 'early movers' to ensure fairness and remove perverse incentives to cease existing abatement projects.

**4. The scientific credibility of offset projects must be guaranteed**

- Amend cl 133(1)(d) to provide that the *type of activity* specified in a methodology determination (not just the method) must also be supported by relevant scientific results published in peer-reviewed literature.
- Amend cl 106 to make clear that the Minister's power to make methodology determinations is conditional on compliance with the conditions in cl 106(4). For example, provide that the Minister '…*is not empowered to* make a methodology determination unless…"
- Each subclause in cl 133(1) be amended to provide that methodology determinations *must* comply with the offsets integrity standards (rather than *should*). For example, amend cl 133(1)(a) to provide that projects specified in methodology determinations "…*must* be covered in the additionality test regulations."
- Methodologies should be prepared by the government, with input from the Domestic Offsets Integrity Committee (**DOIC**) and stakeholders from the agricultural sector. Project proponents should not be permitted to submit their own methodologies for approval.

**5. Eligible offset projects must not have adverse environmental impacts**

- Amend cl 27 to provide that a project must not be approved unless it is 'environmentally sustainable'.
- Consider introducing a biodiversity code similar to the Carbon Sequestration and Biodiversity Code previously proposed under the *Climate Change Act 2010* (Vic).

**6. Offset projects that improve biodiversity outcomes must be prioritised**

- Establish a fund to provide additional funding to projects which improve biodiversity — for example, the Climate Change and Ecosystem Protection Fund proposed by the Australian Conservation Foundation.

**7. Permanence mechanisms must be strengthened**

- Provide that Carbon Maintenance Obligations (**CMOs**) must be imposed on every eligible offsets project which carries a risk of reversal. Amend cl 97 so that CMOs require the carbon sink to be re-established to a level commensurate to the amount of ACCUs issued.
- Amend cll 90-91 so that, where the carbon sink has been reversed by natural disturbance or conduct beyond the proponent's reasonable control, project proponents must relinquish ACCUs. Encourage project proponents to take out insurance to cover the risk of such occurrences.
- Alternatively, amend cll 16-17 to require a tailored risk of reversal buffer to be set for each Certificate of Entitlement, based on the actual risk of reversal for that project (or type of project).

**8. Review of the scheme must be strengthened**

- Reduce crediting periods to 3 years, to allow the scheme to keep up with the latest scientific developments, and so that any initial problems can be corrected.
- Amend Pt 24 to allow any person to apply for merits review of a reviewable decision.

## 1. Choosing a carbon offsets scheme for the land sector is problematic

ANEDO has some serious concerns about the decision to use a voluntary carbon offset trading scheme to drive greenhouse gas abatement in the land sector.

Offsets schemes should not be used as a regulatory tool of first resort. The climate action hierarchy requires that emission should first be *avoided*, if that is not possible they should be *reduced*, and if that is not possible they should be *offset*.[1] Offsets schemes can be a useful way to complement other laws and measures which aim to drive greenhouse gas abatement, but by themselves they are problematic.

The biggest problem is that by themselves, carbon offsets schemes are unable to guarantee net emissions reductions. This is because they work on a project-by-project basis, rather than an economy-wide basis. A well-designed offset scheme can guarantee that an offset has succeeded in reducing greenhouse gas at that location, but it cannot guarantee that abatement is not cancelled out by an increase in emissions elsewhere.[2] This is the problem of 'carbon leakage'. If, for example, a landholder reduces their emissions by reducing the number of cattle they keep, there is nothing to say that other landholders will not increase the number of cattle they keep to make up for that shortfall in supply. The Bill recognises this problem in requiring methodologies to account for increases in carbon caused by the project.[3] But in practice, it is difficult if not impossible to identify such increases. Only an economy-wide cap on carbon (or at least, a price on carbon) can ensure that emissions reductions are not negated by increases elsewhere.

Carbon offsets schemes can also be unfair. To begin with, the additionality requirement means that they only reward people who start carbon abatement activities for the first time — they do not reward early movers who are already undertaking carbon abatement. This is an inherent weakness of offsets schemes, and cannot be remedied without sacrificing the all-important requirement of additionality.

If avoided emissions activities are included, offsets schemes can also be inconsistent with the 'polluter pays' principle. Take avoided deforestation, for example. Providing tradeable credits to a landholder for *not* clearing a forest essentially involves paying them not to pollute. This is inconsistent with the 'polluter pays' principle, which requires that "those who generate pollution and waste should bear the cost of containment, avoidance or abatement."[4] It is also unsound regulatory practice — this is not the way that governments usually prevent pollution, and for good reason.

Last, but not least, a poorly designed offset scheme will spread its problems far and wide if tradeable credits are used. Every time an Australian Carbon Credit Unit (**ACCU**) is created and sold to a polluting company, that company has an excuse not to reduce their emissions. They can even justify an increase in their emissions by 'offsetting' it with abatement under the CFI. This becomes hugely problematic if ACCUs do not represent real and genuine abatement. If the ACCU does not represent genuine abatement (for example, because the offset project it represents is reversed by a natural disaster, or based

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[1] Environment Protection Authority (Vic), *Carbon Management Principles Discussion Paper* (2007). See also the hierarchy for native vegetation offsets in the *Victoria Planning Provisions* cl 15.09, and the 'waste management hierarchy' in *Environment Protection Act 1970* (Vic) s 1I; *Zero Waste SA Act 2004* (SA) s 3(2).

[2] Garnaut Climate Change Review Update Paper No 4, *Transforming Rural Land Use* (2011) 14.

[3] Carbon Credits (Carbon Farming Initiative) Bill 2011 cl 133(1)(e).

[4] *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(d)(i).

on bad science, or not truly new and additional to existing abatement) the polluting purchaser will nonetheless still be allowed to increase their emissions. In this way, the CFI will effectively 'export' any deficiencies into other trading schemes, including a domestic carbon price.

ANEDO submits that these intrinsic weaknesses of carbon offset schemes make them a relatively unattractive option. In particular, it is less attractive than imposing a carbon price on these activities. ANEDO recognises the difficulties of imposing a carbon price on the land sector by including it in an emissions trading scheme. However, we submit that the Government should explore other ways to impose a price on carbon in these sectors. Many of these problems could also be avoided by establishing a fund for activities which improve biodiversity and increase carbon abatement. For example, see the Climate Change and Ecosystem Protection Fund recently proposed by the Australian Conservation Foundation (**ACF**).[5]

Noting the above concerns, the following comments are made in the event that the Government does proceed with the CFI, in order to ensure that the CFI is as rigorous as possible. We submit that the following changes are required to make the scheme robust and reliable, and allow it to meet its purposes.

**Recommendations**:

- Careful consideration be given to whether a carbon offsets trading scheme is the best way to encourage abatement in the land sector.
- Alternative mechanisms, like various types of carbon prices or funds, be considered instead of *or* as well as the CFI.
- The Government proceed carefully with the CFI, to minimise the inherent risks and weaknesses of carbon offset trading as much as possible.

## 2. A strong carbon price is needed to make the CFI work

A domestic compliance market for carbon credits (i.e. an Australian emissions trading scheme) is likely to be a major source of demand for ACCUs. Without a strong carbon price the price of ACCUs is likely to be quite low, and it is unlikely that landholders will use the CFI. The stronger the carbon price, the higher the price of ACCUs — this is so under the initial fixed-price phase, and after the transition to full emissions trading. The fourth Update Paper published by the Garnaut Climate Change Review, *Transforming Rural Land Use*, also makes this point, stating that unless the initial carbon price is quite high, primary producers will not have sufficient incentive to take up abatement projects under the CFI.[6]

Allowing the use of ACCUs in a carbon price/emissions trading scheme does pose a risk if too many ACCUs are generated. Every ACCU that is acquitted under the carbon price:

- allows liable entities to avoid reducing their own emissions, by offsetting them with abatement from the land sector instead; and
- reduces the revenue that the Government will obtain from selling permits under the emissions trading scheme.

[5] http://www.acfonline.org.au/articles/news.asp?news_id=3309.

[6] Garnaut Climate Change Review Update Paper No 4, *Transforming Rural Land Use* (2011) 16.

However, this risk could be resolved by putting a cap on the amount of ACCUs that can be used in the carbon price scheme that the MPCCC is currently developing. This measure was also recommended by the Garnaut Review. The initial limit proposed by the Garnaut Review — 4% of permits in 2012 — is a good guide.[7]

Further, to resolve the problem of 'carbon leakage' mentioned above, the Government should impose a carbon price of some form on emissions from the sectors covered by the scheme as soon as possible. We recognise that these sectors have been excluded from the CFI by the Multi-Party Climate Change Committee. However, there are other ways to price carbon pollution in this sector — for example, a price on deforestation or livestock that approximates the greenhouse gas emissions from these activities.

**Recommendations**:

- The carbon price should start high, to stimulate demand for ACCUs.
- The Government should cap the number of offsets (including ACCUs) that can be used under the carbon price mechanism.
- To combat 'leakage', the Government should explore other ways of imposing a price on carbon pollution in the land sector.

## 3. The additionality test must be strengthened

Additionality is one of the most important integrity standards in the CFI. Without it, ACCUs will be rewarded for abatement that was already going to happen. This causes two problems:

- the ACCU fails to create new greenhouse gas abatement, and gives away ACCUs for nothing;
- those ACCUs are sold to polluters who can justify a failure to reduce their emissions, raising the risk that the ACCUs will lead to a net *increase* in emissions.

It is therefore very concerning that the additionality test in the Bill does not, in fact, guarantee additionality. Clause 41 allows the Minister to add abatement activities which are not already common practice in a region to a 'positive list'. All projects which involve those activities are then deemed to be 'additional'.

The problem with this approach is that additionality cannot be worked out in advance. Whether a project is additional — i.e. whether it was already going to happen without the CFI — is a question of fact to be determined on a case by case basis. The 'positive list' approach makes it very likely (if not certain) that projects which are not additional will receive credits.

Take, for example, the case of no-till farming (assuming that no-till farming is an eligible offset activity under the CFI). ANEDO understands that about 40% of farmers currently use no-till farming methods. Because this method is still only used by a minority of farmers, the Minister could presumably declare it 'beyond common practice'. However, once the activity is included on the positive list, *all* farmers who conduct no-till farming methods will be eligible to claim credits. This includes the 40% of farmers who were already doing this.

[7] Garnaut Climate Change Review Update Paper Number 6, *Carbon pricing and reducing Australia's emissions* (2001) pp 24-5.

Therefore, as currently proposed, cl 41 does not ensure additionality. It appears likely that the CFI will give rise to a large number of very visible and potentially high-profile cases where ACCUs are issued for abatement which is not genuinely new.

ANEDO understands the efficiency benefits of using a streamlined additionality test. It is important that landholders are not dissuaded from taking part in the CFI by excessive red tape or transaction costs. However, ANEDO submits that it is more important to ensure that the CFI does not credit non-genuine offset projects.

We are also not convinced that the transaction costs of a case-by-case additionality test would be prohibitively high. If this does prove to be the case after the CFI has been operating for a while, there are other less time-intensive ways of administering the additionality test. For example, the Department could require project proponents to self-assess additionality (by signing a statutory declaration) and audit every 20th project to ensure compliance.

Given the potential of the CFI to undermine other climate laws and policies (especially the carbon price/emissions trading scheme) the best approach to additionality is a cautious approach. The CFI should start with a case-by-case additionality test, and only *if* that proves truly problematic should the test be replaced with a quick and easy test like the positive list.

ANEDO therefore submits that section 41 should be amended, to be more consistent with existing additionality tests in comparable offset schemes like the Clean Development Mechanism (**CDM**) under the Kyoto Protocol. The CDM test of additionality is simply:

> *CDM project activity is additional if anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity.*[8]

ANEDO recommends that cl 41 be amended to read:

> *A project is additional if the greenhouse gas abatement achieved by the project would not have occurred in the absence of the scheme established by this Act.*

ANEDO recognises that the Department has already taken significant steps to improve the additionality test, by removing the financial additionality test. However, we submit that the problems and difficulties of the financial additionality test do not require that the additionality test by 'streamlined' out of existence. Our proposed test is simple, easy to understand, and lends itself to self-assessment by project proponents. The transaction costs of assessing and enforcing this requirement are as high as the Department makes them.

Finally, ANEDO submits that the unfairness to 'early movers' who are already conducting abatement activities that is caused by the additionality test (discussed above) be ameliorated by other incentives or payments to these early movers. The Government should consider establishing a fund — like the Climate Change and Ecosystem Protection Fund proposed by ACF — to pay these early movers for the biodiversity and

[8] Marrakesh Accords, (Decision 17/CP7: "Modalities and procedures for a clean development mechanism") [43].

carbon reduction benefits that they are already delivering, and finance the continuation of these projects. This will remove any perverse incentives to abandon these activities that might otherwise arise.

**Recommendations**:

- Replace the 'positive list' with case-by-case assessment of additionality, according to a simple test of 'would the abatement have occurred in the absence of the CFI'.
- If the 2014 review shows that this test is inhibiting participation in the scheme, introduce other, less time-intensive assessment methods.
- Positive incentives (for example, a fund) should be provided to 'early movers' to ensure fairness and remove perverse incentives to cease existing abatement projects.

## 4. The scientific credibility of offset projects must be guaranteed

As recognised by the Garnaut Climate Change Review, many of the proposed offset activities listed in the Consultation Paper (such as soil carbon sequestration or reduced methane emissions from livestock) are scientifically untested and largely theoretical.[9] This is a problem, because if ACCUs do not represent genuine abatement, the polluters who buy them will nonetheless be able to justify increasing their own emissions. If this occurs, the CFI could facilitate a net increase in greenhouse gas emissions.

Abatement activities must therefore be proven to a high degree of scientific certainty if they are to be approved as eligible offset activities. The Bill has a number of mechanisms designed to guarantee scientific integrity. However, ANEDO submits that these mechanisms are not comprehensive and must be strengthened, to guarantee the scientific credibility of CFI projects and secure the environmental and commercial integrity of ACCUs.

**Recommendations**:

- Amend cl 133(1)(d) to provide that the *type of activity* specified in a methodology determination (not just the method) must also be supported by relevant scientific results published in peer-reviewed literature.
- Amend cl 106 to make clear that the Minister's power to make methodology determinations is conditional on compliance with the conditions in cl 106(4). For example, provide that the Minister '…*is not empowered to* make a methodology determination unless…"
- Each subclause in cl 133(1) be amended to provide that methodology determinations *must* comply with the offsets integrity standards (rather than *should*). For example, amend cl 133(1)(a) to provide that projects specified in methodology determinations "…*must* be covered in the additionality test regulations."
- Methodologies should be prepared by the government, with input from the DOIC and stakeholders from the agricultural sector. Project proponents should not be permitted to submit their own methodologies for approval.

[9] *Garnaut Climate Change Review Update Paper No 4*, 'Transforming Rural Land Use' (2011) 29-30; see also note 28 above.

**5. Eligible offset projects must not have negative environmental impacts**

There should be no adverse environmental impacts resulting from CFI projects. In that sense, the following components of the Bill are steps in the right direction:

- eligible offset projects must not involve native forest clearing, or use material obtained from it (cl 27(4)(j));
- the Minister can exclude certain types of projects from the scheme, if there is a significant risk that those projects will have a significant adverse impact on water availability, biodiversity conservation, employment, or the local community (cl 56);
- credits will not be issued for projects until all regulatory approvals have been granted (cl 28); and
- a project's consistency with the relevant regional natural resource management plan must be stated in the application for a project (cl 23(1)(g)) and the public register of eligible offsets projects (cl 168(1)).

Positive though these requirements are, they could still allow projects with negative environmental impacts to go ahead. The only type of project which is definitely excluded is those that involve the clearing of native forest. The list of excluded projects in cl 56 has the potential to exclude other projects with adverse environmental effects, but it is only as effective as the Minister makes it. There are a large number of adverse environmental effects that are allowed by other regulatory approvals and regional natural resource management plans.

ANEDO therefore submits that cl 27 should be amended to include a requirement that offsets must be "environmentally sustainable". Whether a project meets that criterion should be assessed with reference to the principles of ecologically sustainable development, including the precautionary principle. This will ensure that all potential impacts of a project, including environmental and social impacts, are thoroughly assessed to ensure no unforeseen impacts. For example, a reforestation proposal should be assessed holistically including its impacts on water diversion and biodiversity as well as its carbon sequestration potential.

In addition, ANEDO submits that the government should consider the introduction of a biodiversity code similar to the Carbon Sequestration and Biodiversity Code which the previous Victorian Government agreed to develop under the new *Climate Change Act 2010* in Victoria. It is intended that the code would include biodiversity principles for the use and management of land for carbon sequestration purposes (such as preventing the clearing of native vegetation, ensuring threatened species are be negatively affected), and measures to be applied to the use and management of land to maximise biodiversity conservation outcomes in relation to carbon sequestration and storage. All offsets must accord with the code or they cannot be approved. A similar code could be used under the CFI, with the status of subordinate legislation. Landholders should have to show they comply with the code before getting approval under the scheme. Alternatively, the Code could guide the application of the 'environmentally sustainable' test mentioned above.

**Recommendations**:

- Amend cl 27 to provide that a project must not be approved unless it is 'environmentally sustainable'.

- Consider introducing a biodiversity code similar to the Carbon Sequestration and Biodiversity Code previously proposed under the *Climate Change Act 2010* (Vic).

## 6. Offset projects that improve biodiversity should be prioritised

There are lots of potential offsets projects that can reduce carbon and improve biodiversity outcomes at the same time. However, at present the Bill does not give clear priority to supporting these projects, as compared to offsets projects that have a neutral or negative impact on biodiversity.

Some provisions have already been made in this regard. The promise to develop a co-benefits index to measure these positive biodiversity and community benefits, and the ability of project proponents to include details of these on the public register of offset projects are both positive measures. [10] This information might allow ACCUs for these projects to be sold at a premium in voluntary markets.

However, further action is required to ensure that projects which enhance biodiversity are 'first cab off the rank'. ANEDO therefore submits that the Government should provide additional incentives to projects which improve biodiversity. This could be achieved through a fund like the Climate Change and Ecosystem Protection Fund proposed by ACF. This biodiversity funding would complement the carbon offset credits, and encourage proponents to choose projects which solve both problems at the same time and can claim credits under each scheme.

**Recommendation**:

- Establish a fund to provide additional funding to projects which improve biodiversity — for example, the Climate Change and Ecosystem Protection Fund proposed by the Australian Conservation Foundation.

## 7. Permanence mechanisms must be strengthened

There are many ways that eligible offset projects under the CFI can be reversed — voluntary withdrawal from the scheme, natural disturbance, deliberate reversal, or the project proponent becoming insolvent. It is vital that the Bill have the facilities to preserve the integrity and credibility of ACCUs and the CFI in these situations.

ANEDO submits that the permanence mechanisms put forth by the Bill to achieve that task are inadequate. Neither the relinquishment obligation, the carbon maintenance obligation, nor the risk of reversal buffer can be relied upon.

The relinquishment obligation is the most important tool of the three.[11] However, it does not appear to be able to deal with the situation where project proponents go insolvent. A direction by the Administrator to relinquish ACCUs will not be effective if the company in question is insolvent. Unless the company is owed any further ACCUs, the only tool the Administrator has to enforce that obligation is to impose an administrative penalty.[12] Such a penalty will not compel the insolvent company to relinquish units.

[10] Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2010, 7.

[11] Carbon Credits (Carbon Farming Initiative) Bill 2010, Pt 7.

[12] cl 179.

In situations like this one, the Bill relies on the carbon maintenance obligation (**CMO**).[13] This might be enough, if the CMO obliged the landholder to restore the carbon sink to a level commensurate to the number of ACCUs in circulation. But it doesn't. At present, the CMO merely imposes an obligation not to allow the carbon sink to be depleted any further.[14] It does not fix the problem; it merely prevents it getting any worse.

This is a missed opportunity to use the CMO to guarantee permanence. If a CMO was imposed on every sequestration project, the landholder would be under a binding legal obligation to maintain the sink in all cases. The CMO could perform the same function as conservation covenants under the *Victorian Conservation Trust Act 1972* (Vic), and guarantee the benefits secured by offset projects in perpetuity.

To mitigate the failure of these mechanisms, the Bill relies on the risk of reversal buffer.[15] The risk of reversal buffer effectively reduces the credits awarded to a sequestration offsets project by 5%. The Bill relies on this to compensate for:

- the problems with the relinquishment obligation, outlined above; and
- reversal of abatement caused by the destruction of carbon sinks by natural disturbance (eg bushfire).

There is no reason to think that these deficiencies can be accounted for by a 5% buffer. If there is a large-scale bushfire, for example, much more than 5% of carbon stores under the CFI could be wiped out. Recent years have shown that large-scale disasters of this kind are a very real possibility which the CFI needs to take into account.

**Recommendations:**

- Provide that CMOs must be imposed on every eligible offsets project which carries a risk of reversal. Amend cl 97 so that CMOs require the carbon sink to be re-established to a level commensurate to the amount of ACCUs issued.
- Amend cll 90-91 so that, where the carbon sink has been reversed by natural disturbance or conduct beyond the proponent's reasonable control, project proponents must relinquish ACCUs. Encourage project proponents to take out insurance to cover the risk of such occurrences.

These recommendations would ensure a strict nexus between the number of ACCUs issued and the actual carbon abatement achieved. This is the best way to foster market confidence in commercial and environmental integrity of ACCUs.

If, however, the Government has decided to abandon that nexus, and rely instead on a risk of reversal buffer to approximate it, then the risk of reversal buffer needs to be strengthened. A buffer of 5% does not reflect the different risks of reversal that different projects carry. A 'sliding scale', allowing the buffer to vary for different projects with different risk profiles, is necessary. Clauses 16 and 17 facilitate this, allowing different risk of reversal buffers to be set by regulation for different types of projects. To ensure that this 'sliding scale' is actually used, and to encourage the Administrator not to assume that a 5% buffer is sufficient, these clauses should be amended so that a tailored risk of reversal buffer *must* be set for each type of eligible offset project.

[13] Carbon Credits (Carbon Farming Initiative) Bill 2010 Pt 8.

[14] Carbon Credits (Carbon Farming Initiative) Bill 2010 cl 97(8).

[15] Carbon Credits (Carbon Farming Initiative) Bill 2010 cll 16-17.

**Recommendation**:

- Amend cll 16-17 to require a tailored risk of reversal buffer to be set for each Certificate of Entitlement, based on the actual risk of reversal for that project (or type of project).

## 8. Review of the scheme must be strengthened

It is very difficult to determine how the CFI will play out in its early years. Whether there will be too many or too few ACCUs, whether transaction costs will be too high, and whether the integrity of ACCUs is up to standard, all remains to be seen.

For that reason, it is important to review the CFI shortly after it commences, and recalibrate the scheme as necessary. ANEDO strongly supports the review of the CFI mandated by cl 306 of the Bill, with the first review due no later than 31 December 2014. The review promises a valuable opportunity to honestly assess the CFI and continually improve its operation.

ANEDO is therefore concerned that, since the release of the Consultation Paper and the draft legislation, the Bill has extended the default length of crediting periods from 3 years to 7 years. These crediting periods 'lock in' the methodologies and risk of reversal buffers for eligible offset projects. They preclude the amendment of these important features of the CFI in response to new scientific evidence or unexpected developments in the operation of the market. They also undermine the first review of the CFI in 2014, which could very well require changes to methodologies and/or the risk of reversal buffer. ANEDO therefore submits that these crediting periods should be reduced to 3 years, as originally proposed.

Further, to allow the continuous and case-by-case review of the operation of the CFI, the Bill should be amended to allow third party rights to merits review. This will provide a valuable 'quality control' mechanism, to maintain a high quality of decisions under the CFI.

Clause 240 of the Bill (which defines 'reviewable decisions') currently provides rights of merits review, but in an unbalanced way. It only allows a 'person affected' by the decision to apply for merits review, which is likely to exclude people whose interests are not directly affected by the decision. Whilst this sort of test may be appropriate in other laws it is inappropriate in an environmental law, where the public interest in environmental protection is integral.

The Bill should ensure that the public interest in an environmentally effective offsets scheme is represented, by allowing 'any person' or 'any person who has demonstrated concern with the decision' to apply for merits review. Many pieces of environment and planning legislation in Australia already include this sort of 'open standing' provision.[16] The experience with those laws is that such provisions do not 'open the floodgates' and

[16] See, eg, *Environment Planning and Assessment Act 1979* (NSW) s 123; *Planning and Environment Act 1987* (Vic) s 114.

swamp the courts with litigation, but in fact contribute to better decision-making and the more open administration of justice.[17]

To facilitate this kind of public interest review, the Bill must change the one-sided definition of 'reviewable decision' in cl 240. At present, cl 240 only allows review of decisions which go against the interests of the project proponent. For example, a decision to *refuse* to issue a certificate of entitlement is a reviewable decision, but a decision to issue such a certificate is not. This sort of unbalanced review is likely to skew the decisions themselves — it encourages decision-makers to make a decision that is not reviewable (i.e. to decide in favour of the proponent every time).

**Recommendations**:

- Reduce crediting periods to 3 years, to allow the scheme to keep up with the latest scientific developments, and so that any initial problems can be corrected.
- Amend Pt 24 to allow any person to apply for merits review of a reviewable decision.

[17] Murray Wilcox, 'Loosening the Shackles' (1996) 13 *Environment and Planning Law Journal* 151; *Ogle v Strickland* [1987] FCA 36 [8] of the judgment of Wilcox J; *Oshlack v Richmond River Council* [1994] NSWLEC 20.