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ISLANDER STUDIES

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*Worldwide knowledge and understanding of Australian Indigenous cultures, past and present*

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

13 April 2011

**Re: Inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011**

AIATSIS welcomes the opportunity to provide input to the Committee in its inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011. The proposed legislation should be commended for its recognition of the role of native title groups and their land managing corporations, Registered Native Title Bodies Corporate (RNTBCs) in Australia's carbon reduction initiatives. Adapting the law to native title rather than attempting to 'fit' native title into the existing legal regime is a positive and welcome approach. The recognition of the human rights of native title holders and consistency of the scheme with the requirements of the *Racial Discrimination Act 1975* (RDA) should also be acknowledged.

The Carbon Credits (Carbon Farming Initiative) Bill 2011 proposed by the Federal Government provides a rare opportunity for RNTBCs to engage in economic activities on recognised native title land. Under the proposed bill, RNTBCs who exclusively hold native title lands can benefit from carbon initiatives as they are deemed to have 'project proponent status' enabling RNTBCs to carry out carbon projects on country. Where there are existing Indigenous Land Use Agreements (ILUAs) or non-exclusive determinations, native title holders have the ability to carry out carbon projects only where it has been agreed to by relevant other parties (including the State government). This treatment is a reasonable way of incorporating native title holders into the system. However, we draw four points to your attention for further consideration.

1. Native title holders who have reached a non-exclusive determination prior to the legislation may need to renegotiate with State government parties and other stakeholders in order to have the ability to carry out carbon initiatives (as per requirements of Part 3, Division 8, clause 43(9)). In areas where non-exclusive native title has been recognised, such as Gunditjmarra country, Gunditj Mirring, the recognised RNTBC for the claim area, are concerned that they will not have 'project proponent status' as this has not been recognised in their consent determination or as a part of the related negotiated ILUA. The need to renegotiate their status as project proponents creates a potential difficulty for non-exclusively recognised consent determinations.
2. While AIATSIS appreciates the attempt by the legislation to work through the complexities of the *Native Title Act 1993*(Cth) (NTA), the analogy of non-exclusively held native title with an easement or license is not the correct. Non-exclusive rights and interests should be recognised as the equivalent of freehold rights and interests minus the rights and interests granted to others (see *Neowarra v Western Australia* [2004] FCA 1092).
3. The proposed scheme does not contemplate the fact that native title does not depend on a determination. According to the principles of *Mabo v Queensland (No 2)* [1992] HCA 23, native title is the recognition of existing rights and interests under Aboriginal and Torres Strait Islander law and custom and is not dependant on a grant or recognition by the Crown. The establishment of the registration scheme under the NTA reflects the underlying rationale that native title exists prior to a determination. Registered native title claimants are proposed to be excluded from the benefit of the deeming provisions. However, registered native title claimants should be able to engage in carbon initiatives on the basis of an ILUA which has safeguards requiring consent of relevant interest holders. Native title holders and registered native title claimant groups should also be recognised interest holders in relation to any project.
4. Given that the proposed consultation regime mirrors s 58 of the NTA, it is not required under the current legislation unless there are additional measures to protect native title rights and interests.

AIATSIS would like to thank you for the opportunity to provide input to this inquiry. Finally, AIATSIS can assist in facilitating further consultations with Indigenous communities that are currently negotiating or contemplating carbon projects on their native title lands through its RNTBC network.

Yours sincerely,

Dr Lisa Strelein  
Director, Research, Indigenous Country and Governance

## **About AIATSIS**

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) was established in 1964, under Commonwealth legislation. Over the last 40 years AIATSIS has established itself as Australia's premiere Indigenous research institute, manages world class collections of cultural and research material, houses the Aboriginal Studies Press and engages in numerous partnerships with research and government institutions and Indigenous communities.

AIATSIS has a research focus on the governance and operating environment of Registered Native Title Bodies (RNTBCs) and their land and water management aspirations. RNTBCs are established to hold and manage native title and any benefits flowing from activities on native title land. Our work in this area is undertaken by the Native Title Research Unit (NTRU).

The NTRU has taken the lead in providing resources and support to native title holding groups and their corporations as a part of its RNTBC Support Project. AIATSIS has been working with native title holding groups since 2006 and has convened two national meetings of RNTBC representatives to discuss their needs, challenges and aspirations. Discussions with RNTBCs have revealed that enterprise development, economic opportunities and improving the wellbeing of individuals within their groups are key aspirations for native title holders in addition to carrying out their roles and responsibilities as custodians of country. However, the capacity of RNTBCs and native title groups to access programs and resources is currently inhibiting them from achieving these aspirations.

AIATSIS is in a unique position to assist the Australian Government, the native title representative body system and native title holders and claimants in developing, analysing and evaluating policy and practice in an Indigenous context and coordinating information and resources throughout the native title system.