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THE AUSTRALIAN NATIONAL UNIVERSITY

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House of Representatives Standing Committee on Climate Change, Environment and the Arts – Inquiry into the Carbon Farming Initiative (CFI) Bills

Thank you for the invitation to make a submission to the Standing Committee's inquiry into the Carbon Farming Initiative (CFI) Bills and the *Australian National Registry of Emissions Units Bill 2011*.

The object of the CFI Bills is to establish a legislative scheme for the accreditation of carbon offsets. The structure of the proposed scheme embodied in the Bills is generally well-designed and has the potential to lead to the realisation of many abatement opportunities in the forestry, waste and agriculture sectors. How successful the scheme is in capturing these opportunities will largely depend on how the scheme is administered and whether it is integrated with any future carbon pricing mechanism.

One problem that has been identified with the CFI Bills is the mechanism it contains for dealing with so-called 'perverse impacts'; adverse impacts arising from offset projects. At present, the Government has proposed that the Governor-General have a power to make regulations, on the advice of the Minister, excluding projects from eligibility to receive Australian Carbon Credit Units (ACCUs). This simple power to make regulations may not be sufficient to address the perverse impact risks associated with offset projects, nor is it likely to give stakeholders sufficient certainty about what projects may be excluded from ACCU eligibility and when.

To address this problem, I suggest making regulations under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to set reforestation/revegetation thresholds in regions (or bioregions). Details of this proposal are set out in the attachment to this letter.

Yours sincerely

Andrew Macintosh

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Dealing with perverse impact risks under the Carbon Farming Initiative (CFI)

Andrew Macintosh

CCLP Information Paper

ANU Centre for Climate Law and Policy

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The ANU Centre for Climate Law and Policy (CCLP) is part of the ANU College of Law. It was established in 2007 with the objective of providing a focal point for law and policy research related to climate change. The CCLP also runs courses in climate law and provides consulting services. Additional details of the CCLP can be found on its website: http://law.anu.edu.au/CCLP/.

The CCLP gratefully acknowledges the support of its founding sponsor, Baker & McKenzie.

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1. Introduction

There is the potential for the Carbon Farming Initiative (CFI), by incentivising land-based carbon offset activities, to generate both co-benefits and perverse impacts. Co-benefits could include improved biodiversity, hydrological and local climate outcomes, reduced land degradation and the generation of tourism opportunities. Perverse impacts could include social and economic decline in rural and regional communities, adverse biodiversity outcomes from the creation of monocultures, and reduced surface and groundwater availability, which could have knock-on effects for agriculture.

While the CFI remains primarily an accreditation scheme for the voluntary market, the risk of significant perverse impacts is low. There will be insufficient demand to prompt large-scale changes in agricultural and forestry landscapes. If the CFI is linked to a domestic carbon price, this could change. A moderate carbon price (i.e. >\$20/tCO_2-e) could see significant changes in certain regions, where the potential for biosequestration is large and the return on agricultural land uses is low.

The CFI Bill deals with the risk of perverse impacts through the so-called 'negative list'.[1] This consists of a power for the Governor-General to make regulations, on the advice of the Minister, to prevent prescribed projects or project types from receiving Australian Carbon Credit Units (ACCUs). The Explanatory Memorandum to the CFI Bill indicates that the Government intends to include sequestration offset projects involving the cessation of harvest of plantations on this list.[2]

The flaw in this approach is that it is completely dependent on the discretion of the Minister; there is no guarantee of what, how or when projects will be listed. This leaves it open to politicisation and ad hoc decision making. There is also no guarantee that members of the public, including potential project proponents, will be consulted on what is included on the negative list and when. Government decision making can often be significantly improved through real and proper consideration of community views. An additional deficiency with the negative list approach is that the Department of Climate Change and Energy Efficient has no experience or capacity in the evaluation of the economic, social and environmental impacts of project-based activities. This would leave the Minister in the precarious position of being dependent on advice from a Department that lacks the capacity to give it and that, in all likelihood, would have to call for assistance from other departments, particularly the departments of agriculture and environment.

2. The alternative – linking the CFI to the EPBC Act

An alternative approach that would reduce the uncertainty associated with perverse impacts would involve the making of new regulations under Part 3, section 25 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). These regulations would prescribe thresholds for the proportion of regions or bioregions that could be subject to reforestation/revegetation projects. These thresholds could be set so as to take account of pre-existing plantations. If these thresholds were exceeded, all subsequent reforestation/revegetation projects would be required to be referred to the Environment Minister under Part 7 of the EPBC Act for assessment

[1] *Carbon Credits (Carbon Farming Initiative) Bill 2011*, s 56.
[2] *Carbon Credits (Carbon Farming Initiative) Bill 2011, Explanatory Memorandum*, para 1.29-1.30 (pp. 14-15).

and approval. That is, any additional CFI reforestation/revegetation projects in the relevant region/bioregion would be illegal under Part 3 unless they are approved by the Environment Minister under Part 9 of the EPBC Act (or are covered by another applicable exemption).

Ideally, once the reforestation/revegetation thresholds were crossed, the Commonwealth, in cooperation with the relevant state(s), would carry out a strategic assessment of the region/bioregion. The strategic assessment would result in the endorsement of a plan for the region/bioregion, which would layout the rules for additional reforestation/revegetation projects (these could be in the form of principles and/or a spatially-based zoning map). Activities that are conducted in accordance with the endorsed plan would be exempt from the project-based assessment and approval process, as provided for under Part 10, Division 1 of the EPBC Act [alternatively, 'approval bilateral agreements' could be made with the states on the assessment and approval of additional reforestation/revegetation projects]. The use of strategic assessments (or approval bilateral agreements) in this manner would be consistent with the COAG regulatory reform agenda; indeed, it has been on the COAG agenda since the mid-2000s.

3. Potential issues with linking the CFI to the EPBC Act

There are a number of potential objections to the idea of linking the CFI to the EPBC Act through regional/bioregional triggers. Each of these is dealt with below.

3.1 Wouldn't the assessment and approval process be confined solely to environmental matters?

This is incorrect. Subsection 25(4) allows different things to be prescribed as the 'matters protected' by the section. This could include the environment generally, and social and economic considerations that arise in relation to the reforestation/revegetation projects. Further, in approving any actions, the Environment Minister is explicitly required to consider the matters protected by the provision and 'economic and social matters' (section 136).

3.2 Where would the Commonwealth get the Constitutional power to regulate these activities?

The short answer to this question is the external affairs power (s.51(xxix) of the *Australian Constitution*). Article 4(1)(f) of the United Nations Framework Convention on Climate Change (UNFCCC) obliges all parties to 'employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change'. The regulations under the EPBC Act would be designed to fulfil this obligation and, as such, would be within the powers granted under s.51(xxix).

3.3 Wouldn't these regulations substantially increase the transaction costs associated with CFI projects?

They could. However, the EPBC Act contains mechanisms to minimise assessment and approval costs. The project-based assessment and approval process under the legislation can be short and relatively cursory so as to minimise costs and unnecessarily delay. This includes assessments conducted on referral documents only (i.e. a 10-20 page pro-forma document) or preliminary documentation. As discussed, the legislation also provides for the conduct of strategic assessments, which can lead to the endorsement of regional/bioregional plans. The approval of projects under regional/bioregional plans would almost eliminate any additional transaction costs for project proponents; they would be given certainty as to when, where and how projects could be carried out through the plans and would not be required to obtain any additional project-based approvals.

3.4 What about public input and participation in the assessment and approval process?

The EPBC Act has many faults but public participation is not one of them. Members of the public have an opportunity to comment on referrals, assessments and, at the discretion of the Minister, draft approval decisions. In the case of strategic assessments, the public is given an opportunity to comment on the terms of reference for the assessment and the draft assessment report. The framework for strategic assessments could be improved (see the Hawke Review (2009)), however, it is sufficient for the current purposes.

3.5 What is the advantage of giving this process to the Environment Department?

The Environment Department has several decades of experience in conducting project-based environmental assessments. Since the mid 2000s, it has also been increasing its strategic assessment capacity and, through the Marine Planning Process, has been directly involved in socio-economic assessments. There is no other department in the Commonwealth with more experience in the conduct of evaluations of the type that would be needed to deal with the perverse impacts of land-based offsets.

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