Chapter 2

Key issues

2.1 Submitters generally supported the proposed amendments to the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act). Project proponents supported the bill in its entirety. The Northern Territory Government stated that it:

> …does not identify any issues with the amendments included in the Bill and supports efforts to address issues associated with the implementation of savanna fire management projects and to reduce unnecessary regulatory burden for projects.[1]

2.2 However, there was a significant divergence of views in relation to the proposed amendment to the consent requirements for area-based emissions-avoidance projects.[2] Indigenous stakeholders, for example, the Cape York Land Council (CYLC), were 'broadly supportive' of the amendments, but opposed the proposed amendment of the consent requirement.[3]

Consent requirement

2.3 The submissions received by the committee focussed mainly on one matter: the proposed amendment to section 28A of the CFI Act. As noted in Chapter 1, the amendment of section 28A will remove the need for third-party consent for savanna fire management projects and other area-based emissions-avoidance projects.

Support for amending the consent requirement

2.4 Support for the proposed amendment of section 28A was received from proponents of savanna fire management projects. They noted that the 2014 amendments to the CFI Act had introduced an error in the consent arrangements and it had always been the Government's intention that eligible interest holder consents were only relevant to sequestration projects. It was further noted that the savanna fire management projects should not be subject to permanence obligations because the emissions have already been saved.[4]

2.5 The Consolidated Pastoral Company (CPC) submitted that the current consent requirements are a 'significant impediment' to advancing savanna emissions-avoidance projects.[5] Corporate Carbon Advisory also commented that it supported the bill as it

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1 Northern Territory Government, *Submission 13*, p. 1.

2 Aboriginal Carbon Fund, *Submission 4*, p. 1; Law Council of Australia, *Submission 9*, p. 4.

3 Cape York Land Council, *Submission 1*, p. 2; Aboriginal Carbon Fund, *Submission 4*, p. 1.

4 Australian Wildlife Conservancy, *Submission 3*, p. 1; Country Carbon, *Submission 12*, p. 2.

5 Consolidated Pastoral Company, *Submission 2*, p. 4.

seeks to 'remove impediments within the Act that would otherwise hamper the abatement potential from savanna projects'.[6]

2.6 CPC provided evidence of the costs and time needed to obtain consent from a range of clan groups for its project in northern Australia. CPC stated:

> The cost of this exercise is estimated at over $100,000 and would likely span 12–18 months with no guarantee of consent.
>
> While this process should be undertaken, it should not be an impediment to the CPC Savanna project being issued ACCUs [Australian Carbon Credit Units] from a project which has barely generated only enough ACCU's to break even from 2016.[7]

2.7 Australian Wildlife Conservancy commented that five of its six registered carbon abatement projects are affected by the current consent requirements. As a consequence, it had been prevented from receiving the carbon credits due on those projects for 2015 and 2016.[8]

2.8 Other submitters similarly argued that the current consent requirement imposes additional and unnecessary administrative burdens for savanna burning projects.[9] AI Carbon went on to note that some projects are of low value. The costs of undertaking the consultations to gain consent for these projects, as currently required, would make them unviable if consultations were to be funded from an emission avoidance project revenue.[10]

2.9 Those undertaking savanna fire management projects also pointed to benefits that can be gained if projects were to proceed more efficiently. It was noted that significant abatement can be achieved as well as ancillary benefits. Ancillary benefits include:

- helping Indigenous communities to achieve economic self-reliance and independence; and
- enhancing agricultural production while protecting the environment.[11]

2.10 AI Carbon provided the committee with examples of the ancillary benefits being delivered by its project in the Kimberley:

> - Protect key pastoral grazing assets from fire damage – economic and natural resource sustainability

6 Corporate Carbon Advisory, *Submission 8*, p. 1.

7 Consolidated Pastoral Company, *Submission 2*, p. 4.

8 Australian Wildlife Conservancy, *Submission 3*, p. 1.

9 Country Carbon, *Submission 12*, p. 2; Wolverton Pastoral Company, *Submission 11*, p. 1.

10 AI Carbon, *Submission 10*, p. 2.

11 Consolidated Pastoral Company, *Submission 2*, p. 2; AI Carbon, *Submission 10*, p. 1.

- Provide additional on-ground part time/seasonal work for ranger and pastoral teams – real jobs, real wages
- Ensure country is cared for in ways that respect traditional owners wishes – cultural asset protection
- Not just burn to maximise carbon credit production, but done in a way to deliver key regional NRM/biodiversity conservation outcomes
- Provide the foundation for skills and employment training in pathways to real jobs on country – Closing the Gap.[12]

2.11 In relation to concerns of some stakeholders about the proposed change to the consent requirement, submitters supporting the amendments noted that the amendments do not remove the need for a project proponent must have a 'legal right' to undertake the project.[13] Country Carbon commented that the retention of the legal right requirement:

> …gives sufficient protection to indigenous communities who have registered native title determinations or ILUAs [Indigenous Land Use Agreements] in place over the relevant project area.[14]

Opposition to amending the consent requirement

2.12 Submitters opposing the amendment of the consent requirement voiced concern in relation to a number of issues. The Law Council of Australia (LCA) argued that, given the complexity of the consent issues, the issue of consent be included in the Government's climate change review before any changes are made to the provision.[15]

2.13 The Department of the Environment and Energy (the department) responded to comments regarding the proposed amendments of section 28A. It stated that the amendments to the consent requirements are aimed at correcting an error which:

> …imposes an unintended requirement on savanna fire management projects and other land based emissions avoidance projects to obtain consent from third parties, such as banks with a mortgage over the land and state ministers for most Crown land.[16]

2.14 In its answers to questions on notice, the department outlined that until amendment in 2014, the third-party consent requirement was limited to sequestration projects. It was noted that the intended application of third-party consent requirements

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12 AI Carbon, *Submission 10*, p. 2.

13 Consolidated Pastoral Company, *Submission 2*, p. 4; Corporate Carbon Advisory, *Submission 8*, p. 1.

14 Country Carbon, *Submission 12*, p. 3.

15 Law Council of Australia, *Submission 9*, pp. 5–6; see also Kimberley Land Council, *Submission 6*, p. 4.

16 Department of the Environment and Energy, *Submission 5*, p. 3.

was reflected in the 2014 Emissions Reduction Fund White Paper. The White Paper was released before the amendments were made to the CFI Act. The department commented that the White Paper 'clearly signalled' the intention that consent from third-parties is required only in relation to sequestration offsets projects. The Explanatory Memorandum to the Carbon Farming Initiative Amendment Bill 2014 also reflected this intent.[17]

2.15 The consent requirements for sequestration projects (i.e. those that store carbon in the landscape) are based on the need to ensure that persons with an interest in land are aware of the potential impact of the CFI Act's permanence obligations on that interest in the land. However, the department noted that it was never the intention that projects that avoid emissions, such as savanna fire management projects, would need consent from third parties, due to the fact that they do not impose long term obligations.[18]

2.16 The department clarified that the need for amendment of the CFI Act arose as the 2014 amendments used the term 'an offset project' in paragraph 28A(1)(a) when the words 'a sequestration offsets project' should have been used. The bill proposes to correct this error.[19] In addition, the department indicated that a broad range of savanna project proponents and Indigenous organisations were consulted on the Government's intention to reintroduce the amendments in early 2017.[20]

2.17 The Aboriginal Carbon Fund (ACF) also opposed the amendments and noted that the consent requirements in the current legislation may be important in avoiding future liability where there is no the legal right to carry out the project. The ACF pointed to pastoral leases and commented that where land interests might be shared, a question arises as to whether pastoral lease holders have the exclusive right to the carbon for a project not contemplated by their lease.[21]

2.18 The department also responded to concerns raised by the ACF about potential liability. The department outlined the nature of the legal right to conduct the activities which make up a project. It concluded that 'persons with an interest in land who are concerned that other persons are conducting activities, such as fire management, without lawful authority to do so need to resolve that dispute and enforce their rights outside the CFI Act'.[22]

2.19 Similarly, the Kimberley Land Council (KLC) opposed the amendment of section 28A. It argued that the 'proposed amendment will alter and remove

17 Department of the Environment and Energy, *Answers to questions on notice*, pp. 1–2.

18 Department of the Environment and Energy, *Submission 5*, p. 3.

19 Department of the Environment and Energy, *Answers to questions on notice*, p. 2.

20 Department of the Environment and Energy, *Answers to questions on notice*, p. 2.

21 Aboriginal Carbon Fund, *Submission 4*, p. 2.

22 Department of the Environment and Energy, *Answers to questions on notice*, pp. 5–6.

fundamental protections for indigenous interest holders with respect to engagement with third parties undertaking projects on their traditional lands and waters'. The KLC went on to comment that there is an important distinction between native title and Indigenous land rights interest, and those of other legal or equitable interest holders. It added that the unique rights of native title holders have been recognised in the CFI Act, including in sections 45A and 46. The KLC concluded that:

> The protections afforded to native title holders by section 45A of the CFI Act would be significantly diminished through the Bill's proposed amendments to section 28A, leaving native title holders with not even a right to be notified of emissions avoidance projects registered on their native title lands.[23]

2.20 In response to these concerns, the department noted that the CFI Act will retain a number of important mechanisms to recognise the nature of native title as well as continuing to provide strong mechanisms to facilitate Indigenous participation. These include mechanisms to make it easier for a registered native title body corporate to register a project. In addition, the CFI Act makes it clear that the CFI Act does not affect the operation of the *Native Title Act 1993*.[24]

2.21 The concerns of Indigenous stakeholders were supported by the LCA which submitted that the 'impact of removing a consent right for Indigenous interest holders is a significant issue'.[25] The LCA commented further:

> There is an important distinction between native title rights and interests, and other legal or equitable interests that may be held in land. Native title is a unique interest in relation to land, which is not afforded the same protections as other interests in land or water (eg: cannot be registered on Torrens title). Activities such as savanna fire management have a clear capacity to interfere with Indigenous people's rights and interests in areas of their traditional country.[26]

2.22 The LCA concluded that the current consent requirements:

> …provide a pathway for engagement and agreement about the impacts of third party proposals on Indigenous people's interests, particularly when the nature of the activity involved (fire) will influence the availability of flora, fauna, access to areas, sites, cultural areas, camping, and other rights and interests likely to form part of a native title determination. There are key differences between native title interests and other forms of legal/equitable interest in land (such as mortgages/security), which warrant specific and proactive statutory engagement measures under the CFI Act.[27]

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23 Kimberley Land Council, *Submission 6*, p. 2.

24 Department of the Environment and Energy, *Answers to questions on notice*, p. 3.

25 Law Council of Australia, *Submission 9*, p. 3.

26 Law Council of Australia, *Submission 9*, p. 4.

27 Law Council of Australia, *Submission 9*, pp. 4–5.

2.23 In response to stakeholder arguments that the consent requirements can provide an important additional check to ensure parties with an interest in land-based projects are appropriately consulted, the department concluded that:

> …the appropriate way to address this issue is by ensuring potential project proponents clearly establish their legal right to undertake the project, rather than using consent requirements in a way that was not intended, and which does not apply to other emissions avoidance projects.[28]

2.24 Both the LCA and the KLC also voiced concern about the impact of the amendments on exclusive possession native title holders and argued that removing the consent requirement for emissions-avoidance projects places exclusive possession native title holders at a disadvantage to equivalent property interest holders, due to limited protections under general property law.[29]

2.25 The department provided the committee with a response to comments that the amendments would place native title rights holders at a disadvantage. The department stated that mechanisms for facilitating Indigenous participation and addressing limitations under general property law are included in the deeming provisions in section 46 of the CFI Act. The department pointed to subsection 46(1) which helps ensure that the nature of native title rights is not a barrier to exclusive possession native title holders registering a project through their registered native title body corporate.[30]

Native title claimants

2.26 Submitters also raised issues concerning the application of the consent requirement to native title claimants. Currently, determined (or completed) native title holders have consent rights but native title claimants do not. The ACF argued that the provisions of the CFI Act 'jars with the *Native Title Act 1993*, which, in general, treats different kinds of native title interests in the same way'. The ACF concluded that the 'position under the CFI Act does not follow this principle and is unfair on native title claimants'.[31] The KLC added that the adoption of an approach consistent with the *Native Title Act 1993* would improve overall integrity of the carbon farming initiative 'as it would ensure future rights holders have consented to the future potential impact on their land'.[32]

2.27 The ACF and the CYLC called for the consent requirement to be amended so that registered native title claimants are treated in the same way as other native title

28 Department of the Environment and Energy, *Submission 5*, p. 4.

29 Kimberley Land Council, *Submission 6*, p. 3; Law Council of Australia, *Submission 9*, p. 4.

30 Department of the Environment and Energy, *Answers to questions on notice*, p. 4.

31 Aboriginal Carbon Fund, *Submission 4*, pp. 3–4.

32 Kimberley Land Council, *Submission 6*, p. 4.

holders.[33] The KLC recommended that the consent requirement, including extending the requirement to native title claimants and non-exclusive native title holders, be considered as part of the Government's climate change policy review.[34]

Conditional consent

2.28 Submitters argued that the amendments are retrospective in relation to 'conditional' projects.[35] Both the LCA and the KLC commented that a small number of savanna burning projects have outstanding consent requirements. The KLC noted that the proposed amendments aim to 'address consents that have not been obtained by some project proponents'. The KLC argued that this would, in effect, rewards project proponents for not engaging with or obtaining the agreement of the relevant native title holders or other eligible interest holders. The KLC concluded that the bill should apply so as to not 'change the goalposts retrospectively' and penalise those proponents who have complied with the consent provisions.[36]

2.29 The department noted that around 30 savanna fire management projects were registered under the original CFI Act before the 2014 amendment required consent from third-parties. Stakeholders had not been informed of the changes until the middle of 2015.[37]

2.30 As noted in Chapter 1, the Government sought to correct the error in section 28A through the Omnibus Repeal Day (Spring 2015) Bill 2015. However, the bill was not passed before the Parliament was dissolved in May 2016. The department commented that it understood that proponents of some projects with conditional declarations had not yet sought to comply with the consent requirements as they expected that the CFI Act would be amended.

2.31 The department went on to note that 20 area-based emissions-avoidance projects have conditional declarations. These may be revoked if consents are not obtained before the end of the first reporting period. If this was to occur, the department stated that it is likely to result in the 'discontinuation of savanna fire management in the projects areas by person who have already demonstrated that they have the legal right to undertake the activity, and who, in some cases, have started the activity'.[38]

33 Cape York Land Council, *Submission 1*, p. 3; Aboriginal Carbon Fund, *Submission 4*, p. 4.

34 Kimberley Land Council, *Submission 6*, p. 4.

35 Cape York Land Council, *Submission 1*, p. 2; Law Council of Australia, *Submission 9*, p. 5.

36 Kimberley Land Council, *Submission 6*, p. 3.

37 Department of the Environment and Energy, *Answers to questions on notice*, p. 2.

38 Department of the Environment and Energy, *Answers to questions on notice*, p. 2; Department of the Environment and Energy, *Submission 5*, p. 3.

2.32 The department concluded that it would be 'unfair' if projects with conditional declarations are required to obtain third party consent when the first 30 projects which were registered were not required to do so. In addition, consent requirements will not apply to new projects from the time the amendments come into force.[39]

Comments on other proposed provisions

2.33 The committee received comments supporting other proposed amendments to the CFI Act.

Variations to projects

2.34 The bill includes amendments which will enable parts of a sequestration offsets project to be removed and credits surrendered for the carbon stored in that area. This amendment was supported by submitters as the CFI Act is currently seen as imposing an unnecessary administrative burden on participants to gain consent to remove an area from a project.[40]

Transfer of projects

2.35 The proposed amendments to facilitate transfers of projects to the proposed savanna sequestration method that credits both emissions-avoidance and sequestration of carbon in the landscape were welcomed by submitters.[41] Climate Friendly, for example, commented that the amendment was 'critically important' and would see many existing savanna emissions-avoidance projects transitioning to the sequestration project as there will be more predictable environmental and economic benefits.[42] Climate Friendly went on to comment that:

> …the new method will therefore open up new areas of land that are currently commercially unviable under the emissions-avoidance method, leading to new carbon abatement and sequestration that can contribute to Australia's 2020 emissions reduction targets and beyond. The method will also provide increased revenue to communities, including Aboriginal communities, which implement improved fire management programs to underpin the savanna emissions-avoidance and sequestration project activities.[43]

2.36 The ACF commented that proposed amendments to 'smooth the way' for the savanna sequestration method were welcomed and accepted.[44] Similarly, the KLC

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39 Department of the Environment and Energy, *Answers to questions on notice*, p. 5.

40 Climate Friendly, *Submission 7*, p. 3; see also Australian Wildlife Conservancy, *Submission 3*, p. 2.

41 See Corporate Carbon Advisory, *Submission 8*, p. 2.

42 Climate Friendly, *Submission 7*, p. 1.

43 Climate Friendly, *Submission 7*, p. 2.

44 Aboriginal Carbon Fund, *Submission 4*, p. 1.

supported these amendments, although it suggested at number of minor amendments 'to facilitate this positive evolution of the scheme'.[45]

Crown land

2.37 The LCA welcomed the proposed amendment of section 44 of the CFI Act and noted that:

> Providing clarity that Crown land Ministers do not have eligible interest consent rights with respect to exclusive possession native title land is consistent with the operation of broader jurisprudence and the CFI Act generally.[46]

Committee view

2.38 The committee notes that the bill will make technical amendments to the CFI Act to reduce the administrative burden for projects, clarify regulatory requirements, provide greater flexibility and expand opportunities for participation in the CFI.

2.39 The committee was presented with evidence highlighting the benefits arising from increased numbers of area-based emissions-avoidance projects, particularly savanna fire management projects. In addition, to reductions in emissions, submitters pointed to benefits for land management and production, environmental protection and greater employment opportunities in remote areas.

2.40 Importantly, the proposed amendments to the CFI Act will address earlier drafting errors. The amendment of section 28A will correct a drafting error introduced when the Act was amended in 2014 which resulted in third party consent requirements applying to area-based emissions-avoidance projects, including savanna fire management projects, as well as sequestration projects.

2.41 The committee acknowledges the concerns about the consent requirements raised in submissions from Indigenous stakeholders. However, the committee considers that it is clear that the application of third party consent requirements to area-based emissions-avoidance projects was a drafting error which should be corrected. This will ensure that the original intent of the legislation is restored.

2.42 The committee has also noted the detailed response from the Department of the Environment and Energy which addressed specific concerns about the proposed amendment to the consent requirements. In addition, the Department of the Environment and Energy provided information on how the CFI Act will continue to provide strong mechanisms to facilitate Indigenous participation after the proposed amendments are passed. The committee therefore supports the proposed amendments contained in the bill.

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45 Kimberley Land Council, *Submission 6*, pp. 4–5.

46 Law Council of Australia, *Submission 9*, p. 3.

Recommendation 1

2.43 The committee recommends that the bill be passed.

Senator Linda Reynolds CSC
Chair