

Labor Senators' Dissenting Report

1.1 First implemented by the Labor Government, the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) stipulates how carbon credits are created, accounted for and discharged.

1.2 Labor Senators are deeply concerned that the Government has used remedying a so-called drafting error to remove consent rights for emission avoidance offset projects from native title holders.

1.3 Labor Senators are broadly supportive of the remaining amendments proposed in this Bill, which will improve the functioning of Australia's carbon credit system.

1.4 While it is good the Coalition Government has finally come around to fix some of the mistakes it has made to how carbon credits are generated, approved and managed, this is still a government that lacks any climate change policy post 2020. In contrast to the Coalition Government, Labor has a detailed climate policy, which will transition Australia to a clean energy economy and meet our international obligations.

Consent requirement

1.5 There is a significant divergence of views in relation to the amendment of native title consent requirements, with support from project proponents and opposition from Indigenous stakeholders and the Law Council of Australia.

1.6 Labor Senators do not support the removal of consent requirements from native title holders for emissions avoidance offset projects. However, given the short-term nature of emissions avoidance offset projects, Labor Senators support the intention of the amendment to remove the requirement to obtain third party consent from entities such as banks with a mortgage over the land and state ministers for most Crown land.

1.7 Labor Senators are concerned that while the Chair's report includes a summary of the legal arguments against amending consent requirements, the Chair's report fails to adequately address the concerns of native title holders themselves. Instead, the report relies on a so-called drafting error in the Government's 2014 amendments to the Act, the tired cliché of a reduction in red tape for project proponents, and assertions from the Department of the Environment and Energy as sufficient justification for removal of native title holders' rights. Labor Senators believe greater weight should have been afforded to the comprehensive submissions from the Law Council of Australia, Kimberley Land Council, Cape York Land Council and Aboriginal Carbon Fund.

1.8 In consultation with Indigenous stakeholders, Labor has prepared a second reading amendment to protect native title holders from having their consent requirements removed. This amendment will be circulated in the Senate at a later date.

1.9 The position of most native title holders and Indigenous land rights land holders has been that consent should be required for any land-based project that may interfere with their rights and interests.¹ The Law Council and Kimberley Land Council argue that emission avoidance offset projects such as savanna fire management have a clear capacity to interfere with or impair Indigenous people's rights and interests (for example, due to permanence obligations of sequestration projects or through the change in availability of flora, fauna and access to sites as a result of savanna fire management projects).² These submissions also raised concerns that the removal of third-party consent places exclusive possession native title holders at a disadvantage to equivalent property interest holders due to limited protections under general property law.³

1.10 The Law Council argues that the amendment creates an unfair burden on native title holders, with the requirement to challenge a potential proponent's legal right left solely to the native title holder.⁴ Further, the Law Council argues it would be inconsistent to repeal emissions avoidance project consent requirements and not provide some form of pro-active statutory protection for exclusive and coexisting native title holders, with respect to area-based emissions avoidance projects.⁵

1.11 The Chair's report relies solely on the so-called 2014 drafting error and does not address the substance of these issues raised by the Law Council and Kimberley Land Council. The Department's response to these claims relies on the provisions contained in section 46 of the CFI Act, but this only applies under a specific set of circumstances.⁶ Labor Senators consider that the Coalition Government has failed to consider the complexities of native title rights and interests.

1.12 The submissions from the Aboriginal Carbon Fund and Kimberley Land Council noted consent requirements in the current legislation may be important in avoiding future liability where there is no legal right to carry out the project. This is of particular concern with pastoral leases where land interests might be shared.⁷ Labor Senators regard the response from the Department of the Environment and Energy for

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

2 Law Council of Australia, *Submission 9*, p. 4; Kimberley Land Council, *Submission 6*, p. 2.

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

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

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

6 Department of the Environment and Energy, *Answers to questions on notice*, pp. 3–4.

7 Aboriginal Carbon Fund, *Submission 4*, p. 2; Kimberley Land Council, *Submission 6*, Attachment, p. 3.

disputes to be resolved outside of the CFI Act as unsatisfactory, as it merely shifts the administrative burden on to native title holders.⁸

Conditional consent

1.13 As currently drafted, the Bill will remove the consent requirements for over 20 savanna fire management projects for which 'conditional consent' has been granted through the Bill's transitional provision.

1.14 These proponents have not sought consents from native title holders and justified this through the Coalition's argument that there was a drafting error and the Coalition's promise that the requirement would be changed retrospectively. The Department of the Environment and Energy argues it would be unfair to require these proponents to seek consents, however the Kimberley Land Council submits that it is in fact penalising those proponents who have gained required third party consents.⁹

1.15 Labor Senators also view as inappropriate the Coalition Government giving advice to these proponents to effectively ignore their legal requirements in seeking third party consent. A future intention to change the law (an action that is subject to the will of Parliament) should not be used as a reason for proponents to ignore the law as it stands, which appears to have been the Government's approach to these conditional consent holders. While Labor Senators understand the frustration of these project proponents, we draw their attention to the inappropriateness of the Government's advice, and its implicit discounting of the role of Parliament in changes to law.

1.16 The Department of the Environment and Energy further argues that these projects should be exempt because the conditional declarations may be revoked as consents were not gained before the end of each project's first reporting period.¹⁰ However, rather than exempt these projects from gaining consents, Labor Senators consider that the proposed amendment to paragraph 31(3)(b), which allows the Regulator to vary a declaration such that the proponent does not need to gain consents before the end of the first reporting period, provides sufficient cover for the proponents while ensuring consents are gained. Labor Senators are nonetheless deeply concerned by the Coalition Government's botched management of this supposed drafting error. Labor Senators further note the argument by the Kimberley Land Council that the conditional consent process is inconsistent with the requirement to obtain free, *prior* and informed consent of Indigenous peoples to activities occurring on their land.¹¹

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

9 Department of the Environment and Energy, *Answers to questions on notice*, p. 6; Kimberley Land Council, *Submission 6*, p. 3.

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

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

Recommendation 1

1.17 Labor Senators recommend that the Bill not be passed in its current form.

Recommendation 3

1.18 Labor Senators recommend that the Bill explicitly include a requirement for project proponents to obtain the consent of native title holders prior to the registration of the project.

Recommendation 3

1.19 Labor Senators recommend that the Bill not include the transitional provision listed in Part 1 of the Bill.

**Senator Anne Urquhart
Senator for Tasmania**

**Senator Anthony Chisholm
Senator for Queensland**