

Additional Comments by the Australian Greens on the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017

1.1 The Australian Greens have concerns about Part 1 of Schedule 1 of the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 (the Bill), which relates to consent requirements, and more broadly about the differential treatment of native title claimants compared with determined native title holders in the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act).

Item 1, Part 1

1.2 As noted in the Majority Committee Report, the amendment of section 28A of the CFI Act will remove the need for third-party consent for savanna fire management projects and other area-based emissions-avoidance projects.

1.3 While the amendments will not remove the requirement for the project proponent to have a 'legal right' to carry out the project, it will remove a consent right for Aboriginal interest holders in relation to their traditional lands and waters. The Law Council of Australia notes in its submission to the inquiry that the impact of this removal is a significant issue.¹

1.4 The Law Council of Australia stated in its submission:

Since the first consultations in relation to the CFI Act in 2009/10, 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. In effect, this applies to both sequestration projects (due to permanence obligations), but also emissions avoidance projects that may impair/interrupt co-existing rights and interests.²

1.5 Section 45A of the CFI Act recognises native title holders as potential eligible interest holders, giving them important protections in ensuring they are consulted.

1.6 The Kimberley Land Council stated in its submission 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.³

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

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

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

1.7 In this regard, the Law Council of Australia notes the limited resources in the native title sector and how removing the positive obligation of the consent requirement for emission avoidance projects will place an additional burden on native title holders and their representative bodies to keep a close eye on the projects being registered.⁴

1.8 There is an important distinction between native title rights and interests, and other legal or equitable interests.⁵ Particularly because native title is not protected in the same way that other interests in land or water are; it cannot be registered on title.⁶

1.9 The Kimberley Land Council stated in its submission:

This situation is particularly concerning as it applies to exclusive possession native title holders. Exclusive possession native title holders should be afforded rights equivalent to other exclusive interest holders when it comes to third parties undertaking activities on land and waters. 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.

...

It would be inconsistent to repeal emissions avoidance project consent requirements and not provide some form of pro-active statutory protection for exclusive and co-existing native title holders, with respect to area-based emissions avoidance projects.⁷

1.10 Given the differences between native title interests and other legal/equitable interests in land, statutory provisions that require proactive engagement from those wishing to undertake area-based offsets projects on traditional lands is warranted, and necessary.

Item 2, Part 1

1.11 There is also concern regarding the transitional provision, which will retrospectively remove the need to obtain conditional consent, a measure that was introduced as part of the 2014 amendments. As the Kimberley Land Council stated in its submission:

The explanatory memorandum to the Bill confirms that the aim is to address consents that have not been obtained by some project proponents. As a consequence, this will enable proponents, who registered and bid for projects, with a clear understanding of the CFI Act requirements (and receiving conditional ERF contracts) to be rewarded for not engaging with

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

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

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

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

or obtaining the agreement of the relevant native title holders or other eligible interest holders. The majority of ERF contract holders are capable of designing and winning projects that involve obtaining all relevant consents (or addressing this risk through other commercial measures). The Bill should not apply so as to change the goalposts retrospectively. Doing so penalises those proponents who have invested in complying with the regime by spending time and money seeking indigenous or other eligible interest holder consent, and rewards those who have not done so by granting them a retrospective reprieve from compliance.⁸

1.12 The Law Council of Australia also commented:

All contracts for the past four auction cycles have been issued on the current statutory basis. To change this requirement now, impacts on the interests of Indigenous people, but also potentially disadvantages existing ERF participants and previous bidders into the ERF.⁹

Native title claimants

1.13 There is also concern over the differential treatment of native title claimants compared with determined native title holders in the CFI Act. This is because determined native title holders have consent rights but native title claimants do not. The Aboriginal Carbon Fund feels the CFI Act is unfair on native title claimants and wants to see registered native title claimants be treated the same way as other native title holders.¹⁰ The Cape York Land Council is of the same view.¹¹

1.14 In its submission, the Kimberley Land Council stated:

Given that a native title determination does not create new native rights, but confirms the existence (subject to extinguishment) of existing native title rights, registered native title claimants should be afforded the same rights as native title holders who have received a determination. This approach would be consistent with the approach taken in the *Native Title Act 1993*, and improve overall CFI integrity, as it would ensure future rights holders have consented to the future potential impact on their land, for example through the application of a carbon maintenance obligation.¹²

Recommendation 1

1.15 The Australian Greens recommend that item 1 of Schedule 1 be removed from the Bill.

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

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

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

11 Cape York Land Council, *Submission 1*, p. 3.

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

Recommendation 2

1.16 The Australian Greens recommend that further consultation with Aboriginal and Torres Strait Islander peoples be carried out in relation to item 2 of Schedule 1 of the Bill.

Recommendation 3

1.17 The Australian Greens recommend that the Government amend the Bill so that the registered native title claimants are treated the same as determined native title holders.

**Senator Peter Whish-Wilson
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