

Appendix 2

Department of the Environment and Energy

Answers to questions on notice



Australian Government

Department of the Environment and Energy

Dr Gordon de Brouwer PSM
Secretary

Ref: EC17-000435

Ms Christine McDonald
Secretary
Environment and Communications Legislation Committee
PO Box 6100
Parliament House
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Dear Ms McDonald

Inquiry into the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017

Thank you for the opportunity to respond to the issues raised in submissions and clarify the operation of the amendments proposed by the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017.

The Bill proposes the removal of the need for third-party consent for savanna fire management projects and other area-based emissions-avoidance projects because this requirement was included in *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) unintentionally.

Until amended in 2014, the third-party consent requirement in paragraph 27(4)(k) of the CFI Act was limited to sequestration projects as follows:

- (k) if the project is a sequestration offsets project—each person (other than the applicant) who holds an eligible interest in the project area or any of the project areas has consented, in writing, to the making of the application

The intended application of third-party consent requirements was reflected in the 2014 Emissions Reduction Fund White Paper, before the amendments to the Act were made. The White Paper clearly signalled the intention that consent from third parties is required only in relation to sequestration offsets projects (pages 9, 26 and 74). This was also made clear in

paragraphs 1.34 and 1.35 of the Explanatory Memorandum to the Carbon Farming Initiative Amendment Bill 2014:

1.34 – The current law requires that anyone with an eligible interest in a sequestration project must give their consent to the project and this will remain a requirement under the Emissions Reduction Fund.

1.35 – To provide further flexibility, sequestration projects can be registered on a conditional basis before having obtained the consent of all eligible interest holders. [Schedule 1, items 83A, 115, 119A and 119B] This will enable proponents to obtain the necessary consents after going to auction and securing a contract for the project.

The 2014 amendments used the term “an offsets project” in paragraph 28A(1)(a) when the words “a sequestration offsets project” should have been used. The Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 proposes replacing “an offsets project” in paragraph 28A(1)(a) with the words “a sequestration offsets project”.

The purpose of the third-party consent requirements has always been 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. This was explained in the Explanatory Memorandum to the Carbon Credits (Carbon Farming Initiative) Bill 2011 as follows:

4.43 The consent of relevant interest holders is required because an area of project land can become subject to a carbon maintenance obligation (explained in chapter 6 of the explanatory memorandum). These scheme obligations may affect interests in the land, and, therefore, it is important to ensure that all persons whose interests may be affected have agreed to the land being brought into the scheme.

Around 30 savanna emissions-avoidance projects were registered under the original CFI Act before the need to obtain third-party consent was introduced. Persons and entities involved in emissions-avoidance savanna fire management projects were not informed that third-party consent was required for future area-based emissions avoidance projects until the middle of 2015.

At the end of 2015, the Government acknowledged, and sought to correct, the error through the Omnibus Repeal Day (Spring 2015) Bill 2015 introduced into Parliament on 12 November 2015. The Parliament was dissolved before the Bill could be passed by the Senate.

The Department understands that some project proponents with conditional declarations have not yet sought third-party consent because of the expectation (in part as a result of the earlier attempt to amend the CFI Act) that legislative amendments would remove that condition from their declaration.

A broad range of savanna project proponents and Indigenous organisations were consulted on the Government’s intention to reintroduce the amendments in early 2017. The Department notes that the committee has received a number of submissions outlining their support for the removal of third-party consent requirements and the unintended impact of the requirement on their projects.

Around 20 area-based emissions-avoidance projects have conditional declarations and may be revoked if consents are not obtained before the end of each project's first reporting period. Revocation is likely to result in the discontinuation of savanna fire management in the project areas by persons who have already demonstrated that they have the legal right to undertake the activity, and who, in some cases, have started the activity.

The Department notes that the CFI Act will continue to include strong mechanisms to facilitate Indigenous participation after the proposed amendments are passed. For example, the CFI Act includes mechanisms to make it easier for a *registered native title body corporate* to register a project. Where the conferral of legal rights in relation to land affects native title, the protections in the *Native Title Act 1993* apply. Section 301 of the CFI Act makes clear that the CFI Act does not affect the operation of the *Native Title Act 1993*.

The *Native Title Act 1993* establishes procedures that enable proposed actions or developments that affect native title lands or waters (known as future acts), which took place on or after 1 January 1994, to be done validly. One such procedure is the formation of *Indigenous Land Use Agreements*, which are voluntary agreements made between governments or land users with native title groups about the use and management of land and waters. In order to be valid, these agreements must be authorised by all relevant native title holders (for example, in the area that is the subject of the agreement).

The scope of these agreements can include access to land, the relationship between native title rights and the rights of other land users, and activities such as savanna fire burning projects. In many cases, project proponents (Indigenous and non-Indigenous proponents) have formed *Indigenous Land Use Agreements* to agree arrangements for savanna fire burning projects and ensure that the rights of native title holders are protected and promoted.

As a result of this framework, Indigenous organisations operate, or have strong involvement in, a large number of the savanna fire management projects registered under the Emissions Reduction Fund.

The beneficial treatment of native title is explained further in Chapter 4 of the Explanatory Memorandum to the Carbon Credits (Carbon Farming Initiative) Bill 2011. *Determined exclusive possession native title holders* will also benefit from other amendments in the Bill which clarify that the State Crown lands Minister does not have a third-party consent right for Torrens system land or land rights land.

Specific questions from the Committee

The Committee notes several submissions question the proposed amendments. The Department's response to each of these issues is as follows:

The removal of third-party consent fails to recognise the distinction between native title rights and interests, and other legal or equitable interests that may be held in land (Law Council of Australia (LCA) paragraph 16, Kimberley Land Council (KLC) p. 2).

After the amendments, the CFI Act will retain a number of important mechanisms to recognise the nature of native title and facilitate Indigenous participation in the Emissions Reduction Fund.

Significantly, section 46 of the CFI Act recognises that the nature of native title rights may present difficulties for meeting the requirements to register projects. It provides a deeming mechanism for a *registered native title body corporate* to register a project and overcome difficulties that may arise due to the nature of native title rights.

Where other interests in land seek to register a project, the Clean Energy Regulator needs to be satisfied that person has the legal right to carry out the project. Where the conferral of legal rights in relation to land affects native title, the protections in the *Native Title Act 1993* apply.

The operation of the deeming provisions in section 46 of the CFI Act, and other beneficial treatment of native title, is explained in Chapter 4 of the Explanatory Memorandum to the Carbon Credits (Carbon Farming Initiative) Bill 2011.

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 (LCA, paragraph 17, KLC, p. 3).

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. In particular, subsection 46(1) 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*. Where the conferral of legal rights in relation to land affects native title, the protections in the *Native Title Act 1993* apply.

There are also circumstances where third-party consent requirements for area-based emissions avoidance projects can be a barrier to Indigenous participation. For example, removing the requirements would allow *non-exclusive possession native title holders* with the legal right to undertake a project to participate in the Emissions Reduction Fund without needing to seek consent from the relevant State Crown lands Minister. *Determined exclusive possession native title holders* will also benefit from other amendments in the Bill which clarify that the State Crown lands Minister does not have a third-party consent right for Torrens system land or land rights land.

The removal of third-party consent creates inconsistency within the Carbon Credits (Carbon Farming Initiative) Act 2011 in relation to other land management interests (LCA, paragraphs 19, 20).

The Law Council of Australia submission argues that the removal of third-party consent is inconsistent with the requirement to indicate whether or not a project is consistent with the applicable natural resource management plan in paragraph 23(1)(g) of the CFI Act.

The Department notes that the CFI Act only imposes an obligation for project proponents to *consider* the applicable natural resource management plan. Projects can still proceed that are inconsistent with that plan. Unlike third-party consent, the requirement to consider a natural resource management plan does not prevent participation in the Emissions Reduction Fund.

The removal of third party consent could significantly diminish the protections afforded to native title holders by section 45A of the Act (KLC, p. 2).

Section 45A of the Act will continue to provide *determined native title holders* with consent rights for projects with permanence obligations under the Act.

If a person has the legal right to carry out a particular activity on their land, a third party (such as a state government, bank with a mortgage or *registered native title body corporate*) should only be able to veto participation in the Emissions Reduction Fund for sequestration projects resulting in long-term land management obligations.

As noted previously, the third-party consent requirement for area-based emissions-avoidance projects was imposed in error and significant protections for Indigenous interests will remain after the amendments are passed.

The removal of third party consent removes a pathway for engagement and agreement about the impacts of third party proposals on Indigenous people's interests (LCA, paragraph 22).

The third-party consent requirement for area-based emissions-avoidance projects is much broader than a pathway for engagement and agreement about impacts on Indigenous people's interests.

It allows a broad range of persons with an interest in land, such as banks with a mortgage and State Crown lands Ministers, to veto a person with a legal right to conduct an activity receiving a benefit from the emissions avoided by that activity. That right of veto is only appropriate where the permanence obligations under the Act have the potential to impact that interest in land.

As noted above, separately to the CFI Act, the *Native Title Act 1993* provides procedures for negotiation and agreement regarding activities which impact native title land or waters, including procedures for identifying and notifying relevant native title holders, and decision-making processes to ensure that decisions about native title interests reflect the will of all native title holders.

The removal of third-party consent requirements will allow *non-exclusive possession native title holders* to register and benefit from savanna fire management projects without the consent of the relevant State Crown lands Minister.

The Department notes that submissions have questioned the adequacy of guidance and access to information about projects seeking registration. If additional guidance, processes or requirements would assist Indigenous people's interests in savanna fire management projects, these could be included in the revised methodology determinations and associated legislative rules on which we are currently consulting. This would enable any additional guidance, processes or requirements to be targeted to circumstances of savanna fire management projects.

The removal of third-party consent could lead to a liability arising from challenged project declarations (Aboriginal Carbon Fund (ACF) p. 2).

To register a project under the Fund, a person must have the legal right to conduct the activities which make up the project. The registration of a project under the CFI Act does not itself confer any legal right to undertake the relevant activities.

In some circumstances, parties may need to negotiate with other parties who hold all or part of that legal right. If, through negotiations, claims to legal right for the project remain disputed, the project may not be able to be registered. The Clean Energy Regulator assesses legal right based on material provided to them.

If the legal right to carry out a project is lost due to changes in circumstances, the project may be revoked. The onus remains on the registered project proponent to maintain their legal right to continue to receive credits.

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 of the CFI Act.

The removal of third-party consent should not be retrospective (Cape York Land Council (CYLC) p. 1; LCA paragraph 24 and KLC, p. 2).

As set out at the start of this letter, the third-party consent requirement for area-based emissions-avoidance projects was an error introduced by the 2014 amendments to the Act. It was not recognised until the middle of 2015. The Government proposed to correct the error in a Bill introduced on 12 November 2015.

It would be unfair if the 20 or so projects currently with conditional declarations are required to obtain third-party consent when the first 30 projects registered were not required to, and new projects will not be required to from the time the amendments come into force.

The Department understands a number of project proponents have taken the Government's proposal to correct the error into account in deciding to delay seeking third-party consent for their projects.

The KLC and ACF raised matters related to conditional consent and non-exclusive possession native title holders and native title claimants.

The consent requirements were not intended to be a mechanism to determine the question of who has the legal right to carry out a project. The legal right to carry out a project needs to be established when the project is registered and the interests of native title holders and claimants are protected through the *Native Title Act 1993*. Section 301 of the CFI Act makes clear that the CFI Act does not affect the operation of the *Native Title Act 1993*.

Conditional declarations were introduced in 2014, in recognition that the process for obtaining the wide range of third-party consents under the Act can be time consuming. This has allowed activities which reduce emissions, and which the project proponent has the legal right to implement separate from the CFI Act, to proceed.

Please let us know if you require any further clarification in relation to these issues.

Yours sincerely

Gordon de Brouwer
May 2016

