

The Senate

Environment and Communications
Legislation Committee

Carbon Credits (Carbon Farming Initiative)
Amendment Bill 2017 [Provisions]

May 2017

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Chapter 1

Introduction

Referral

1.1 On 30 March 2017, the Senate referred the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 (the bill) to the Senate Environment and Communications Legislation Committee for inquiry and report by 9 May 2017.¹

Conduct of the inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations inviting written submissions by 11 April 2017. The committee received 13 submissions which are listed at Appendix 1 of this report.

1.3 The committee did not hold a public hearing for this inquiry. However, the committee requested the Department of the Environment and Energy (the department) to provide a written response to concerns raised in submissions. The department's response is provided at Appendix 2.

1.4 The public submissions and other information received during the inquiry are available on the committee's website at:
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/CarbonFarmingInitiative

Reports of other committees

1.5 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.6 The Scrutiny of Bills Committee made no comment on the bill.²

Background

1.7 The *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act) established a voluntary carbon offsets scheme with the purpose of creating incentives for carbon abatement projects in the land. There are two broad types of carbon

1 *Journals of the Senate*, 2016–17, No. 38, 30 March 2017, pp. 1244–46.

2 Scrutiny of Bills Committee, *Scrutiny Digest 4/17*, p. 5.

abatement projects—emissions *avoidance* projects that prevent the release of emissions into the atmosphere (i.e. savanna burning) and emissions *sequestration* projects that store carbon from the atmosphere into the land (i.e. tree planting).

1.8 The CFI Act also included requirements to ensure persons with a legal interest in land, who could be subject to requirements to store carbon (permanence obligations) applicable to carbon sequestration projects, provide consent to the projects being carried out.³ The permanence obligations ensure that stored carbon is maintained for either 25 or 100 years. These long-term obligations can affect other eligible interest holders, for example financial institutions or the relevant state or territory minister in the case of Crown land.⁴ Under the original Act, these consent requirements applied only to emissions *sequestration* projects as emissions *avoidance* projects do not entail permanence obligations.

1.9 Amendments to the CFI Act in 2014 established the Emissions Reduction Fund (ERF) and amended administrative aspects of the consent requirements for land-based projects involving the long-term storage of carbon.

1.10 However, in doing so, the 2014 amendments also introduced an error in the CFI Act as the amendments 'inadvertently applied the consent requirements to savanna fire management projects and irrigated cotton projects that are not credited for storing carbon'.⁵ This meant that savanna emissions *avoidance* projects were inadvertently required to obtain consent despite there being no permanence obligations associated with those projects. This outcome was in conflict with the original operation of the Act since 2011, as well as the intention of the 2014 amendments. However, as a consequence, consent for these projects must be obtained from third parties. The department indicated that over 20 registered savanna fire management projects, which have been conditionally approved, are subject to unintended requirements to obtain consent from third parties. The department noted that projects, for which consent has not been obtained, risk being revoked.⁶

1.11 In response to representations from savanna fire management projects affected by the unintended consequences of the 2014 amendments, the Government sought to amend the CFI Act. The Omnibus Repeal Day (Spring 2015) Bill 2015 was introduced in November 2015. The bill lapsed at the prorogation of the Parliament on 15 April 2016 and was not restored to the Senate *Notice Paper* before the dissolution of the Parliament on 9 May 2016.

3 Explanatory Memorandum (EM), Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 3.

4 EM, p. 7.

5 EM, p. 3.

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

1.12 In late 2016, the department held discussions with savanna fire management proponents on new opportunities to earn credits for carrying out savanna fire management projects. During this consultation:

...participants reiterated the need to remove the requirement for consent for savanna fire management from the Act. Participants also identified problems with the operation of the Act for projects to store carbon in savannas, such as in relation to the unfairness of including credits for avoided emissions in the net total number of units calculated for a project.⁷

1.13 In early 2017, the department distributed an information paper describing possible amendments to the Act that would address the unintended consent requirement as well as other amendments. The department noted that there was 'strong support received from proponents subject to the [unintended consent] requirements'.⁸

Purpose and overview of the bill

1.14 The bill proposes to amend the CFI Act in relation to the crediting elements of the ERF. The proposed amendments will remove the unintended consent requirements, address implementation issues, reduce administrative burden and clarify the original intent of the Act. The Minister for the Environment and Energy stated, in his second reading speech, that the bill will build on the success of the ERF and:

...will also reduce regulatory burden and increase flexibility for projects. It will help participants in the fund by clarifying consent requirements to conduct projects. It will make it easier for projects to adapt their project areas to their evolving needs, preserving emissions reductions and business flexibility. It will also ensure the requirements to return credits if a proponent reduces the size of their project or ends a project as appropriate.⁹

1.15 The Minister concluded that the 'amendments demonstrate the government's ongoing commitment to reduce red tape, streamline administrative processes and reduce emissions'.¹⁰

1.16 The bill would amend the consent requirements by replacing the term 'offsets project' with the defined term 'sequestration offsets project' in paragraph 28A(1)(a). The proposed amendment applies the obligation to obtain consent of eligible interest holders only to sequestration offsets projects and removes the obligation from existing area-based emissions-avoidance projects. The amendment will reflect the intent of the CFI Act as passed in 2011.

7 EM, p. 6.

8 EM, p. 6.

9 The Hon Josh Frydenberg MP, Minister for the Environment and Energy, *House of Representatives Hansard*, 23 March 2017, p. 2966.

10 The Hon Josh Frydenberg MP, Minister for the Environment and Energy, *House of Representatives Hansard*, 23 March 2017, p. 2966.

1.17 The bill also provides transitional provisions to remove the effect of any conditional declarations for non-sequestration offsets projects made after the commencement of the 2014 amendments and the date of the amendment to paragraph 28A(1)(a).¹¹

1.18 The bill would amend section 44 of the CFI Act to clarify that state and territory government Crown lands ministers and Commonwealth ministers responsible for land rights legislation do not have consent rights for projects conducted on exclusive possession native title land.

1.19 The bill also proposes a number of amendments relating to sequestration projects. The major amendments are as follows:

- Providing for legislative rules or regulations to allow proponents to remove parts of a sequestration offsets project and to surrender credits for the carbon stored in that area (proposed paragraph 29(3)(l)). The intent is to provide greater flexibility for adjustments to projects over time 'while maintaining the integrity of the credits previously issued and used by the Government or third parties'.¹²
- Replacing section 42 to provide for a new formula for 'net total number' of Australian carbon credit units issued in relation to an eligible offsets project. In addition, the proposed new section 42 introduces defined terms 'total units issued', 'units issued for emissions avoidance' and 'units relinquished'. The proposed amendment is intended to assist in the uptake of the proposed new savanna sequestration method.¹³
- Amendments facilitating the transfer of projects to the proposed savanna sequestration method that credits both emissions-avoidance and sequestration of carbon in the landscape.¹⁴
- Amendments facilitating savanna crediting options to provide flexibility to extend the crediting period of savanna sequestration projects without providing credits to projects that are not subject to enforcement of their permanence obligations relating to those credits.¹⁵
- Amendments facilitating removal of conditions after the end of the first reporting period. Amendments to section 31 will allow legislative rules or regulations to provide for the removal of regulatory approval or consent

11 EM, p. 8.

12 EM, pp. 4, 11–12.

13 EM, pp. 4, 12–13.

14 EM, pp. 4, 13–17.

15 EM, pp. 4, 17–18.

conditions on declarations where that regulatory approval or consent has been obtained after the end of the first reporting period for the project.¹⁶

16 EM, pp. 4–5, 17–18.

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

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.

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- 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

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

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

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.

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**

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**

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
Deputy Chair
Senator for Tasmania**

**Senator Rachel Siewert
Senator for Western Australia**

Appendix 1

Submissions received by the committee

- 1 Cape York Land Council
- 2 Consolidated Pastoral Company
- 3 Australian Wildlife Conservancy
- 4 Aboriginal Carbon Fund
- 5 Department of the Environment and Energy
- 6 Kimberley Land Council
- 7 Climate Friendly
- 8 Corporate Carbon
- 9 Law Council of Australia
- 10 Australian Integrated Carbon
- 11 Wolverton Station
- 12 Country Carbon
- 13 Northern Territory Government

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
Canberra ACT 2600

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

