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

The KLC has a long history of engaging in climate change policy, working with the Australian Government on the development of the Carbon Farming Initiative (**CFI**), the Direct Action Plan and Emission Reduction Fund, and sharing experience in implementing carbon offset projects through the World Indigenous Network, World Parks Congress, 21st Conference of Parties in Paris, and UNESCO Indigenous People Climate Change Conference in Morocco.

The KLC facilitated the registration of the first four indigenous CFI projects in the Kimberley in 2013, which remain the only projects registered on the basis of exclusive possession native title. These projects herald a new era for native title holders, demonstrating how native title rights and traditional indigenous practices can form the foundation for innovative projects, generating social, environmental and economic benefits in remote communities.

The KLC continues to work with native title holder and indigenous groups throughout the Kimberley region to increase knowledge and understanding of the opportunities provided by carbon projects, and to register new projects, so that more native title holders are able to benefit from these opportunities.

The Bill amends the *Carbon Credits (Carbon Farming Initiative) Act 2011* (**CFI Act**) to:

1. remove the obligation to obtain consent of eligible interest holders from existing area-based emissions-avoidance projects;
2. 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 that is Torrens system land;
3. provide for legislative rules or regulations to allow parts of a sequestration offsets project to be removed and credits surrendered for the carbon stored in that area;

4. ensure a sequestration project's net total liability under the scheme does not include credits issued for emissions avoidance or credits that have already been relinquished;
5. clarify that requirements to relinquish carbon credits if carbon stores are lost apply to sequestration projects that store carbon and avoid emissions;
6. provide for projects to transfer between methods so as to move between emissions-avoidance and sequestration; ensure that relinquishment requirements apply to projects whose crediting period extends beyond their permanence period; and
7. allow legislative rules or regulations to provide for the removal of regulatory approval or consent conditions on declarations obtained after the end of the first reporting period for the project.

1. Obligation to obtain eligible interest holder consent

Item 1 of Schedule 1 of the Bill proposes to amend section 28A of the CFI Act to remove the requirement for the consent of an 'eligible interest holder' to be obtained for emissions avoidance offset projects (as opposed to sequestration projects). This proposed amendment will alter and remove fundamental protections for indigenous interest holders with respect to engagement with third parties undertaking projects on their traditional lands and waters and, in combination with Item 2 of Schedule 1, will remove these rights retrospectively.

The position of native title holders and Indigenous land holders has always been that consent should be required for any land-based project that may interfere with their rights and interests - both sequestration projects (due to permanence obligations), but also emissions avoidance projects that may impair/interrupt their co-existing rights and interests.

There is an important distinction between native title and indigenous land rights interests, and those of other legal or equitable interest holders. Native title is a unique interest in relation to land, which is not afforded the same protections as other concurrent interests in land or water (cannot be registered on title). For this reason positive protections for native title are required in legislation which creates incentives for third parties to use and benefit from activities on areas of traditional country. Activities under the CFI, such as savanna fire management, have a clear capacity to interfere with indigenous people's rights and interests in areas of their traditional country and therefore trigger the need for this positive protection.

The unique rights of native title holders, and possible limitations on their ability to participate equally in the scheme, is specifically recognised in the CFI Act, including through section 46, which deems exclusive possession native title holders to be project proponents in certain circumstance and section 45A, which recognises native title holders as eligible interest holders for an area of land subject to native title that is within a carbon project area (irrespective of whether this is an emissions avoidance or sequestration project).

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.

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.

The CFI Act contains examples of how other land management interests are protected by express statutory requirements. Section 23(1)(ga) provides special protection to non-proprietary management plans, such as regional natural resource management plans, by including a positive obligation trigger. In this example, section 23(1)(ga) requires an area-based carbon project proponent to ensure that an application for a project within a natural resource plan area is accompanied by a statement about whether the project is consistent with the plan.

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.

a. Conditional Consent

Related to the question of consent, the Bill raises a key ERF market design issue: the timing of eligible interest holder consents and the registration and contracting of 'conditional' projects. The ability to register a project 'conditional' upon obtaining eligible interest holder consents was introduced as part of the 2014 amendments.

The conditional consent requirements introduce significant uncertainty into the scheme, and, as they apply to native title holders, are inconsistent with the requirement to obtain free, *prior* and informed consent of indigenous people to activities occurring on their land, an important tenet of international law.

To provide a snapshot of how conditional consent has operated, as at 24 March 2017, there are 80 registered savanna burning projects, 55 of which have been contracted under the ERF. Of these 55, 43 are not subject to any outstanding consents, whereas only 12 have outstanding conditional consent requirements.

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 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.

b. Non-exclusive native title and native title claimants

The Bill raises a second ERF design issue: scope of native title consent. Currently, sections 28A and 45A operate to recognise the eligible interests of both exclusive and non-exclusive native title holders. However, for non-exclusive possession native title

interests, this recognition extends no further, making it extremely difficult for non-exclusive possession native title holders to participate in the scheme, highlighting the need for a more thorough review of the scheme's interaction with native title rights.

For native title claimants, the challenge extends further still, with the CFI Act only providing protections for Registered Native Title Body Corporates (RNTBCs), but not registered claimants. 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.

The KLC **recommends** that:

A. There be no change to the nature of consent requirements under the CFI Act. Given the complexity of the consent issues, this proposal should be more comprehensively reviewed, including through extending right to native title claimants and non-exclusive native title holders, as part of the Australian Government climate change policy review.

B. Retrospective amendment of eligible interest holder consent requirements should be referred for further consideration and consultation with indigenous peoples.

2. Consent rights for projects on exclusive possession native title land

KLC welcomes Items 3 and 4, which amend section 44 of the CFI Act. It is consistent with broader jurisprudence and the CFI Act generally, clarifying that Crown land Ministers do not have eligible interest consent rights with respect to exclusive possession native title land.

The KLC **recommends** that:

A. This amendment is supported.

3.-7. Amendments to assist projects store carbon in the landscape

Items 5 through to 29 introduce a number of changes to facilitate the uptake of the new *Carbon Credits (Carbon Farming Initiative—Savanna Fire Management—Sequestration and Emissions Avoidance) Methodology Determination 2017* (**new method)**, which will credit both the avoided emissions from early dry season burning as well as the increase in the storage of carbon in dead organic matter sequestration projects.

Savanna burning methods not only offer an important contribution towards Australia's international emission reduction target, but deliver significant environmental, social and cultural benefits, particularly for Indigenous people and remote communities participating in the CFI.

The Bill introduces a number of positive amendments which seek to overcome incongruence between the new method, the CFI Act and the related policy setting. This arises because the new method is the first to combine avoided emissions and sequestration in a single method, and the CFI Act was not originally drafted to allow for

such a possibility. A number of minor amendments are therefore required to facilitate this positive evolution of the scheme.

For example, under the current CFI Act, where a project registered under the new method chooses to deregister, it would be required to hand back not only ACCUs issued for sequestration, but also any other ACCUs issued for emissions avoidance. This is despite the fact that avoiding emissions is already a permanent saving for the atmosphere, and that no other emissions avoidance project would be required to do this under the same circumstances. Items 6-8 amend the definition of 'net total number' to clarify that this applies only to sequestration credits, addressing this inconsistency.

The KLC **recommends** that:

A. Amendments related to facilitating the update of savanna sequestration projects are supported.

END.