Cape York Land Council Aboriginal Corporation
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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

10 April 2017

Re: *Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017* (Cth)

The following is a submission from the Cape York Land Council (**CYLC**) about the above Bill (the **"CFI Bill"**), which is currently before the Committee.

CYLC is a representative Aboriginal and Torres Strait Islander body under the *Native Title Act 1993* (Cth) (**NTA**), representing Aboriginal people in their quest to reclaim traditional lands through native title determination applications and other processes. By reason of the latter, CYLC facilitates the granting of land to traditional owners under the *Aboriginal Land Act 1991* (Qld) (**ALA**). We act for land trusts under the ALA, and corporations under the *Corporations (Aboriginal and Torres Strait) Islander Act 2006* (Cth) that hold Aboriginal land under the ALA.

It is of considerable concern to CYLC that item 1 of Schedule 1 of the CFI Bill would amend s.28A of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (the **"CFI Act"**) to remove the requirement for the consent of an "eligible interest holder" to be obtained for emissions avoidance offsets projects.

Furthermore, item 2 of Schedule 1 of the CFI Bill will retrospectively remove conditions under s.28A requiring that consent be obtained before the end of the first reporting period for emissions avoidance offset projects declared on or after 13 December 2014. This is the date upon which s.28A was inserted by item 115 of schedule 1 of the CFI Act.

The explanation provided by the Department of Environment and Energy to justify this proposed amendment was that the requirement for the consent of eligible interest holders was 'unintentionally' included when s.28A was introduced. That explanation beggars belief, and no evidence has been provided to support it.

We attach our recent submission to the Department of Environment and Energy in respect of:

- the draft *Carbon Credits (Carbon Farming Initiative) Amendment Rule 2017 (No. 1)* (Cth);
- the draft *Carbon Credits (Carbon Farming Initiative—Savannah Fire Management—Emissions Avoidance) Methodology Determination 2017* (Cth);

- the draft *Carbon Credits (Carbon Farming Initiative—Savannah Fire Management—Sequestration and Emissions Avoidance) Methodology Determination 2017* (Cth).

CYLC is broadly supportive of the amendments to the CFI Act proposed by the CFI Bill, but we strongly object to the proposal to remove from s.28A the requirement to impose a condition related to the consent of Aboriginal land holders and native title holders for emissions avoidance projects.

Native title holders who have a determination of native title under the NTA and a registered native title body corporate determined by the Federal Court are eligible interest holders under s.45A of the CFI Act. Similarly, the grantees of Aboriginal freehold under the ALA are eligible interest holders under s.44(2) of the CFI Act.

The explanatory memorandum for the CFI Bill identifies that over 20 savannah fire management projects will be affected by the retrospective amendment in item 2 of Schedule 1 of the CFI Bill. It is likely that some of these are located on Cape York. We understand that the Clean Energy Regulator may have invalidly issued carbon credits without enforcing the provisions of the CFI Act which requires that a project proponent establish they have "the legal right to carry out" the project, and that eligible interest holders have consented. A substantial number of projects may be at risk because of this failure.

Additionally, the Clean Energy Regulator may have discriminatorily applied the eligible interest holder consent provisions by requiring landholder consent, but not seeking the consent of the co-existing native title holders (for example, on a pastoral lease subject to non-exclusive native title).

It could be deduced that part of the motivation for the retrospective amendment of s.28A is to correct the failure of the Clean Energy Regulator to enforce the native title consent provisions of the legislation. The removal of s.28A will particularly benefit those carbon aggregator companies that have failed to correctly engage with native title holders. It is our understanding that the Clean Energy Regulator now intends to somehow rely on project proponents having the "legal right to carry out" a project without any framework for the proponent to substantiate whether that legal right exists.

In effect, what the Commonwealth is attempting to legislate is a retrospective and in-perpetuity discrimination against native title holders – an egregious and outrageous situation in modern Australia.

We are alarmed that the Commonwealth is proceeding with the CFI Bill without alternative arrangements in place that would give certainty to native title holders, the holders of Aboriginal land and participants in emissions avoidance offsets projects that benefit from the Emissions Reduction Fund.

Sections 28A, 44(2) and 45A of the CFI Act provide a legal framework for the Clean Energy Regulator to be satisfied that a carbon abatement project has the informed consent of native title holders and Aboriginal land holders to the project. The integrity of the Emissions Reduction Fund is at risk if the Clean Energy Regulator registers projects for, issues ACCUs to,

or contracts through the auction process with, a proponent who has not secured the necessary native title consents.

Rather than introduce a process which is even more unreliable, unworkable and in danger of challenge, the Commonwealth should work with Indigenous parties to achieve a legislative outcome which provides greater clarity and certainty.

We urge the following:

- the retention of the eligible interest holder consent provisions of the CFI Act (s.28A) applicable to the holders of Aboriginal freehold under the ALA and native title holders for all emissions avoidance projects including savannah fire management projects;
- the amendment of the CFI Act to also apply these consent arrangements to projects registered before 13 December 2014 (and make appropriate arrangements for transitional assessment of those projects);
- a review of the Clean Energy Regulator's enforcement of the "legal right" and "eligible interest holder consent" provisions;
- the amendment of the CFI Act to require the obtaining of consent from both determined native title holders and registered native title claimants under the NTA; and
- the Commonwealth work with regional indigenous representative organisations and other key stakeholders to achieve a workable and fair resolution to the issue of native title holder and Indigenous landholder consent to offsets projects under the CFI Act.

We would urge the Committee to consider public hearings into this matter, and we would be pleased to talk to this submission and provide further evidence at that hearing.

Yours sincerely

Peter Callaghan
Chief Executive Officer
Cape York Land Council