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Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth)
Australian National Registry of Emission Units Bill 2011 (Cth)
Carbon Credits (Consequential Amendments) Bill 2011 (Cth)

Senate Standing Committees on Environment and Communications

Submission of the National Native Title Council

11 April 2011

Introduction

1. Set out below is the submission of the National Native Title Council (**NNTC**) concerning:
   (a) the *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth) (**Carbon Farming Bill**);
   (b) the *Australian National Registry of Emission Units Bill 2011* (Cth) (**Registry Bill**);
   (c) the *Carbon Credits (Consequential Amendments) Bill 2011* (Cth) (**Consequential Amendment Bill**).

2. The NNTC is a peak body representing organisations which, under the *Native Title Act 1993* (Cth), represent and assist native title holders and claimants – native title representative bodies and native title service providers.

3. In a previous submission on a consultation paper for the Carbon Farming Initiative, the NNTC identified the significant potential that carbon abatement and sequestration projects represent.[1] In that submission, the NNTC identified three broad areas of concern about the proposed Initiative, namely:
   (a) the lack of clear and concise carbon rights legislation, particularly arising from the treatment of native title under the *Native Title Act 1993* (Cth);
   (b) the need for design principles for the Initiative to respect the rights, interests and aspirations of Indigenous communities;
   (c) the risk that design complexity of the Initiative may discourage Indigenous participation.

4. These three areas of concern remain in respect of the three bills before the committee.

5. The limited time available to provide submissions requires the NNTC to focus its comments upon the Carbon Farming Bill. We foreshadow a supplementary submission to amplify this submission and address the Registry Bill and the Consequential Amendments Bill.

6. Because of the mandate of the NNTC, these submissions primarily focus on the position of native title claimants and holders. However, the treatment of statutory land rights and native title settlements which do not involve a determination of native title are also relevant to the impact of the proposed legislation upon Aboriginal peoples and Torres Strait Islanders whether they hold native title or not.

[1] NNTC, submission to Department of Climate Change and Energy Efficiency, 4 February 2011.

Treatment of native title rights and native title holders

7. The content of native title rights is variable throughout Australia. The primary distinction drawn by the Carbon Farming Bill – between exclusive and non-exclusive native title – fairly represents the two broad categories of native title rights.

8. Offset projects, for which an application can be made for them to be declared eligible offset projects and so qualify for the issue of a certificate of entitlement,[2] may be either an emissions avoidance offset project or a sequestration offsets project.[3] Every offset project must have a project proponent who is responsible for carrying out the project and has a legal right to undertake the project.[4] In the case of a sequestration offsets project, the project proponent must also hold the 'applicable carbon sequestration right'[5] for the project area.[6]

9. It is fair and appropriate that the Carbon Farming Bill gives certainty to the holders of exclusive native title by providing that:

   (a) they are the holders of the applicable carbon sequestration right for their exclusive native title land (whether directly or by authorisation under a body corporate Indigenous land use agreement);[7]

   (b) their registered native title body corporate, if no other person has a right to undertake the project, is taken to be the project proponent[8] and Ministerial approval of the project is not required;[9]

   (c) the Crown lands Minister of the State or Territory is not the holder of an 'eligible interest'[10] (and so their consent to a sequestration offsets project is not required[11]).

[2] Carbon Farming Bill cl.15 and 27.
[3] Carbon Farming Bill cl.5 (definition of 'offset project'), 53 and 54.
[4] Carbon Farming Bill cl.5 (definition of 'project proponent').
[5] Carbon Farming Bill cl.43 (applicable carbon sequestration right).
[6] Carbon Farming Bill cl.5 (definition of 'project proponent', para.(a)(iii)).
[7] Carbon Farming Bill cl.43(9) and (10).
[8] Hence, there is no need for the registered native title body corporate to separately demonstrate that it has the legal right to carry out the project.
[9] Carbon Farming Bill cl.46(1).
[10] Carbon Farming Bill cl.45(2). This cl.45 is not appropriately drafted. The condition in cl.45(2) provides that if land is neither land rights land nor native title land, then the Crown lands Minister has an eligible interest. However, other provisions of the same clause do specifically provide that the Crown lands Minister has an interest in areas where exclusive possession native title land may exist. For example, a reserve for Aboriginal purposes may result in a determination of exclusive possession native title by reason of *Native Title Act 1993* (Cth) s.47A. Even though exclusive possession native title exists on the reserve, the Crown lands Minister will be treated as the holder of an eligible interest by reason of cl.45(7). Clause 45 should be amended to declare

10. Non-exclusive native title holders receive no such fair treatment. For non-exclusive native title holders:

    (a) there is no protection from the disposition of carbon sequestration rights (**CSRs**) in their land where that is permitted by the *Native Title Act 1993* (Cth);

    (b) the Carbon Farming Bill provides no mechanism to recognise the essential co-ownership of CSRs between native title holders and others (including State and Territory governments) where non-exclusive native title rights include a right to use flora, timber or similar natural resources – non-exclusive native title holders forgoing these rights, absolutely or for a term, should be translated into a corresponding share of the total CSR;

    (c) there is no protection against the establishment of an emissions avoidance offset project on their native title land without their consent where the project involves a new use of land to that previously undertaken on that land;

    (d) there is no recognition in the Carbon Farming Bill that native title holders may contribute to an emissions avoidance offset project by foregoing activities, which they are otherwise authorised to do by reason of their non-exclusive native title rights (eg. burning, use of timber, flora and similar natural resources).

11. Many, but not all, of these policy failures flow from the structure of the Carbon Farming Bill and its relationship to the *Native Title Act 1993* (Cth). The failure to provide a clear pathway for non-exclusive native title holders into participation in offset projects is a major weakness in the Carbon Farming Bill. The Bill fails to treat non-exclusive native title rights as valuable property. The Bill should avoid the fractionation of property interests on non-exclusive native title land, which would otherwise exclude the possibility of eligible offset projects being undertaken because of the 'orphaned' CSRs (CSRs not allocated between co-owners). The disincentive created by excessive division of property interests is well recognised in the literature.[12]

12. Paragraph 4.28 of the Explanatory Memorandum for the Carbon Farming Bill states:

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that the Crown lands Minister is not the holder of an eligible interest for land that is exclusive possession native title land.

[11] See Carbon Farming Bill cl.27(4)(k).

[12] Chander A., 'The new, new property' (2003) 81 *Texas Law Review* 715, Heller M. A., 'The tragedy of the anticommons: property in the transition from Marx to markets' (1998) 111 *Harvard Law Review* 621, Heller M. A., 'The boundaries of private property' (1999) 108 *Yale Law Journal* 1163, Holderness C. G., 'Joint ownership and alienability' (2003) 23 *International Review of Law and Economics* 75.

> The bill does not provide any special treatment for non-exclusive native title. This is because non-exclusive native title interests, such as native title access or usage rights, would be less likely to include carbon sequestration rights, and are more akin to non-freehold interests such as an easement or a licence. Easements and licences do not confer carbon sequestration rights which would give a project proponent the basis to undertake projects.

13. Suggesting that non-exclusive native title rights 'are more akin' to easements and licences is an outrageous analogy and should be withdrawn. It is not only incorrect, but unhelpful. It demonstrates serious weaknesses in the policy thinking that underpins the Carbon Farming Bill's treatment of non-exclusive native title.

14. The Carbon Farming Bill should be amended to provide:

    (a) that non-exclusive native title holders have an eligible interest in their non-exclusive native title land;[13]

    (b) a mechanism by which non-exclusive native title holders can be recognised as the co-owners of a CSR;[14]

    (c) that the consent of non-exclusive native title holders is required for an agricultural emissions avoidance offset project, as a condition of its declaration as an eligible offset project.[15]

CSRs and the Native Title Act

15. The NNTC is particularly concerned that the operation of the *Native Title Act 1993* (Cth) may authorise State and Territory governments to create CSRs on native title land, whether exclusive or not, without the prior consent of native title holders in the form of an Indigenous land use agreement. CSRs are a new form of property and it is inequitable, unfair and contrary to the *Racial Discrimination Act 1975* (Cth) (the provisions of which are overtaken by the *Native Title Act 1993* (Cth)) to permit rights not contemplated at the time of the enactment of the Act, or its significant amendment in 1998, to be granted to non-native title holders to the detriment of native title holders. An analogy with co-owned property is apt. Where two persons are co-owners of property, each with concurrent and non-exclusive rights to use timber, flora and other natural products, the creation of CSRs in

[13] Carbon Farming Bill cl.45.

[14] Carbon Farming Bill cl.43. Such an amendment would benefit other non-exclusive rights holders. It is curious that cl.43(7) is the sole subsection that refers to a 'carbon sequestration right' rather than an 'applicable carbon sequestration right'. It is unclear if this is intended to create a different treatment for the Commonwealth or statutory authorities of the Commonwealth.

[15] Carbon Farming Bill cl.27.

one co-owner is unfair to the other. CSRs should be divided between the two either equally, or in priority according to the extent of their non-exclusive rights.

16. The NNTC submits that the *Native Title Act 1993* (Cth) must be amended to preclude the creation of CSRs in native title land other than in accordance with *Native Title Act 1993* (Cth) part 2 division 3 subdivision M.[16]

What are CSRs?

17. CSRs are a novel property right, first created in 2001 in Victoria.[17] They may be analogous to the well known common law profit à prendre but they are not the same. CSRs are best understood as a property right created by statute involving a right to sequester and store carbon, both now and in the future.

18. The mechanisms for the creation, maintenance and discharge of CSRs are not uniform throughout Australia.[18] The treatment of CSRs on native title land should not be left to the law of a State or Territory.

CSR Example – Queensland

19. In Queensland, carbon sequestration rights may be created by a 'natural resource product agreement'. Subsection 61J(3) of the *Forestry Act 1959* (Qld) provides that a natural resource product agreement may do any one or more of the following:

    (a) vest all or part of the natural resource product in a person;

    (b) grant a person the right to enter on land for either or both of:

        (i) establishing, maintaining or harvesting the natural resource product; or

        (ii) carrying out works or activities for the natural resource product;

    (c) grant a person the right to deal with the natural resource product.

20. A 'natural resource product' is defined as:[19]

> ***natural resource product*** includes the following—
> (a) all parts of a tree or vegetation, whether alive or dead, including parts below the ground;
> (b) carbon stored in a tree or vegetation;

[16] Under this subdivision, native title rights can be affected (as they would be by the creation of CSRs) in the same way, and on the same terms, as a freehold interest in land.

[17] See *Conveyancing Act 1919* (NSW) ss.87A-89, *Forestry Act 1959* (Qld) s.61J, *Forestry Rights Registration Act 1990* (Tas), *Forest Property Act 2000* (SA), *Carbon Rights Act 2003* (WA), *Forestry Rights Act 1996* (Vic). Although the enacting years precede 2001, none of these statutes provided specifically for carbon sequestration rights before that year.

[18] See Hepburn S., 'Carbon rights as new property: the benefits of statutory verification' (2009) 31 *Sydney Law Review* 239.

[19] *Forestry Act 1959* (Qld) schedule 3, definition of 'natural resource product'.

(c) carbon sequestration by a tree or vegetation.

21. 'Carbon sequestration' is in turn defined as:

> ***carbon sequestration***, for a tree or vegetation, includes the process by which the tree or vegetation absorbs carbon dioxide from the atmosphere.

22. Given the definition of natural resource product and the wide variety of rights that can be conferred under a natural resource product agreement, a natural resource product agreement can be used to create carbon sequestration rights, confer a right to conduct forest plantation operation or a bare right to harvest (but not grow) timber.

23. A natural resource product agreement is an agreement between an owner of land[20] and another person about the natural resource products on the land.[21] An owner is a lessee of land under the *Land Act 1994* (Qld) or registered land under the *Land Title Act 1994* (Qld).[22] Where the owner is the former, that owner can only enter into a natural resource product agreement if the natural resource product is owned by the lessee as an improvement under the *Land Act 1994* (Qld). Also, a lessee can create (or at least register) an agreement only for the period of their lease.[23] The narrow scope of the person who can enter into a natural resource product agreement – an owner of freehold or lessee under the *Land Act 1994* (Qld) – excludes native title holders (whether exclusive or non-exclusive) from creating CSRs on the basis of foregoing, or agreeing not to exercise, their native title rights.[24]

24. The ownership of improvements by a lessee is something of a misnomer. At common law, the tenant only had a leasehold interest in the land and any fixtures established by the

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[20] For a natural resource product agreement, land is not all tenures of land. It is defined by *Forestry Act 1959* (Qld) s.61J(7) as follows:

> ***land*** means—
> (a) land held under the *Land Act 1994* under a lease that allows the land to be used for agricultural or timber plantation purposes; or
> (b) land held under the *Land Title Act 1994*.

Non-exclusive native title rights may continue to exist for many former pastoral leases in Queensland. With the advent of the *Land Act 1994* (Qld), pastoral leases are now taken to be term leases for pastoral purposes under the *Land Act 1994* (Qld): see *Land Act 1994* (Qld) s.472. Despite the apparent restriction of use to pastoral purposes, a term lease for pastoral purposes must be used only for grazing or agricultural purposes, or both: *Land Act 1994* (Qld) s.199A(2). Consequently, a lessee of a term lease for pastoral purposes may enter into a natural resource product agreement under *Forestry Act 1959* (Qld) s.61J.

[21] It appears that the requirement to enter an agreement with 'another person' displaces the typical power of a person to convey an interest to themselves: *Property Law Act 1974* (Qld) s.14(3). This would preclude the potentially useful avenue for owners of freehold to create separate carbon sequestration rights in themselves without a change of ownership.

[22] *Forestry Act 1959* (Qld) s.61J(7), definition of 'owner'.

[23] *Land Act 1994* (Qld) s.373I.

[24] It may be that *Forestry Act 1959* (Qld) s.61J, in this way, violates *Native Title Act 1993* (Cth) part 2 division 3 subdivision M.

tenant reverted. The *Land Act 1994* (Qld) provides a limited form of compensation to tenants who undertake specified capital improvements. These are defined as follows:[25]

> ***improvements*** means any—
> (a) building, fence or yard; and
> (b) artificial watercourse or watering-place, bore, reservoir, well or apparatus for raising, holding or conveying water; and
> (c) cultivation, garden, orchard or plantation; and
> (d) building, structure or appliance that is a fixture for the working or management of land or stock pastured on the land or for maintaining, protecting or increasing the natural capabilities of the land;
> but does not include development work.

25. CSRs may be registered over a lease with the Minister's approval.[26] There is no other mechanism for creating CSRs on non-freehold land.[27]

CSR example – Western Australia

26. Western Australia differs markedly from Queensland. CSRs can be created for any Crown land unilaterally.[28] The only limitation of the creation of CSRs by the Minister is that their registration requires the consent of all registered interest holders in the affected land.[29] Native title interests are not capable of registration and so consent of native title holders is not required.[30]

Transactions related to native title claims

27. In some parts of Australia, there are prospects of the settlement of native title claims without a resulting determination of native title. This would effectively mean that an existing native title claim was withdrawn, and a package of negotiated benefits was received by claimants in exchange. In such a process, native title claimants wish to ensure that they may receive an eligible carbon sequestration right. There is no discrete mechanism available under State and Territory law by which CSRs may be vested in a native title claim group that

[25] *Land Act 1994* (Qld) schedule 6, definition of 'improvements'. A previous lessee under the *Land Act 1994* (Qld) is entitled to be paid the value of their improvements by an incoming lessee or purchaser of the land on which the improvements are situated (*Land Act 1994* (Qld) ss.139, 140 and 247.). On the resumption of a lease under a condition of the lease, or a reservation in the lease, the lessee is entitled to compensation for improvements only (*Land Act 1994* (Qld) ss.226 and 232.). Where a lease is resumed for public purposes under *Land Act 1994* (Qld) chapter 5 part 3 division 1, a lessee is entitled to the compensation determined under the *Acquisition of Land Act 1967* (Qld) (*Land Act 1994* (Qld) s.219(3)).

[26] *Land Act 1994* (Qld) s.373G.

[27] This statement disregards *Forestry Act 1959* (Qld) part 6D which concerns the recent sale of State forest plantations in Queensland.

[28] *Land Administration Act 1997* (WA) s.18A. Crown land is all onshore non-freehold land: see *Land Administration Act 1997* (WA) s.3(1), definition of 'Crown land'.

[29] *Transfer of Land Act 1893* (WA) s.104B(1)(a).

[30] Again, it may be that this violates *Native Title Act 1993* (Cth) part 2 division 3 subdivision M.

settles without a determination of native title, although one may be created in the future. To facilitate such settlements, it is recommend that a new subsection be inserted in clause 43 of the Carbon Farming Bill that provides, similarly to cl.43(10), that if as a result of a settlement of an application of an application under s.61 of the *Native Title Act 1993* (Cth), an agreement with a State or Territory government provides that a person is to have the exclusive legal right to obtain the benefit of sequestration, then their agreement is taken to be the applicable carbon sequestration right.

Concluding submission

28. The NNTC acknowledges that the Carbon Farming Bill provides an appropriate treatment of exclusive possession native title, as near as practicable to that of freehold.[31] However, the Bill is in need of substantial reform in respect of its treatment of non-exclusive native title land. This submission makes proposals for such reform.

Brian Wyatt
Chief Executive Officer
11 April 2011

[31] It is noted that the declaration of an eligible offset project on freehold (Torrens) land does not require the notification of the Crown lands Minister, compare Carbon Farming Bill cl.47(2), but the practical reality is that the Crown lands Minister may not otherwise be aware of the project. Query, however, the definition of Torrens land, in cl.5 of the Bill, which refers to registered title. This definition may inadvertently include Crown leasehold land under the *Transfer of Land Act 1893* (WA), which is also capable of Torrens registration.