NEW SOUTH WALES ABORIGINAL LAND COUNCIL
ABN 82 726 507 500

Committee Secretary
Senate Standing Committee on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

8 April 2011

To whom it may concern,

Carbon Carbon Credits (Carbon Farming Initiative) Bill 2011 ("CFI Bill")

We write with respect to the above legislation.

The New South Wales Aboriginal Land Council **("NSWALC")** has previously made a submission on the CFI Bill to the Department of Climate Change and Energy Efficiency **("the Department")** on 18 February 2011. We **attach** this again now and note that its contents remain relevant to our current submission. We ask that you consider our previous submission in conjunction with this one.

The NSWALC is a statutory body corporate, established under the *Aboriginal Land Rights Act 1983* (NSW) **("ALRA")**, and is a peak representative body for the 119 Local Aboriginal Land Councils **("LALCs")** set up under the ALRA. The NSWALC has, as one of its objectives (s105), the aim of improving, protecting and fostering the needs of Aboriginal people of NSW. To this end, it welcomes any legislation which recognises the needs of Aboriginal people and is beneficial in nature. It is, however, mindful to ensure new legislation does not inadvertently detract from the rights conferred on Aboriginal people under the ALRA.

The NSWALC has only very recently become aware that the CFI Bill has changed significantly since its previous submission, such that it now includes numerous provisions dealing with State and Territory land rights land. These amendments to the CFI Bill affect land held by an ALC which was vested or granted under the ALRA. Please note that the comments below are, due to time restrictions, high-level only, and the NSWALC may wish to make further comments in the future.

Distinction between freehold land and land rights land in NSW under the CFI Bill

The ALRA is beneficial legislation which provides for claimable Crown land in NSW to be vested in Aboriginal Land Councils **("ALCs").** Once transferred, land is held as freehold and registered under the Torrens system, though dealing with land is subject to the provisions of the ALRA (please refer to our previous submission for an explanation of this).

With regard to the CFI Bill, the NSWALC queries the need for a distinction to be made at all between regular freehold Torrens land and freehold land rights land, and is not clear what Parliament seeks to achieve by making this distinction in the legislation. As noted above and in our previous submission, ALC land transferred under the ALRA is freehold Torrens land, subject to only the provisions of the ALRA. As far as NSWALC understands, these provisions are not relevant to explaining the distinction drawn in the CFI Bill between freehold land rights land and normal freehold land.

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The NSWALC is concerned that making a distinction between freehold land rights land, land rights land and Torrens land may result in confusion in the interpretation and application of the CFI legislation. Further, whilst it understands other states and territories in Australia may have systems which distinguish freehold land rights land from other land rights land (though this is not the case in NSW), the definitions applying to these two terms under the CFI Bill appear to the NSWALC to confuse the issue even further in NSW.

For example, the definition of "freehold land rights land" in the CFI Bill covers a freehold estate over land where the grant of the freehold took place under a law providing for such a grant for the benefit of Aboriginal people. The definition of "land rights land" in the CFI Bill also covers freehold estates granted under legislation designed to benefit Aboriginal people. Both of these definitions would cover land vested in ALCs under the ALRA and there is no practical difference in these two terms in relation to NSW land rights land.

These definitions are relevant to s44(7) of the CFI Bill, which relates to eligible interest holders in land. This section provides that if an area of land is "land rights land" but not "freehold land rights land" then the Crown Lands Minister is an eligible interest holder. This creates an inherent conflict in the application of the legislation, since "land rights land", by definition, includes the same land which falls under "freehold land rights land". Section 44(7) applies only where land is both "land rights land" *and* not "freehold land rights land". The NSWALC is not aware of a situation where this situation could ever be possible in NSW.

In addition, if there ever was such a situation where a parcel of land was "land rights land" but not "freehold land rights land" land, because the definition of land rights land includes freehold estates, it is not clear why the Minister should become the eligible interest holder in lieu of the freeholder of the land rights land. The NSWALC is concerned that this provision could potentially detract from the rights of Aboriginal freehold owners of land to give consent to projects affecting their land by placing decision making power in relation to the land back into the hands of the government.

Similarly, section 52 of the CFI Bill requires that if the administrator of the CFI scheme makes declaration under s25 of the CFI Bill in relation to a project over land which is freehold land rights land and Crown land but not Torrens system land then the Crown Lands Minister must be notified. Again, ALC land granted and transferred under the ALRA is registered freehold Torrens land, and as such, cannot be Crown land at the same time. The NSWALC is not aware of any circumstances in NSW in which a project which is on freehold land rights land will ever be also on Crown land but not on Torrens system land. Even if it were the case that there is some freehold land rights land in NSW which is also Crown land but not Torrens land (see comments below on old title system land), the NSWALC does not understand why the freehold land rights owner should not also be notified of a s25 declaration, since a project occurring on freehold land rights land would affect their rights and interests.

The NSWALC considers that the inherent conflict in the definitions of land rights land and freehold land rights land, and the distinction between freehold land rights land and Torrens land under the CFI Bill requires further consideration and amendments to clarify these issues.

Eligible Interest

The NSWALC understands that the CFI Bill provides that those with eligible interests in the land must consent to a project on the land and must be notified of any declaration made in relation to a project occurring on the land (s27). However, as the NSWALC understands, a line is drawn between

legal estates and interests and unregistered or equitable interests, so that only those with a legal estate or interest are required to consent to the project.

The NSWALC notes that the explanatory memorandum dealing with Indigenous land provisions of the CFI Bill states, at paragraph 1.41, that:

"Eligible interest holders on Torrens system land include, for example, registered interests... but would not include unregistered interests... On Crown land, ***legal*** *interests or estates derived from the Crown are recognised as eligible interests..."* (emphasis added).

Further, paragraph 1.42 of the explanatory memorandum states that:

"Interests in land rights land will be an eligible interest similar to other land interests. Therefore, the holders of land rights land will generally need to consent to projects on their land where others are undertaking projects".

The NSWALC is concerned about these statements. In practice, it is often the case that the actual legal transfer of land granted to an ALC can be an extremely lengthy process (usually because of the requirement to survey the land first). Currently, as the NSWALC understands, there are around 300 parcels of land in NSW where land has been vested in an ALC but the transfer of the title has not yet occurred. These may include parcels of land covering large areas which would be ideal for carrying out carbon farming projects. The NSWALC anticipates that this number will increase in the future as more claims are made.

The ALRA caters for these situations by providing, under s40(2), that land is "vested" in a ALC if an ALC has a legal interest in the land, or the land is subject to a land claim and the Crown Lands Minister is satisfied the land is claimable or the Court has ordered land be transferred to an ALC, but (in any of these cases) the land has not yet been transferred. In such cases, there is no notation at all made on the title of the fact that the land is "vested" in the ALC, and as such, the title for such land is in the name of the State of NSW and other prior (and no longer relevant) legal interest holders (ie, those subject to a previous Crown lease) or it is not Torrens land.

This means that:

- With regard to paragraph 1.41 of the explanatory memorandum, an ALC in whom land is vested but not yet transferred will not have a registered "legal" interest in Crown land and will therefore not have an eligible interest under Division 9 of the CFI Bill (indeed, prior Crown lessees still on the title, for example, could be eligible interest holders instead);
- It is not entirely accurate to assert (paragraph 1.42 of the explanatory memorandum) that "interests in land rights land will be an eligible interest similar to other land interests", because Division 9 only caters for registered interests and not unregistered interests, even though unregistered land rights land is statutorily "vested" in an ALC under s40(2) of the ALRA; and,
- Ultimately, an ALC with an interest in the land awaiting legal transfer is not required to be notified of, or give their consent to, carbon projects affecting their land under the CFI Bill. This leaves land councils vulnerable to having their lands tied up by actions taken by the State prior to transfer.

In addition to this, NSWALC is also concerned that eligible interests provided for under Division 9 of the CFI Bill also do not appear to include old system title which has not yet been converted to Torrens land but which may still constitute freehold land.

If it is Parliament's intention to maintain the distinction in the legislation between land rights land, freehold land rights land and Torrens land, then NSWALC considers it appropriate that Division 9 of the CFI legislation which defines eligible interests should also expressly contain provisions clarifying that land rights land and freehold land rights land holders (of registered or vested interests) also have an eligible interest, such that they must give their consent to any proposed carbon farming projects.

The NSWALC would urge Parliament to address these concerns through amendments to the legislation to ensure that all land rights land holders (including where land is vested but not transferred) be required to give their consent to carbon projects on their land.

Preservation of supremacy of State legislation

The NSWALC notes that sections 301 and 203 of the CFI Bill provide that certain legislation is not affected by the CFI Bill. The NSWALC urges Parliament to consider including similar provision with respect to state (and possibly territory) land rights legislation. As we understand, it is not Parliament's intention to change or amend state land rights legislation, and as such, we would ask that Parliament express this through the legislation so as to avoid any legal uncertainty that may arise if there are inconsistencies between this legislation and state legislation.

Please contact myself if you have any further queries or concerns with regard to our submissions.

Yours sincerely

Lila D'souza
Principal Legal Officer
NSWALC

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

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18 February 2011

By email and by post

Jeremy Dore
Emerging Policy Section, Land Division
Department of Climate Change and Energy Efficiency
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Email: CFI@climatechange.gov.au

Dear Mr Dore

Submission response to the Design of the Carbon Farming Initiative ("CFI") Consultation Paper (the "consultation paper") and draft legislation

I write with regard to the CFI consultation paper and accompanying draft legislation. I refer to our recent telephone discussions in relation to the consultation paper and thank you for agreeing to accept our comments on the CFI consultation even though the response date has passed.

Background

The NSW Aboriginal Land Council (**NSWALC**) is a statutory body corporate, set up under the *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**). NSWALC is the peak representative body for the 119 Local Aboriginal Land Councils (**LALCs**) operating in NSW, also set up under ALRA. NSWALC aims to protect the interests and further the aspirations of its members and the broader Aboriginal community.

The ALRA is a compensatory regime that empowers NSWALC and the network of LALCs to acquire land (by claim over certain Crown Land or by purchase), deal with land and maintain and enhance Aboriginal culture, identity and heritage. As a consequence, LALCs have landholdings all around NSW.

NSWALC is concerned to ensure that the CFI proposals enhance the rights of NSW Aboriginal land holders and do not detract from any rights granted to Aboriginal people under the ALRA or inadvertently conflict with the provisions of the ALRA.

Indigenous land and the CFI

I note with interest the section of the Consultation Paper which states that "*some Indigenous lands are not readily comparable to freehold title (eg, Crown reserves) and there may be uncertainty in these cases as to the capacity of Indigenous people to participate in the scheme*".

I am not sure exactly what the Department means by this statement, and would appreciate your clarification in this regard. I note for your information that:

- land acquired or granted to Aboriginal land councils under the ALRA is registered freehold Torrens title land. As such, (subject to the points below) the registered freehold owner has the same rights to deal with the land as any freeholder in NSW has;
- to acquire or be granted the land, Aboriginal people do not have to prove any existing connections with the land as they would under the native title system;

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- the ALRA does, however, set out some additional requirements for LALCs that are landholders to follow before they are able to "deal" with their land (note this is a defined term, see section 40 of the ALRA). For example, NSWALC must approve all land dealings proposed by itself and as the peak body for LALCs, and has certain consultation obligations (see Part 2 Division 4 sections 42C-G);
- however, land council land can only be compulsorily acquired by a new Act of Parliament (see section 42B of the ALRA), unlike normal freehold land; and
- whereas native title rights usually give way to freehold rights, land granted to a LALC under a land claim that was lodged after November 1994 will be granted as a freehold title subject to a native title notation on the title (see section 42 of the ALRA).
- under section 42 of the ALRA, an Aboriginal land council is prohibited from dealing with any land vested in it which is subject to undetermined native title rights and interests. In order to obtain a native title determination, the Federal Court must make a finding about the existence of native title. If native title rights are found to exist on the land, any land dealing by a land council must not conflict with the native title rights.

Comments on the draft legislation

In light of the above, we assume that for land council land, the draft CFI legislation would work so that if the land is not the subject of a native title application (assuming that carbon farming would fall within the definition of "land dealing" under ALRA, see further below) and all other legislative requirements were met then the land council could seek approval to be recognised as an offset entity and carry out a project.

If the land were subject to native title rights, the native title holders would be considered to have a "legal" and therefore "eligible" interest in the land under section 42 of the draft CFI legislation. This would not remove the rights of the land council to otherwise apply to carry out the project, provided all requirements relating to other eligible interests in the land were met.

Please let us know if this understanding is not correct.

As stated above, the term "deal with land" is defined under section 40 of ALRA and all land dealings must be approved by NSWALC. "Deal with land" covers a broad range of actions including creating or passing a legal or equitable interest in land, entering into biobanking and conservation agreements under other legislation, execution of instruments relating to land and making a development application in relation to land. Carbon farming projects are not expressly referred to in the definition of land dealing. However, assuming that at least some of these projects will require a development application to be made, it is possible that such projects will be subsumed within the meaning of this term.

This will have the consequence that any NSW land council whose land is subject to a native title notation where there is no determination of the native title claim will not be able to carry out any offset project under the CFI legislation, in accordance with section 42 of the ALRA. To ensure legislative consistency between the CFI legislation and ALRA, the Department may wish to consider whether it is necessary to include provision in the CFI legislation to deal with this situation.

If possible, we would very much appreciate the opportunity to review the draft sections of the CFI legislative provisions dealing with native title interests/Indigenous land, once they are available, to ensure they do not conflict with the provisions of ALRA.

Fit and Proper person test

I also wish to note our concern to ensure that the fit and proper person test relating to offset entity recognition provided for under section 53 of the draft CFI legislation (and, related to this, the cancellation provisions under section 54) does not prejudice Aboriginal land owner applicants.

I understand from our discussions via telephone on 16 February 2011 that this unlikely, given that:

- under these sections the Administrator must only "have regard" to the factors listed (and any other relevant matters) and is not bound by them having occurred;
- that any issues an applicant may have relating to this test could be raised through the application process;
- that the decisions of the Administrator are able to be reviewed by the Administrative Appeals Tribunal;
- that the Administrator may, as a matter of practical administration of the scheme, give applicants the chance to respond to any concerns they may have prior to making a decision (though I note this does not appear to be expressly provided for in the draft legislation); and
- that the list of matters to be considered relating to body corporate applicants appears to target executive officer conduct exclusively, implying that if there has been an offence committed in the past, but the executive body has since changed, that this should not impede any body corporate applications to gain recognition as an offset entity.

Again, please let us know if this understanding is not correct.

We look forward to hearing from you on these matters. If you have any queries or concerns, please contact Linda Gibbons (legal officer) on 02 9689 4429.

Yours faithfully

Lila D'souza
Principal Legal Officer