Cape York Land Council Aboriginal Corporation
ICN 1163 | ABN 22 965 382 705

23 December 2016

ERF Governance, ERF Division
Department of the Environment
GPO Box 787
CANBERRA ACT 2601

Via email -

Dear Sir/Madam

Re: Submission of Cape York Land Council in respect of:

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

I write to make a submission in respect of the draft instruments above, and their operation under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (the **"CFI Act"**) and the *Carbon Credits (Carbon Farming Initiative) Rule 2015* (Cth) (the **"CFI Rule"**).

Cape York Land Council (CYLC) is a representative Aboriginal/Torres Strait Islander body under the *Native Title Act 1993* (Cth) (**NTA**) and represents Aboriginal people in their native title determination applications, and other processes for the return of land to traditional owners. By reason of the latter, CYLC facilitates the granting of land under the *Aboriginal Land Act 1991* (Qld) (**ALA**) to traditional owners and acts for land trusts under the ALA and corporations under the *Corporations (Aboriginal and Torres Strait) Islander Act 2006* (Cth) (the **"CATSI Act"**) that hold Aboriginal land under the ALA.

A number of savannah fire management based "emissions avoidance offsets projects" (within the meaning of s.5 of the CFI Act) have been purportedly approved by the Regulator (being the Clean Energy Regulator under the *Clean Energy Regulator Act 2011* (Cth)).

CYLC is concerned that the Aboriginal people of Cape York who are traditional owners, whether directly or acting through corporate entities that represent them (whether corporations under the CATSI Act, such as registered native title bodies corporate (**RNTBCs**), or land trusts under the ALA), have not given their free, prior informed consent (**FPIC**) to "offsets projects" under the CFI Act that have been approved by the Regulator and are undertaken:

(a) on land where native title has been determined to exist under the NTA;
(b) on land the subject of a native title determination application under the NTA;
(c) on land where native title rights may exist;
(d) on Aboriginal land under the ALA.

CYLC's primary submission is that a review should be undertaken of all offsets projects approved to date by the Regulator on these four categories of land within Cape York. The standard of consent required should be that recognised in the United Nations Declaration of the Rights of Indigenous Peoples, in particular article 32 which provides:

> **Article 32**
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

In CYLC's view, an offsets project undertaken on land within the four paragraphs above is a "project affecting their lands or territories and other resources" within the meaning of paragraph 2 of article 32. Clearly, the CFI Act does not require consent amounting to FPIC for most offsets projects undertaken on Indigenous land and CYLC's proposed review should examine that state of affairs.

The CFI Act requires that persons holding eligible interests must give their consent to a project for it to be approved by the Regulator. If such approvals are not in place when the Regulator assesses a proposed project, the Regulator may impose a condition requiring the written consent of each interest holder to be obtained before the end of the first reporting period for a project (CFI Act s.28A(2)).

The meaning of an eligible interest is set out in ss.43, 44, 45 and 45A of the CFI Act (see CFI Act s.5, definition of "eligible interest"). To date in Cape York, s.43 of the CFI Act has had little relevance as it defines the eligible interest of the holder of carbon sequestration right in the case of a sequestration offsets project. Section 44 of the CFI Act is relevant to Cape York savannah burning projects undertaken on freehold land. As far as CYLC is aware, all freehold land in Cape York is Torrens land (land registered under the *Land Titles Act 1994* (Qld)) whether as private freehold land (land granted in fee simple), Aboriginal land under the ALA or deed of grant in trust land under the *Land Act 1994* (Qld). The grantee of Aboriginal land is plainly an eligible interest holder (CFI Act s.44(2)). The treatment of native title holders is not equivalent to that of the owners of freehold (contra NTA ss.24MA-24MD). For native title holders of non-freehold land (as most native title is), the native title holders are not all treated as holding an eligible interest whereas lessees from the State (such as pastoral lessees) are eligible interest holders (see CFI Act ss.45(2) and (3)(b)). CYLC regards this disparate treatment as a *prima facie* case of a denial of equality before the law contrary to s.10 of the *Racial Discrimination Act 1975* (Cth) (the operation of which is preserved by s.302 of the CFI Act). Section 45A of the CFI Act goes some way to addressing the disparate treatment of native title holders, in that native title holders with an approved determination of native title under NTA s.13 (who, by necessity, will have had appointed a RNTBC) have their RNTBC as the holder of an eligible interest. This applies equally to an exclusive and a non-exclusive determination of native title. But native title claimants do not receive the same benefit, even if they ultimately succeed in their native title claims.

This treatment by the CFI Act is inconsistent with the declaratory theory of native title claims (whereby native title has always existed, its existence is merely recognised by the Federal Court) and s.10 of the *Racial Discrimination Act 1975* (Cth).

CYLC believes that a review of offsets projects approved within Cape York should address the entitlement of native title claimants to treatment that is the same as that of freehold owners, consistently with the policy of part 2 division 3 subdivision M of the NTA.

A related difficulty arises for savannah burning projects on pastoral lease land, where pastoral lessees claim that they have all necessary rights to undertake the project. In order to qualify as a "project proponent" as defined in CFI Act s.5, a person must demonstrate they have "the legal right to carry out the project". CYLC believes that some proponents have asserted that the rights to carry out an emissions reduction project based on savannah burning on pastoral leave may be obtained merely by authorisation from a pastoral lessee and the minister administering the *Land Act 1994* (Qld). CYLC does not agree. Rather, in CYLC's view, savannah burning for commercial gain is beyond the scope of rights conferred by a pastoral lease, and a new authorisation is required (whether under the *Land Act 1994* (Qld) or the *Forestry Act 1959* (Qld)) before savannah burning may be undertaken. The creation of that new authorisation will affect non-exclusive native title rights such that the future act provisions of the NTA must be observed. Typically, future act authorisation should be obtained by way of an Indigenous land use agreement under the NTA. CYLC is concerned that pastoral lessees, supported by the State, have purported to confer "the legal right to carry out the project" that is an emissions avoidance offsets project on pastoral lease land subject to a native title claim or determination without the involvement of traditional owners. The review proposed by CYLC should consider whether any offsets projects within Cape York have been declared as eligible offsets projects on pastoral lease without appropriate authority under the NTA.

The newly proposed methodologies, and proposed amendments to the CFI Rule, offer the opportunity to reassess eligible offsets projects in Cape York that chose to take advantage of the new methodologies. Clause 9 of the draft *Carbon Credits (Carbon Farming Initiative) Amendment Rule 2017 (No. 1)* (Cth) (the **"Amendment Rule"**) will insert a new r.30A. Paragraph 30(1)(d) of this new rule will require evidence that all eligible interest holders have consented to the making of an application to bring a project under the new methodologies. CYLC submits that the Regulator should review its policies concerning the treatment of native title claimants (as regards the operation of s.10 of the *Racial Discrimination Act 1975* (Cth)), and the creation of legal rights to carry out an offsets project to the exclusion of native title holders and claimants, when giving effect to the proposed r.30A.

CYLC would welcome the opportunity to further discuss the matters above with the officials conducting consultation on the new methodologies and the Amendment Rule.

Yours faithfully,

Peter Callaghan
Chief Executive Officer

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