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Committee Secretary
Senate Standing Committees on Environment and Communications
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Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 submission

The current bill is designed to smooth the way for the proposed savanna sequestration method—the first method to include emissions avoidance and sequestration abatement pools. The machinery to do this is welcome and accepted.

However, the bill also brings into focus the consent provisions, including the conditional consent provision introduced in the 2014 amendments. This allowed projects to register conditionally without obtaining all consents upfront. The bill proposes to restrict consent requirements to sequestration projects, as was the case prior to the 2014 amendments.

Original framework

It is worth noting two principles evident from the original CFI Act framework:

- avoiding any liability issues arising from land interest holders, and
- offering similar opportunities for native title holders as compared to other interest holders.

Liability could arise if people are affected by actions of the Clean Energy Regulator—for example, if the Regulator applied a carbon maintenance obligation to stop losses of carbon from a project. This was noted in the original explanatory memorandum:

> It is important to ensure that persons who could be subject to, or have their interests in land affected by the carbon maintenance obligation have agreed to the land being brought into the offsets scheme. *[CFI Bill 2011 replacement explanatory memorandum 3.53]*

Having a consent system means all those who could be affected by later Regulator actions have a say before a project proceeds. This

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avoids any liability issue if a carbon maintenance obligation is applied

The objective of offering comparable pathways for Aboriginal and Torres Strait Islander landholders was also noted in the original explanatory memorandum:

> Aboriginal and Torres Strait Islander land is often held communally and differently to other forms of land tenure. This could mean, without special provision, that opportunities for participation by Aboriginal and Torres Strait Islander people would be more limited than for other land holders. The Government is committed to facilitating Aboriginal and Torres Strait Islander participation in carbon markets and the bill contains a number of provisions to give effect to this objective. *[CFI Bill 2011 replacement explanatory memorandum 4.4-4.6]*

The special native title provisions included in the CFI Act provide pathways for Aboriginal and Torres Strait Islander people to own and run projects, similar to other landholders.

Consent for emissions avoidance projects

The explanatory memorandum to the current bill states that over 20 savanna emissions avoidance projects are subject to conditional consents. As they are not sequestration projects, these projects will not be subject to a carbon maintenance obligation and consent is not required for this reason.

However, consents may be desirable for another reason: to avoid liability arising where projects do not have the legal right to carry out the project. For example, the 20 conditional projects are on pastoral leases in WA, NT and Qld. Whether these pastoral lease holders have:

- the right to carry out project activities, and
- the exclusive right to be issued all carbon credits

is a matter of some debate. Where land interests might be shared, do pastoral lease holders have the exclusive right to the carbon for a kind of project not contemplated by their lease?

Apart from project approvals, there is no information on the Clean Energy Regulator website or state government websites explaining whether pastoral lease holders have these rights. The people who might challenge this position are people who also share interests in the land. Giving these people a consent right is currently mediating any concern they may have and ensures that no liability is arising from project declarations by the Regulator. Without the consent right, the legal right position may well be challenged.

By way of comparison, it is worth noting that, in addition to other requirements, offset projects in the United States under the California Air Resources Board that are undertaken on tribal land must obtain a limited waiver of immunity. In this way, all projects on tribal land—even if they are not sequestration projects—must essentially have the consent of the group before they can go ahead.

Position:

- ➔ Pause the bill until the Clean Energy Regulator and state governments declare their reasoned position with respect to pastoral leases and savanna projects.
- ➔ Consider maintaining consents for emissions avoidance projects to avoid any liability arising from challenged project declarations.

Consent as a condition

Consents can currently be made after a project declaration but before the project reports. In this window, a project developer may invest a considerable amount of time and money developing the project and take on other legal obligations, such as ERF contracts, prior to consent being obtained.

There are ERF contracts totalling well over 5 million tonnes linked to projects that are currently conditional on consent being obtained. The explanatory memorandum does not provide any information on how many consents of this kind have been obtained or whether any of the 20 outstanding projects have tried to obtain consent.

Best practice for obtaining consent from Aboriginal and Torres Strait Islander landholders is following free, prior and informed consent. This standard is found in land rights legislation in Australia, such as the *Aboriginal Land Rights (Northern Territory) Act 1976*, and, to a lesser extent, in the *Native Title Act 1993*. It is also part of Australia's obligations under the United Nations Declaration of the Rights of Indigenous Peoples Article 32.

While there are benefits in project partners getting to know each other, is it fair to ask for consent when a project is already well under way and potentially with carbon delivery contracts in place? It is not clear this meets Australia's obligations.

Position:

- ➔ Australian Government declare whether conditional consent meets Australia's obligations under UNDRIP Article 32.
- ➔ Consider maintaining consents upfront as part of best practice for obtaining free, prior and informed consent.

Consent for native title claimants

Consent rights for native title holders were originally inserted by Greens amendment while further consultation was undertaken:

> Given the practical and legal complexity of the interaction of the scheme with native title, the Government intends to undertake further consultation with a broad range of stakeholders and complete detailed legal analysis before reflecting a considered approach to native title and eligible interests in amendments to the bill. *[CFI Bill 2011 replacement explanatory memorandum 4.51]*

The current position is that determined (or completed) native title holders have consent rights but native title claimants do not. This has not been resolved.

This position jars with the *Native Title Act 1993*, which, in general, treats different kinds of native title interests the same way (with the exception of subdivision L for low impact future acts). For example, native title holders and native title claimants are, in general, treated the same way under the NTA.

The position under the CFI Act does not follow this principle and is unfair on native title claimants. A native title claimant group may eventually be recognised as the exclusive possession native title holder—a position equivalent to ownership of land—yet not have any say over a project which might run for 100 years. Consent rights are only point in time under the CFI Act so there is no later opportunity to consent. A native title application may not be determined through no fault of the claimants at all.

If a carbon maintenance obligation is applied after native title is determined, it may be invalid, at least with respect to the native title holders, because they did not consent. While other kinds of interests may arise later informed of the project, native title will not: it does not require a process or grant by government—it is determined to exist by the court and is unique in this respect.

The different treatment of native title claimants compared to other landholders may also be discriminatory under the *Racial Discrimination Act 1975*.

Providing native title claimants with consent rights would meet the objective of providing opportunities for participation for native title holders. There is a clearly defined register of native title claimants.

Position:

➔ Registered native title claimants be treated the same way as other native title holders.

Related matters

There are related matters to the issue of native title and consents under the CFI Act, such as:

- how consents ought to be provided (for example, in an indigenous land use agreement)
- how native title claimants might be represented, and
- whether carbon maintenance obligations ought to apply to native title holders who have not consented.

Due to the nature of native title and its regulation, there is some complexity to these issues. Noting them serves to underline taking the time to give proper consideration to consent issues and the approaches that might be taken. Not doing so will likely result in more issues arising later.

Position:

➔ Pause the bill to give space for full and fair consideration of native title consents and related issues.

Disclosure

I was involved in the drafting of the CFI legislation from 2010-12 while working at the then Department of Climate Change and Energy Efficiency.

Yours sincerely,

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