

22 September 2000

Joint Standing Committee on Treaties  
Parliament House  
Canberra ACT 2600

Dear Sir,

**Re: Inquiry into the Kyoto Protocol Terms of Reference**

Further to the above, the Institute appreciates the opportunity to place before the Joint Standing Committee its views in relation to the Inquiry by the Committee into the Kyoto Protocol. The Institute's submission responds to the invitation by the Committee for public comment in line with the *Terms of Reference*, which state *inter alia* that the Committee shall inquire into and report on:

- *What definitions and criteria Australia should develop and actively pursue in its national interest with regard to:*
  - *grandfathering,*
  - *trading credits,*
  - *carbon credits,*
  - *sequestration,*
  - *revegetation,*
  - *land management, and*
  - *definitions (eg "forest").*
  
- *The economic, environmental and social implications of a punitive approach to any domestic regulation of industry including such proposals as a carbon tax and an incentive-based approach.*

Before providing specific details of the Institute's views in respect of the Committee's inquiry, it is worthwhile that the Committee is aware of the Institute's history and activities. The Australian Property Institute was originally formed over seventy years ago in 1926, and today represents more than 7000 property experts throughout Australia employed in private and public practice within government and commercial organizations. As a learned professional body, the primary role of the API is to set and maintain the highest standards of professional practice, education, ethics and discipline.

Institute members are engaged in all facets of property rights including valuation, development and management, financing and property trusts, professional property consultancy, property, planning and environment law, urban and regional land use planning, architecture, and plant and machinery valuation.

Turning now to the specific details of the Inquiry, the Institute established a Submission Committee the members of whom are listed in an attachment to this submission. As a result of two meetings of the Submission Committee in Sydney, the Committee prepared the following submission on behalf of the Institute.

The Institute supports the overall need to inquire into the implications of the *Kyoto Protocol* and notes with general approval the *Terms of Reference*. The following Submission addresses the various issues referred to in the *Terms of Reference*, which are specific to this Institute's expertise in the area of property rights and interests:

- Property rights
- Land-based Carbon Credits
- Issues

### **Property Rights**

The API is specifically concerned with the issue of definitions and criteria that should be developed within Australia with particular regard to the interconnected issues of carbon credits, sequestration, revegetation, and land management.

As the Committee is aware there has been much discussion in recent years regarding proposals for land-based carbon credits, however it is the Institute's view that these proposals should be understood as a property right, a concept which in itself is not widely understood

Property rights as generally understood are a titled right to land or to exploit natural resources such as minerals. Commonly these rights are referred to by the terminology "real estate", with its emphasis on the immovable nature of the "property" such as land, buildings and minerals.

The sorts of interests that are classed as "property" are limited only by our imagination, however the Courts of common law countries have only recognised a few kinds of interests in land, which are regarded as usual property rights. Some of these rights will be readily recognised such as freehold and leasehold, however a few such as mining rights, fishing rights, and water rights have also been recognised.

A feature of all of these is that the interests in question are territorial, in so much as the right is contained only within defined boundaries. This is commonly achieved by way of a legal description of the boundaries, which have been defined by means of a cadastre. In addition, these rights are also proscribed in so far as what activities can occur within the territory, the manner in which the right is to be paid for, and other obligations incurred or limitations imposed.

Some of these usual property rights can be acquired outright, while some such as fishing rights and water rights are attached to rights that are held in a parcel of land adjacent or nearby. Nevertheless, in varying degrees all "property rights" result in the conferral of a management power, an ability to receive income or benefits, and an ability to sell or alienate the interest. The degree to which these three qualities are evident in a particular property right depends on the mix of fundamental characteristics that the particular property right contains.

It is generally accepted that there are six minimum characteristics which are found combined in any property right, namely: duration, flexibility, exclusivity, quality of title, transferability, and divisibility.

Market evidence shows how, when just four of these characteristics are varied, the worth of a particular property right can change, given that the amount of any of the characteristics can be observable, measurable, and continuously variable.

As regards duration, this fundamental characteristic indicates the period usually in years that the property right is held, and hence represents a profit or saving to the holder. This particular characteristic is of special relevance to land-based carbon credits. The second characteristic, exclusivity, is the inverse of the number of holders of the same or similar property right. Clearly, a reduction in the exclusivity will reduce the profit or saving enjoyed by the holder. The third characteristic, transferability, is the measurement of the market for the sale or leasing of the particular property right. It is pointed out that a high value would indicate that the demand reaches well beyond the original acquiring group, and that the mere creation of a market and hence tradability in itself enhances the value of the particular property right.

Finally, as regards the characteristic of divisibility, this has a number of facets. The property right may be capable of being shared between a number of holders over one territory or the territory itself maybe subdivided and each new part held separately. It may also be possible for the holder to divide the right on the basis of seasons, or in the case of fishing rights on the basis of particular marine species.

All of the above shows how some classes of property rights such as fishing and water rights are conceived both in law and in economics. The Institute believes that there is a particular value in this explanation of “property rights” as it will provide the Committee with an understanding of the complex web of property rights and interests that currently exists in the Australian economy, environment and society.

### **Land-based Carbon Credits**

The conceiving of a “property right” in the form of land-based carbon credits is part of an increasing commodification of natural resources in the common law world. In Australia, as the Committee would be aware there have been moves to create fully tradeable private property rights in natural resources such as water.

However, the birth of these rights has not been without its problems, and the Institute draws the Committee’s attention to the recent decision of the High Court in *Yanner-v-Eaton* (1999) HCA 53 (unreported 7 October) (*Yanner*) at p.12, where the question of ownership and the statutory vesting of “property” in the Crown was closely considered. The Court recognised that the State had the necessary power to preserve and regulate the exploitation of important natural resources, but significantly the statutory vesting of ownership of the natural resource was held to not have occurred, for the following reasons:

*[t]he Crown’s property is property with no responsibility. None of these aspects of the Fauna Act concludes the question what is meant by “property of the Crown”, but each tends to suggest that it is an unusual kind of property and is less than full beneficial, or absolute, ownership.*

Further:

*[I]n the light of all these considerations, the statutory vesting of “property” in the Crown by the successive Queensland fauna Acts can be seen to be nothing more than “a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”*

Those land-based carbon credits that are sourced from sequestration enterprises conducted by government agencies on Crown land must, in view of the Institute be closely examined to ascertain their validity as a “property right” given the decision in *Yanner* and the continuing reluctance of the Courts to grant property at common law in natural resources.

However, the creation of private fully tradeable property rights in the form of land-based carbon credits must, if to be correctly valued for the purposes of a carbon sequestration market, meet the six minimum characteristics for “property rights” outlined earlier in this submission. The recent example of water and the subsequent identification of a new form of property right and market in this natural resource, shows, in the view of the API that at an early date any new forms of “property rights” must be carefully constructed and legally defensible.

The Institute believes that a significant reassessment is presently occurring in land law of accepted notions of “property”, and new forms will continually arise as stated earlier for the Kyoto Protocol to operate correctly, it is the view of the API that property rights in land-based carbon credits are a critical construct.

### **Issues**

The API is of the view that those carbon credits that have a nexus to land, or have evolved from a traditional land-based property right, need further investigation before a true market can be created. The Institute strongly believes that this aspect needs further attention by the Committee as it inquires into the implications for Australia proceeding or not proceeding to ratify the Kyoto Protocol. This is especially important if the target emission levels are to be met by 2008, or whatever other timeframe is recommended to Parliament by the Committee.

To do otherwise, would in the view of the API lead to false and misleading expectations as to the security and hence value of land-based carbon credits as a “property right”. The nexus between the concept of carbon credits, sequestration and the utilisation of land for these purposes requires, in the view of the Institute both industry and community understanding of the particular “property right”, and a need for an analytical discourse available to all parties.

The creation of a land-based carbon credit “property right” is however recognised by the Institute as having almost certain implications for existing holders of private property in Australia. Currently, one raft of incentives commonly used to reduce some of the fixed costs associated with property is through the reduction of local government rates and State land taxes for owners of specific classes of properties. For example, in NSW there are provisions for the reduction in such charges for owners of heritage properties and those within wildlife conservation programmes authorized by the National Parks and Wildlife Service.

These savings in charges may, in some cases be significant, however the API considers that there should be much more significant savings for those property holders undertaking Carbon reduction programmes for their industry. The Institute recognises, that such reductions in charges paid by property holders would result in a loss in rate revenue for Local Government, however this could be solved by specific grants to local government for the loss sustained.

Another issue that the API has been informed of is the loss, or perceived likely loss, of real income to farmers and owners of commercial and industrial property because of restrictions placed on development to reduce carbon production. These issues, in the view of the Institute, go to the heart of the stability of the property markets in Australia and will have to be recognised and addressed by the Committee as it inquires into the implications for Australia in proceeding or not proceeding to ratify the Kyoto Protocol.

The API is of the firm view that incentives for property holders which address the issue of restrictions on development, are a much more acceptable alternative to blanket restrictions, notwithstanding that sometimes it may be necessary for the latter to be available as a last resort.

Similarly, the API believes that there needs to be constructive programmes of education in relation to the economic, environmental and social implications of any domestic regulation of industry. The unpalatable alternative would be a forced realisation of the effect of greenhouse gas production only when the evidence is overwhelming. Examples of such measured education responses can be found in the Landcare movement, which has addressed at the community, industry and government levels issues such as rising water tables, ground water vulnerability, and the broader issue of rural and urban salinisation.

Finally, the Institute would like to inform the Committee that it would be pleased to assist in a study of the cost effect of carbon credits and compliance with target emission levels on the capital value of all general classes of property. The API considers that this action is an important pre-requisite before the Committee and Parliament can properly form a view regarding the cost effect. Carbon credits and compliance will almost certainly affect the large amount of mortgage and financial funds invested in Australian property, as the underpinning support for much commercial and industrial enterprise in Australia.

The Institute trusts that the above information is of assistance, and is happy to discuss any of the matters raised in the above submission or to provide any additional information that the Committee may request. Arrangements can be made by contacting Mr Grant Warner, National Secretariat, Canberra, telephone no. 6282 2411.

Yours faithfully

Brian Ellerbeck  
**National President**  
**Australian Property Institute**

**Australian Property Institute**  
**National Secretariat**  
**Kyoto Protocol Submission Committee Membership**

**Submission Committee**

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