Australian Property Institute

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John Hawkins
Committee Secretary
Senate Select Committee on Climate Policy
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Hawkins

Please find below comments from the Australian Property Institute on the Carbon Pollution Reduction Scheme Draft Exposure Bill.

I would be delighted to have the opportunity to give evidence at the upcoming hearings at either Brisbane or Melbourne. Your late consideration of this submission is greatly appreciated.

Should you require any further information, please contact David Fisher on 9299 1811.

Regards

John Sheehan
Chair, Government Liaison
NSW Division

Carbon Pollution Reduction Scheme Bill			
Part/s	**Division/s**	**Clause/s**	**Comment**
Part 1		5	The definition c*arbon sequestration right* is ascribed the meaning given by *Clause 240*, however the living fibre of vegetation (trees) remains part of the elemental land property right. The definition does not clearly articulate how the right to carbon in the living fibre will be crystallised out of the land property right. A number of States have adopted profit a prendre as a basis for the right to carbon, however this offends the common law notion of land property, and is fundamentally flawed.
Part 1		5	The definition *forest stand* includes other requirements (e) if specified in the regulations. At paragraph 6.30 the Commentary indicates that regulations will require a forest stand to be established of the same species. This is an undesirable requirement given that biologically diverse stands of vegetation may arguably have a greater capacity for carbon sequestration than a mono species stand. It is considered that further detailed scientific investigation is required before a mono species regime is adopted, to ensure that greater harm is not actioned upon the natural environment
Part 1		5	The definition *Torrens system land* is confusing and the definition could have been better phrased as *land for which the title is recorded under a Torrens system of registration.*
Part 7	Division 2	145	There must be a process of reconciliation between the National Registry of Emissions Units and the Registry of Reforestation Projects. This is unclear in the Bill and in the Commentary.
Part 10	Division 1	190	The net total number of tonnes of greenhouse gases attributable to a forest stand remains problematic. The International Accounting Standards Board (IASB) has withdrawn its accounting standard for the attribution of greenhouse gases from forests. It is unclear how this will be dealt with given the continuing absence of scientific clarity. Further the reforestation report must be undertaken independent of the person or organisation undertaking the reforestation project, or having the benefit of the carbon sequestration, or being the owner or beneficiary of the land upon which the reforestation project is or will be undertaken. A Registrar of Titles making entries on land titles in the case of the six Australian States arguably has no authority under this Bill, given the historic jurisdictional divide provided in the Australian Constitution between the Commonwealth and the States. All matters pertaining to land management rest with the States, and it is unclear how the Bill addresses the need for inter Governmental relations to be established to permit a Registrar of Titles to act as proposed. Once the necessary inter Governmental relations are established (see above) the making of entries on land titles must be mandatory. The phrase “may make entries” leads to a perception that not all projects and obligations pertaining to reforestation will necessarily be endorsed on land titles.

Part 10	Division 3	195(2)	For the Authority to be satisfied that the applicant is a recognised reforestation entity and that the carbon sequestration right is held by the applicant is at this juncture, impossible for the Authority to achieve. The unclear nature of the right to carbon in vegetation crystallised out of the elemental land property right denies the Authority the capacity to ascertain that the right to carbon is held as asserted by any applicant. The capacity of the Authority to satisfy itself as to the fundamental nature of the right to carbon asserted by the Applicant, is clearly limited by the resources of the Authority to undertake such a task. Sequestration through reforestation throughout the Australian continent requires a level of accuracy in mapping of vegetation, species identification and biomass assessment which is currently not possible.
Part 10	Division 3	195(3)	The formula utilised to ascertain the net total number of tonnes of greenhouse gases removed requires a level of accuracy which is currently unavailable. As previously mentioned the IASB has withdrawn its formulaic approach to the calculation of tonnes of greenhouse gases removed as the formula was “unworkable”.
Part 10	Division 3	195(4)	The reforestation unit limit assumes that the sum of the non-CPRS green house gases removal sales number and the 2008 carbon stock base line number, will apply to any project. The calculation of the reforestation unit limit as required at Clause 220(4) is extremely difficult to understand, and will vary immensely from project to project. This notion of reforestation unit limit requires significant redrafting.
Part 10	Division 5	209(4)	This section requires an intimate interaction between the State land titling systems for Torrens system land or Crown land, which in respect of the Commonwealth it has no power. There is a need for an intergovernmental arrangement to be established to permit this section to operate Constitutionally.
Part 10	Division 7	223(1)	The provision of the first and subsequent reforestation report in the relevant five year period (or other nominated period) indicates that the report will be undertaken by a party or parties associated with the project. This should not occur and this section should be redrafted to ensure transparency.
Part 10	Division 7	224(1)	As mentioned in the comment on *Clause 223(1)* this section should be redrafted to ensure independence of the author of the reforestation report.
Part 10	Division 8	225(2)	The person holding the carbon sequestration right is required to give the Authority a written reforestation report about the project. This provision is flawed as it does not allow for an independent report to be provided to the Authority, and will throw doubt over the veracity of the tonnes of carbon allegedly being sequestrated in a particular reforestation project. This is a fundamental flaw of Part 10 overall.

Part 10	Division 8	225(3)	The reforestation report is to be given in a manner and form to be prescribed by the regulations setting out therein the information to be specified in the regulations. The manner, form and information to be provided in the reforestation report is critical to the success or failure of the concept of reporting reforestation projects. These requirements must not be left to prescription in subsequent regulations, but are necessarily part of the Bill and should be included herein. This is a fundamental flaw of Part 10 overall.
Part 10	Division 9	226(2)(a)	Forest maintenance obligation pertaining to existing forest stands should be more clearly articulated, and as currently drafted will lead to confusion.
Part 10	Division 12	236, 237	The noting of entries on title registers must be a mandatory requirement, and the use of the word "may" suggests that not all carbon sequestration projects will necessarily be entered on title registers maintained by the States or Territories.
Part 10	Division 14	240(1)(e)	The common law concept of land property has not been correctly addressed in this section, which purports to identify an "exclusive legal right to obtain the benefit (whether present or future) of sequestration of carbon dioxide by trees". The current legislation in the six Australian States attempt to distil such a right out of the elemental land property right, but the basis used is primarily profit a prendre which is neither exclusive nor correct in application for this purpose. The use of this terminology in this section highlights the poorly understood nature of the carbon sequestration right in vegetation, which currently lies firmly with the landowner. This section of Part 10 is significantly flawed and is further discussed in detail in the general comments at the end of this submission.
Part 10	Division 14	240(2)	As stated above the use of the terminology "exclusive right" and attributing that capacity to the carbon sequestration right under the Torrens system is flawed and needs considerable recasting, and indeed inter Governmental liaison to ensure firstly harmonisation between the States, and secondly inter Governmental agreement between the States and the Commonwealth.
Part 10	Division 14	240(4)	Whilst this section refers to Crown land that is not Torrens system land the comments pertaining to Torrens system land (above) are repeated.
Part 10	Division 14	240(8)	This sections purports to include sequestration rights of carbon dioxide in the soil in which the trees are growing. This is poorly drafted, and demonstrates an appalling misunderstanding of common law concepts of land property. It is inconceivable under current property law that carbon in soil could be separated from the elemental land property right, and in this regard attention is drawn to the paper "Carbon Property Rights in Soil" (Sheehan and Kanas 2008).

Part 25	Division 4	360(2)	It is considered that an additional field should be included (j) property rights, as this field is an interdisciplinary undertaking having significant input for expert advisory committees.
Part 26		379	It is considered that an action or other proceeding for damages arising from powers conferred by this Bill should be subject to judicial review, especially given that a transparent carbon trading market is to be established as a pivotal endeavour of the Bill.
Part 26		383	It is considered that this clause offends s.51(xxxi) of the Constitution by attempting to provide for the acquisition of property on terms other than just. It is unknown what the phrase "reasonable amount of compensation" constitutes in the light of the mandatory obligation placed upon the Commonwealth to provide just terms. Any regulation purporting to dilute *s.51(xxxi)* must be problematic.

General comments

As referred to in the earlier comment on *Clause 240,* the following additional comments are made in respect of the definition of carbon sequestration right. *Clause 240* sets out the exclusive legal right to obtain the benefit of sequestration by carbon dioxide, which arises as a consequence of holding a legal estate or interest in land which is registered under the Torrens framework, constituting the carbon sequestration right. This clause raises four critical issues:

First, the definition blurs the distinction between the underlying land interest to which the carbon right relates and the carbon sequestration right itself. The natural position is that the land confers rights to carbon sequestration from trees which grow upon it because the landowner owns the natural rights flowing from that land. However, if
we are to accept that carbon sequestration exists as a separate land interest to the underlying land title, the right must be severed from the land pursuant to a positive act. Hence, the carbon sequestration right, whilst existing in a dormant state as a product of the natural ownership rights of the landowner, can only become a separate
interest where it is specifically separated from those underlying rights. The right cannot exist as a separate interest in the absence of such an action. In its current form the legislative provisions do not acknowledge this. The act of separation is usually a contract or agreement whereby the landowner specifically confers upon a third party the benefit of the carbon sequestration right. The legislation needs to make it clear that a carbon sequestration right will arise as an interest separate to the bundle of rights associated with the underlying ownership of the land where this act of separation or severance has occurred.

Second, the definition is restrictive in that it confines carbon sequestration interests to persons holding legal estates in land. It is unclear why a person could not hold an equitable interest in the project area - unless the legislation mandates possession and occupation of the land as a pre-requisite to the existence of a carbon sequestration right as these are rights attributable to legal estates. It seems unduly restrictive to confine the endorsement of carbon sequestration rights over `project´ land which is owned legally. Perhaps it would be more accurate to endorse possession as a pre-requisite of the ownership status of the underlying `project´ land. This would ensure that owners who are possessors (whether freehold or leasehold) and who therefore acquire natural rights associated with possession, are the only type of owners who are capable of creating the carbon sequestration right.

Third, the definition suggests that the carbon sequestration right can only arise in circumstances where the natural right of the underlying owner is an exclusive legal right. This requirement is problematic. All Western land interests carry the right to exclusivity, being defined by their in rem status. However, it is not always easy to
determine how some rights included within the `bundle of rights´ that a land owner acquires, achieve this exclusivity. It is arguable that carbon sequestration falls into this category. Carbon sequestration is an amorphous concept. The right to store carbon over forested land might theoretically belong exclusively to the

owner of the underlying forested land however practically, determining the nature and scope of this control may be difficult. In some instances it may be arguable that exclusivity cannot be achieved. For example, determining exactly how much storage exists, what the rights of the owner might be to uphold this storage and how those rights might be enforced against adjoining land interests can be difficult to determine in the absence of specific and individualised agreements. It is therefore appropriate that the legislation focus on mandating the validity of connected and associated carbon covenants rather than making exclusivity a pre-condition to the existence of the carbon sequestration right.

Fourth, the legislation appears to distinguish between its reference to State or Territory legislation where the right `is taken to be an estate or interest in land´ (Clause 240(2)(e)), Clause240(5)(e) and State or Territory legislation where the right `runs with the relevant land´(Clause240(3)(e), Clause240(6)(e). This distinction appears to take into account the fact that some states mandate the carbon right as a land interest and other mandate it as a contractual right. The legislation needs to take account of the clear differences between state and territory legislation as these differences are significant. In particular, it would be appropriate for the legislation to mandate a uniform definition for carbon sequestration rights, overriding different state and territory legislation. This definition should not attempt to utilize the common law concept of the profit a prendre as the right does not fit into that categorization easily and distorts the fundamental principles associated with this interest. Rather, it would be
appropriate for the legislation to endorse the validity of the carbon right as a statutory encumbrance, similar to the approach taken by the Carbon Rights Act 2003 (WA). Statutory validation would promote a consistent and accessible definition of the carbon sequestration right which would be consistent with the fact that the legislation
currently endorses Torrens registration as a pre-requisite to the recognition of a right as a carbon sequestration right.

Further, the Commentary on the Carbon Pollution Reduction Scheme Bill 2009 purports at 171 - 174 to describe the concept of ‘carbon sequestration right’. Paragraph 6.44 observes that the concept is central to the reforestation scheme set out in Part 10 of the Bill. Importantly the Commentary notes at Paragraph 6.45 that the holding of a carbon sequestration right over an eligible reforestation project is the key to obtaining free Australian Emissions Units.

It is noted that the Commentary states at Paragraph 6.52 that the definitions of “forestry right” and “carbon sequestration right” are still being developed and foreshadows that additional provisions will be included in the subsequent Bill as introduced into the House of Representatives in due course. The notion of a carbon right generated by sequestration in vegetation separate from the common law concept of the elemental land property right is not settled, and the API and SIBA are deeply concerned that the right is yet to be articulated with any definitional accuracy, and indeed adequacy as a legal platform.

At Paragraph 6.49 the Commentary indicates that carbon sequestration rights are to be separate from land property rights and in a diagrammatic representation provided by Landgate of the Western Australian Government purports to illustrate this proposal. At Paragraph 6.50 the Commentary requires that carbon sequestration rights will ordinarily be registered on a State land titling system, notably where such right under State legislation is deemed to be an estate or interest in land.

Irrespective of the deeming by any State that such a right is an estate or interest in land, the common law reality is that such rights are in any event an estate or interest in land. As such they must be capable of meeting accepted criteria to establish “true” property rights in carbon in vegetation. One important criteria is the capacity to support interests such as mortgages. The capacity of carbon sequestration rights to act as collateral for debt remains problematic, and suggests strongly that the overall thrust of Part 10 of the Bill is fatally flawed.

Given that substantive emitters of greenhouse gases will be seeking to purchase Australian Emissions Units, some of which will be emerging from approved reforestation projects, the issue of adequate collateral base for debt is critical for the success of this particular component of the emerging carbon trading market. Urgent attention is needed to be given to the inadequate definition of carbon sequestration rights, and the capacity to support debt given the rising value of carbon as the cap and trade system progresses. Substantial value will be attached to carbon sequestration rights, and the conceiving of such rights is a considerable change in Australian property theory, and Australian property law, which ought to be undertaken with great care.

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