Submission by Country Carbon

Review of the Carbon Farming Initiative Legislation and the Emissions Reduction Fund Consultation Paper: August 2017

Country Carbon is very happy to respond to the Review of the Carbon Farming Initiative Legislation and the Emissions Reduction Fund Consultation Paper: August 2017 (the Review).

Country Carbon is one of Australia's leading carbon project developers in the area of emissions reductions in the land and bioenergy sectors. We are the leading provider of emissions reductions for Northern Australia with over 8 million hectares under management and over 300,000 tonnes abated annually from over 30 carbon projects. Country Carbon has been successful with the government's key policy platform to achieve Australia's emission reductions targets, the Emission Reduction Fund (ERF). Our company is contracted to deliver approximately 3 million tonnes of carbon abatement with a contract value over $70 million to the Clean Energy Regulator. Based in Albury NSW, we also have offices in the United States and Germany.

Overview of the emissions reduction fund

Country Carbon believes that the ERF has the capacity to be a highly successful ongoing component of the government's climate change policy. We note, it is our view that much of the lowest cost abatement has already been contracted and that to unlock further abatement in future we expect the price offered for carbon, either in an auction or a compliance market will have to rise. Our experience is that there are many landholders who want to participate in the ERF who are waiting for the carbon price to increase.

Development, approval and review of methods

Country carbon agrees with the Climate Change Authority that, especially from a landholder's perspective, methods are considered "long, complex legal documents". We believe proponents will always require expert help to navigate the Carbon Farming Initiative (CFI) and ERF, however, we believe, there could be more, comprehensive, plain English, guidance material provided by the CER for each methodology to enable proponents to independently arrive at a solid understanding of their obligations in relation to a project. In the early stages of engaging a project developer, project proponents are sometimes forced to seek independent professional advice from lawyers or accountants who have no real background in the ERF and the CFI. More extensive government information aimed at a landholder, could only enhance this process and make establishing quality projects much more efficient.

Postal Address: CBC Chambers 8/499 Kiewa Street ALBURY NSW 2640
PH: 1300 368 044
Email: info@countrycarbon.com.au Website: www.countrycarbon.com.au
ABN 72 152 922 408

Q.1. Is the coverage of methods sufficient or should other emissions reduction opportunities that are consistent with the offsets integrity standards be included?

Country Carbon believes that new methodologies will be needed to ensure the future growth and vitality of the ERF. There could be further development of methodologies for smaller scale properties, which could enable greater uptake from the southern states who are currently unable to participate as they do not meet the minimum area (from a cost per Ha perspective). Aggregation in these areas is challenging due to the sheer volume of landholders that would need to be involved. Some areas that could be investigated for further method development, include fertiliser improvements in cropping land, and run off to catchment areas in the food bowl districts.

Q.5. Why do some methods have low uptake?

A good example of methodology development is the Savanna Sequestration methodology, where industry has been closely involved throughout its implementation and review, providing valuable feedback resulting in a methodology that is not only technically sound, but has been widely adopted. Country Carbon believes that there could be even greater and closer involvement in methodology development from industry, and all government agencies, to assess the potential level of uptake for a methodology.

Country Carbon believes that in some cases, such as the cotton methodology, the uptake may be affected through the current CER interpretation of the 2014 amendments to the CFI Act which, the CER maintains introduced a requirement that eligible interest holder consent was to extend to an entirely new class of projects (area-based offsets projects).[1] The idea that a cotton farmer needs the consent of all property interest holders in the project area in order to alter the way in which they deal with fertiliser, for us clearly illustrates the problem with the CER's current approach to the issue.

Q.12. Do 25-year and 100-year permanence timeframes raise particular issues?

In general, we can report, many landholders have found the 25- year permanence period option an attractive one. Many are reluctant to commit to 100-year periods, due to the unreliability of the ongoing farming operations and uncontrollable external factors, including drought, flood, pest, fluctuating sale prices of commodities and family growth.

We are aware that within the industry, concerns have been expressed that 25-year permanence period projects may have issues in any future international market for ACCUS, due to the 25-year

[1] This is even though the express primary purpose of the 2014 amendments was to "cut red tape", See *Explanatory* Memorandum to the *Carbon Farming Initiative Amendment Bill* 2014 (the Bill)

Postal Address: CBC Chambers 8/499 Kiewa Street ALBURY NSW 2640
PH: 1300 368 044
Email: info@countrycarbon.com.au Website: www.countrycarbon.com.au
ABN 72 152 922 408

period not being compliant with UN carbon accounting standards. This issue should be comprehensively explored and dealt with so that proponents can be given current information to make them aware of any potential consequences when they make the choice of permanence period.

Q.14. Is there sufficient information available to inform land purchasers about permanence obligations?

As indicated above, we believe the industry could only benefit from having more numerous, more comprehensive, plain-English, guides issued by the Regulator as to the impacts of the permanence periods, ongoing obligations, as well as the individual methodologies. This would help foster a greater level of understanding by proponents (and their lawyers and accountants), all of whom have a clear need for objective information to assess advice being given to them by project developers.

The ERF and indigenous participation

Q.17. Should contracts between carbon service providers or aggregators and other participants be made available to the Clean Energy Regulator?

Country Carbon believes that in certain limited cases, contracts between carbon service providers or aggregators and other participants should be made available to the Clean Energy Regulator. For example, there has been disclosure by unsatisfied customers of project developers that they are being unfairly restricted from selling their properties due to clauses in Service Agreements. This, if proved correct, could potentially bring the scheme into disrepute among landholders.

Q.19. What are the barriers to Indigenous participation in the ERF and how can they be addressed?
Q.20. Are the eligible interest holder arrangements working effectively? If not, how could they be improved?

These two questions together raise a major issue for Country Carbon arising out of the current CER view that the CFI Act requires eligible interest holder consent (EIHC) for area- based projects (which include savanna burning projects).

Firstly, we believe along with the Department of the Environment, that the CER interpretation has been made in the context of wording in the CFI Act which is clearly the result of a drafting error.

There are an overwhelming number of indicators showing that the CER interpretation is contrary to the intention of parliament. These are as follows:

a) The major shift in policy was never pre-announced or even mentioned in a single industry

consultation. It was only 'discovered' three months after the change took place.[2]

b) There is not a single mention in any Explanatory Memoranda or Statements indicating that the legislature intended to extend the consent requirement to savanna burning projects or cotton projects, or to any new class of projects.

c) There are at least five explicit mentions in legislative Explanatory statements and memoranda following the 2014 amendments, indicating that the intention of the legislature was to continue to apply the requirement solely to sequestration projects.[3]

d) the Explanatory Memorandum to the Carbon Farming Initiative Amendment Bill 2014 indicated that the category of area-based emissions project was created for the single purpose of cutting red tape and "streamlining project registration". Extending the highly onerous requirement of EIHC to an entirely new class of projects directly contradicts this intention.

e) There have never been any policy reasons articulated for extending requirement of EIHC to savanna burning, or cotton projects. In the case of savanna burning projects and cotton projects, there is no potential for a carbon maintenance obligation to be placed on the title of the project area, which is the original sole justification for EIHC in sequestration projects.[4]

In this context, it appears that the CER feels itself legally constrained by the literal words in the CFI Act to arrive at its interpretation which produces a highly perverse result from the perspective of

[2] The change only came about because a Clean Energy Regulator lawyer discovered the change in law three months after it had been enacted.

[3] For example, the Explanatory Statement to the Carbon Credits (Carbon Farming Initiative) Amendment Rule 2015, (No. 1) which came into force on 14 July 2015, five months after the supposed introduction of the SB EIHC requirement, contains the following words:
"*The Clean Energy Regulator must not exercise its discretion to vary a declaration unless it is satisfied of all of the following: […] The consent of all eligible interest holders has been obtained in respect of the varied project area (if the project is a sequestration project)".* See also the following paragraphs of the Explanatory Memorandum to the *Carbon Farming Initiative Amendment Bill* 2014 "*1.34 The current law requires that anyone with an eligible interest in a sequestration project must give their consent to the project and this will remain a requirement under the Emissions Reduction Fund*." "1.*35 To provide further flexibility, sequestration projects can be registered on a conditional basis before having obtained the consent of all eligible interest holders*.", "*1.49 The current law requires relevant state or Commonwealth ministers who have consented to a sequestration project to also certify that they will not deal with the land in a way that makes it difficult or impossible to carry out the project*."

[4] See Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011", Commonwealth of Australia, accessed at https://www.comlaw.gov.au/Details/C2011B00060/8a9cf5fe-a9ac-486f-a089-5ac45056afff, September 2016, "*3.52 The consent of eligible interest holders is a precondition to the declaration of a project as an eligible offsets project because, in some limited circumstances, an area of land involved in a project can become subject to a carbon maintenance obligation*."

good policy, good governance and even fairness.

There are however, extremely strong grounds for the CER to arrive at an interpretation which is both more legally defensible and which also leads to a better policy result. A legal opinion secured on 25 May 2017 from Senior Counsel Margaret Allars (a pre-eminent expert in Administrative Law) states that the most correct literal meaning of the actual words in Section 28A is in fact that the EIHC requirement applies to all offsets projects, not just area-based offsets projects. [This is a result which is consistent with the known fact that an error has taken place, and which leads to a literal conclusion that is clearly absurd which would therefore according to the *Acts Interpretation Act*, enable reference to the extrinsic materials described up in points a) to e) above.][5] The correct interpretation may ultimately need to be tested in the AAT.

The consequences of the CER approach to this issue to date have been extremely serious for Country Carbon. We have so far, exhausted all available avenues attempting to communicate with and secure consent from native title holders for affected projects and will therefore soon be in a position where we will be forced to both pay back ACCUs already issued (the bulk of proceeds of which have already been passed on to clients) as well as forgo significant future profits on affected projects.

This situation raises two issues:

a) The first is that individual project developers and project proponents can find themselves virtually powerless to prevent conduct by the CER which they believe is clearly unfair. This is most serious in circumstances where the consequences of this conduct potentially threatens the very existence of a business. The only genuine recourse available to users of the ERF, is to the AAT, where even if successful they will have to bear their own high legal costs, which will be too high for the average participant in the scheme. There clearly is a potential role for an expert third party ombudsman, with legal expertise, and genuine independence to field complaints and to work through these thoroughly, impartially and fairly. Such a third party could work with a view to both ensuring that the ERF remains user-friendly as well as ensuring that the integrity of the scheme is preserved. (In our case an overturning of the current CER approach would actually be a result which would clearly work in favour of both these priorities). One major issue is that because the day to day role of the CER involves a tremendous amount of discretionary power, users of the scheme are reluctant to make complaints for fear of "falling out of favour" with the Regulator. In these circumstances, some accessible and inexpensive avenue of recourse is even

[5] The *Acts Interpretation Act* 1901 (Cth) s 15AB(1) provides that consideration may be given to extrinsic material (as defined in s 15AB(2) this includes an explanatory memorandum) (a) to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision, or (b) to determine the meaning of the provision when it is ambiguous or obscure, or that the ordinary meaning leads to a result that is manifestly absurd or is unreasonable.

more appropriate and critically needed for the health of the scheme.

b) The second is that the requirement of EIHC in the context of native title needs considerable further work in order to make the process of engaging with native title organisations more successful. We believe many project developers would support initiatives which give native title-holders a greater role in the development of projects on native title land. Country carbon, for example, would support, a solution which amounted to a scheme-wide, automatic, imposed levy for all projects requiring EIHC which take place on native title land. Such a levy would remove the costly inefficiency and uncertainty surrounding the process of negotiating for EIHC with individual land corporations. We can report that because of prior experience, often native title land is now increasingly removed from project boundaries by project developers simply because of the difficulty and actual uncertainty surrounding the process of securing consent. This has the result that a) potential abatement is not able to be delivered to help the Australian Government meet its UN targets, b) developers and participants lose out on revenue, and c) no revenue at all flows to native title bodies. This scenario produces the worst possible case scenario for all parties and should be remedied as quickly as possible.

Q.23. Are there administrative barriers that are preventing participation in the ERF?

The obvious barrier as mentioned above is that in the absence of clear processes and structures, the requirement of consent for projects in native title areas can make projects automatically non-viable. The extension of the requirement of EIHC for area based offsets projects is in this context, a serious problem which could be completely avoided if the CER adopted an approach to the issue which was more consistent with its role as a guardian of the integrity of the scheme.

Country Carbon

September 29, 2017

Postal Address: CBC Chambers 8/499 Kiewa Street ALBURY NSW 2640
PH: 1300 368 044
Email: info@countrycarbon.com.au Website: www.countrycarbon.com.au
ABN 72 152 922 408