Kimberley Land Council
P.O. BOX 2145 BROOME WA 6725
Phone: (08) 9194 0100 Facsimile: (08) 9193 6279 Website: www.klc.org.au
ABN 96 724 252 047 ICN 21

Submissions
Climate Change Authority
GPO Box 787
Canberra ACT 2600
Via email: submissions@climatechangeauthority.gov.au

28 September 2017

KLC Submission: Review of the Carbon Farming Initiative Legislation and the Emissions Reduction Fund

The Kimberley Land Council (KLC) is the peak Indigenous body in the Kimberley region, working with Aboriginal people to secure native title recognition, conduct conservation and land management activities and develop cultural business enterprises.

The KLC facilitated the registration of the first four Indigenous CFI projects in the Kimberley in 2013, which remain the only projects registered on the basis of exclusive possession native title. These projects herald a new era for native title holders, demonstrating how native title rights and traditional Indigenous practices can form the foundation for innovative projects, generating social, environmental and economic benefits in remote communities.

The KLC continues to work with native title holders and Indigenous groups throughout the Kimberley region to increase knowledge and understanding of the opportunities provided by carbon projects, and to register new projects, so that more native title holders are able to benefit from these opportunities.

The KLC made submissions to the Action on the Land: reducing emissions, conserving natural capital and improving farm profitability issues paper and the Department of the Environment and Energy's (DoEE) 2017 Review of Australia's climate change policies. Key recommendations pertinent to the CFI/ERF review are repeated here.

This submission is specific to the operation of the ERF as it affects native title holders and claimants in WA, specifically with regard to the operation of savanna burning projects.

Summary

The KLC makes the following comments and recommendations in relation to the future operation of the ERF:

Protection of Indigenous peoples rights (q20 & 21)

The ERF has great potential to improve the livelihoods of Indigenous peoples in remote communities. Conversely, projects registered and/or operating in a way that do not respect, or actively restrict or remove Indigenous peoples' rights can have significant negative impacts, and impede the ability of Indigenous people to manage their own country.

The CER has an essential role in vetting project applications such that the rights of native title holders and other vulnerable people are protected.

Recommendation 1: That the CER proactively works to protect the rights of Indigenous peoples through ensuring projects have the *legal right* to be undertaken and that project proponents gain the consent of native title claimants or holders in a manner consistent with the principle of *Free, Prior and Informed Consent (FPIC).*

Recommendation 2: That the CER continues to build its own capacity to ensure the rights of Indigenous peoples, and other vulnerable peoples are protected.

Recommendation 3: Where there is any ambiguity whether native title rights may be impacted by a potential (or existing) project, that the CER seeks advice from native title representative bodies (NTRBs).

Recommendation 4: That the CFI Act is extended to protect the rights and interests of native title claimants and non-exclusive native title holders.

Recommendation 5: That the ability to declare a project prior to obtaining consent from native title holders is removed as it is inconsistent with the principle of FPIC.

Recommendation 6: Include a dedicated section in the CFI/EFR review report on native title matters.

Barriers to Entry (q12)

The barriers to entry for Indigenous landholders are considerable. Start-up costs for savanna burning projects are high, specialist expertise or advice is required, and the income potential through the ERF auction process is often lower than the cost of production.

Indigenous savanna burning projects deliver social and environmental benefits beyond the emissions reductions rewarded through the ERF. However, there is an absence of a market or mechanisms to support delivery of these co-benefits. In a perverse shifting of roles, the voluntary carbon market appears to have some appetite for Indigenous carbon credits (due to the additional social and cultural benefits) but not in sufficient price and volume to support the industry, while the Government refuses to support these demonstrable public goods.

Without assistance from government grants, philanthropic investment and the interest of the secondary market it is unlikely that any Kimberley savanna abatement projects would have been established to date, or would be in the near future, resulting in not only a reduction in emissions avoidance but social, cultural and environmental outcomes.

Recommendation 7. The Government acknowledge and commit to supporting the demonstrable public good flowing from Indigenous carbon projects.

Recommendation 8: That the model of lowest-cost-abatement be reviewed and alternatives be considered, such as a return to a market-led mechanism to provide a long

term, sustainable market for high-value emissions avoidance projects such as savanna burning.

Recommendation 9: That a fund is established to assist Indigenous landholders to undertake project feasibility, support capacity building and finance new project registration.

Recommendation 10: That a dedicated purchasing mechanism for Indigenous ACCUs within the ERF is established, priced to reflect the significant benefits delivered by these projects.

Recommendation 11: A co-investment fund which partners private sector purchase of Indigenous produced ACCUs with Government investment in the social, environmental and cultural outcomes.

Permanence Arrangements (q11)

The CER is yet to identify how permanence obligations will interact with native title. This will become a major issue once the proposed savanna sequestration method is released. NTRBs across Northern Australia are in consensus that sequestration projects are a future act under the Native Title Act (NTA) and Indigenous Land Use Agreements (ILUAs) are the best instrument for securing consent of native title holders to these projects. If the CER fails to require an ILUA, this not only could result in non-compliance with the NTA, but will undermine the integrity of the ERF, as the CER will be unable to enforce permanence arrangements on native title lands.

Recommendation 12: For the purposes of clarity and efficiency, the Government should adopt a clear position that sequestration projects on native title land will require an ILUA, and project proponents should work with NTRBs to develop best practice guidelines.

Further Detail

Q.19. What are the barriers to Indigenous participation in the ERF and how can they be addressed?

Despite extensive environmental, cultural, social and economic benefits flowing from Indigenous carbon projects, it is estimated that only about 25 percent of Traditional Owner groups across Northern Australia with the potential to participate in the carbon economy currently do so. A number of barriers and challenges face the sector and limit its potential expansion. These include:

a) High project establishment and operational costs;

b) The complexity of the method and legislation often requires native title holders to seek external support to register a project and maintain ongoing project compliance obligations (notwithstanding the additional complexities of native title law and land tenure); and

c) Income through ERF auctions is typically insufficient to cover costs of production (through emissions avoidance method).

It is anticipated that these barriers will limit Indigenous project proponents seeking to transition to the combined emissions avoidance and sequestration method. Therefore, uptake of the new combined method may be restricted due to funding and capacity challenges rather than lack of interest.

Additionally, the permanence obligations within the draft combined emissions avoidance

and sequestration savanna method will be a significant barrier to the registration of Indigenous-owned projects. To offset the risk associated with permanence obligations, new corporate structures and corporate governance arrangements will need to be established –with FPIC - to ensure the interests of native title holders are protected.

To encourage greater Indigenous participation in the ERF, financial assistance is required to offset start-up costs which include: feasibility studies, outreach and capacity building, governance strategies, validated vegetation mapping and expertise.

To secure the long-term viability of Indigenous owned savanna carbon projects, the biodiversity, social and cultural benefits generated with each ACCU also need to be recognized and valued.

Recognising and valuing these 'co-benefits' need-not occur through complex (and potentially expensive) accreditation arrangements. Investment in start-up, capacity and business development would position individual projects to develop appropriate metrics to identify and – if desired – report on beneficial outcomes. Projects can then decide to sell ACCUs into the voluntary market or into a dedicated Indigenous ERF market, priced to recognize the value of the ACCUs. One possible model for this approach is the development of a government co-investment fund. Under this model, private sector emitters that voluntarily offset their emissions could partner with Indigenous projects to purchase ACCUs, and Government could provide matching funds to realise the social and public goods delivered by the projects.

Q.20. Are the eligible interest holder arrangements working effectively? If not, how could they be improved?

While carbon projects have the potential to deliver significant benefits, conversely, without proper checks and balances, savanna projects implemented without Indigenous consultation or consent have been demonstrated to result in community backlash, disempowerment, undermining of traditional practices and erosion of native title rights – at odds with broader Government policy on Indigenous rights and native title. This is particularly concerning in the context of sequestration and the conditional consent arrangements which fail to align with international requirements of FPIC.

The KLC submitted a comprehensive response regarding the protection of native title rights to the 2017 review of climate change policies. This is available at: http://www.environment.gov.au/submissions/climate-change/review-climate-change-policies-2017/kimberly-land-council.pdf

The ability for projects to register prior to obtaining Indigenous consent (conditional registration) creates significant perverse outcomes, is inconsistent with the *Native Title Act,* and inconsistent with Australia's obligations under the *United Nations Declaration on the Rights of Indigenous People.*

The ability of projects to obtain consent after project declaration was introduced as part of the 2014 amendments to the CFI Act. Since that time, experience has demonstrated that these changes have resulted in increased risk and uncertainty and significantly undermined the overall integrity of the scheme. The practice of seeking approvals to an activity post-registration and contracting is not common in any industry nor best business practice. Within an Indigenous context, it undermines relationships, disempowers Traditional Owners and creates significant power imbalance when negotiating partnerships and agreements.

Q.21. Are the ERF arrangements to prevent adverse outcomes from ERF projects sufficient? If not, how could they be improved?

The above response (q. 20) identifies the key adverse outcome for Indigenous peoples from ERF projects: namely the establishment of projects without FPIC of Traditional Owners.

A separate, but equally concerning issue is where projects have been registered on Indigenous land without the legal right having been properly established.

The consultation paper notes challenges the CER faces in administering the ERF regarding this issue:

> *"Land where native title has been determined or that is subject to native title claims can lead to administrative challenges for the CER in determining who has the legal right to undertake the project or whether appropriate eligible interest holder consents have been given".(p.18)*
>
> *"there may also be challenges in assessing whether a pastoral lease or an Indigenous land use agreement covers proposed ERF projects in all circumstances" (p.18)*

In the absence of a notification obligation and sufficient resourcing for Indigenous Prescribed Body Corporates (PBCs), the CER is the only party with the agency to identify and challenge invalid project applications.

To ensure integrity of the scheme, the CER needs to have the understanding and capacity to accurately assess project applications to ensure that project proponents have the legal right to conduct the activity. And to ensure that eligible interest holders' consents have been sought and received.

Multiple cases are known where the CER has been unable to achieve legal right certainty, resulting in challenges or deregistration once the existence of the project became known to the party with the sole, or co-existing legal right.

The establishment of guidelines by the CER for those considering registering projects on land subject to native title is commendable. However, the KLC recommends that the CER undertake greater due diligence at project registration.

The KLC would welcome the opportunity to increase the understanding of CER staff regarding native title rights, land tenure and ILUA negotiation processes.

Contact

Please direct any questions regarding this submission to Catriona Webster, Fire and Carbon Outreach Officer, KLC on (08) 9194 0100 or catriona.webster@klc.org.au.

END.