KIMBERLEY LAND COUNCIL

"30 years strong"

Submission of the Kimberly Land Council to the Senate Committee on Environment and Communications, in relation to its inquiry into the following bills:

- ***Carbon Credits (Carbon Farming Initiative) Bill* 2011**
- ***Carbon Credits (Consequential Amendments) Bill* 2011**
- ***Australian National Registry of Emissions Units Bill* 2011**

15 April 2011

A. Introduction

1. The Kimberley Land Council Aboriginal Corporation (**KLC**) is an association of Aboriginal people in the Kimberley region. It is a peak regional community organisation.

2. The KLC was established in 1978 by Aboriginal people to work for the protection of traditional land and waters and is charged with the responsibility to protect, enhance and gain formal status (legal, social and political) for the customs, laws and traditions of Kimberley Traditional Owners.

3. As the Federal Government recognised native title representative body for the Kimberley region, the KLC has statutory functions under the *Native Title Act* (Cth) 1993 (the **Native Title Act**). In accordance with these functions, it assists Aboriginal people to obtain recognition of, and fully enjoy, their native title rights and interests.

4. The KLC is conscious of the dynamic change taking place in contemporary Aboriginal society, and emphasises the role of Kimberley Traditional Owners, our members, and communities in managing that change. In this context, it is dedicated to the development of a modern, sophisticated and innovative service to its members and the community.

5. The KLC sees the introduction of a Carbon Farming Initiative (**CFI**) as an important element in the development of a strong and vibrant community by allowing the development of viable commercial enterprise in a manner consistent with a sustainable future.

B. Summary

6. The KLC is grateful for this opportunity to comment on the proposed CFI scheme[1], and expresses its support for the development of a coherent national approach to this emerging market.

7. The KLC is concerned that there are some elements of the proposed CFI scheme that may create unnecessary barriers to the future development of enterprises by

[1] Reflected in the *Carbon Credits (Carbon Farming Initiative) Bill* 2011, *Carbon Credits (Consequential Amendments) Bill* 2011, and the *Australian National Registry of Emissions Units Bill* 2011.

Traditional Owners by reason of the way in which native title interests are treated in the Bills. The KLC is concerned that native title-based property rights are being treated differently, and less favourably, than other types of property rights under the new CFI scheme. This is particularly concerning given the expectation that native title holders will develop economic opportunities from the recognition of native title rights and interests. The essential question raised by the proposed CFI legislation is this – how can native title holders gain an economic benefit from the recognition of their native title rights if those rights are treated differently, and less favourably, in the marketplace? While existing marketplaces may not be able to accommodate native title and non-native title interests equally, new marketplaces that are being defined and developed through legislation such as the CFI should be designed on the basis that native title and non-native title property rights are equally effective for participation in the market.

8. The KLC's concerns are summarized as follows:

a. **Discrimination**

The treatment of non-exclusive native title is discriminatory and fails to accord proper importance to the interests carried by native title.

b. **Lack of Consent**

The scheme fails to include a provision for the consent of native title holders as eligible interest holders where a project is contemplated on native title land.

c. **Permanence**

The KLC is concerned that the effect of permanent obligations may inappropriately impair native title interests, and create an additional barrier to participation by Traditional Owners in the emerging market.

d. **Additionality**

The KLC is concerned that the provisions relevant to Additionality in the CFI scheme does not adequately cater for Traditional Owners, and may operate to deprive Traditional Owners of some of the benefits of commercial development via the CFI scheme.

e. **Constraints on manner of participation**

The KLC is concerned that participation of native title holders may be limited to participation via their registered native title body corporate[2]. The legislative arrangements should be sufficiently flexible to account for business entities representative of native title holders, other than a registered native title body corporate.

9. These concerns are set out more fully, below.

C. Discrimination

10. The KLC does not object to the treatment of exclusive native title land under the CFI scheme. However, as noted in the EM:

> *Aboriginal and Torres Strait Islander land is often held communally and differently to other forms of land tenure[3].*

11. The KLC acknowledges that the nature of native title presents complexities for the recognition and treatment of those rights. However, such complexities are addressed in the process of recognition and registration of rights under the *Native Title* Act, and there is no justification for registered rights held by Aboriginal and Torres Strait Islander people to be treated differently in a new legislative scheme. Non-exclusive native title rights constitute an interest in property[4], in the same way that non-exclusive interests such as pastoral leases constitute an interest in property, and ought to be recognized as such and treated equally and fairly.

12. The KLC observes that the effect of the proposed system would be to confer proprietary rights in carbon on holders of non-exclusive non-native title interests, while excluding non-exclusive native title holders simply by reason of the type of proprietary interest they hold. The KLC considers that there is a real risk that such an approach is inconsistent with the *Racial Discrimination Act* (1975) (Cth).

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2 *Carbon Credits (Carbon Farming Initiative) Bill 2011* s46(1).

3 Explanatory Memorandum entitled: *Carbon Faming Initiative: Proposed Treatment of Indigenous Land – March 2011*, paragraph 1.1.

4 The KLC rejects any suggestion that non-exclusive native title interests are relevantly analogous to a licence, as suggested in *Carbon Faming Initiative: Proposed Treatment of Indigenous Land* – March 2011, paragraph 1.25, and notes in any event that licenses may be sufficient to support an eligible project under the CFI scheme.

13. The KLC encourages a continuing dialogue with the Commonwealth to ensure that appropriate measures are put in place for the proper recognition of non-exclusive native title.

D. Consent

14. The KLC is concerned that the proposed system does not include provision for obtaining the consent of native title holders as eligible interest holders. If there were such a provision, then Traditional Owners' consent would be a precondition to the declaration of a project as an 'eligible offset project'[5].

15. The failure to provide for a consent requirement reduces the value of native title interests, places native title holders in a disadvantageous position in dealings with holders of other (non-native title) interests, and reduces the capacity for native title holders to develop sustainable businesses in partnership with private enterprise and their co-owners, or other interest-holders.

16. Further, it fails to recognise the full extent of interests of native title holders in their land, particularly in circumstances where some types of native title will be relevant to carbon storage (such as rights relevant to flora / fauna).

E. Permanence

17. The CFI regime as currently proposed includes provision for carbon storage for up to 100 years. This principle is reflected in:

    a. Section 16 – the risk of reversal buffer;

    b. Sections 79 – 83, the relinquishment provisions; and

    c. Sections 89 – 93 – the carbon maintenance obligations and carbon restoration orders.

18. These provisions together provide for permanence of carbon storage. In particular, the carbon maintenance obligation would be recorded on land titles. This is a matter of some concern to the KLC insofar as it may impede Traditional Owners' use and interest in their land for generations.

[5] See s 27(2)(a) or (b) of the *Carbon Credits (Carbon Farming Initiative) Bill* 2011.

19. The permanence created by ‘on-title’ records of CFI obligations has the potential to impact upon native title holders in a significant manner. The KLC is concerned that it could further exclude Traditional Owners from participation in emerging economic activities and reduce the available uses of the land.

20. In addition, it is not clear how the liability provisions would operate, and the scheme must be clarified, so that no liability could adhere to non-exclusive native title holders by reason of the imposition of a carbon maintenance obligation.

21. The KLC would welcome the opportunity to engage in dialogue to assist in considering how these difficulties may be overcome.

F. Additionality

22. It is a general principle of any carbon abatement scheme that an eligible project must result in a carbon abatement that would not have occurred without the CFI scheme. This is intended to ensure that the scheme has effect beyond ‘business as usual’ carbon reduction. This principle is known as ‘additionality’.

23. The KLC is concerned that additionality does not deter involvement in the CFI scheme by penalizing Traditional Owners for utilizing Government assistance and grants, or excluding those established on that basis.

24. In this regard, there is concern that budding Indigenous enterprise may be stymied by the need to either avoid Government assistance, or risk exclusion from the CFI scheme. The KLC considers that this may put at risk the considerable benefits to be gained for Traditional Owners in the development of sustainable and viable commercial enterprises.

25. The CFI should be clarified to ensure that presently existing assistance and development schemes co-exist with the new scheme to maximize Traditional Owners’ capacity to build viable and commercially sustainable enterprises capable of increasing autonomy and service delivery to Indigenous Australians.

F. Constraints on manner of participation

26. Section 46(1) of the *Carbon Credits (Carbon Farming Initiative) Bill 2011* provides that a registered native title body corporate (**RNTBC**) will be a deemed project

proponent in areas subject to determinations of exclusive possession native title rights and interests.

27. The KLC supports the initiative in the Bill to assist native title holders to participate in the carbon economy. However, it should be noted that the corporate structure of many native title holding communities may not be consistent with a RNTBC participating in commercial activities. The proposed legislation should be sufficiently flexible to reflect this, otherwise many native title holders will be either excluded from the scheme or forced to undertake restructuring of their corporate entities, including RNTBCs, to participate.

G. Conclusion

28. The KLC welcomes the opportunity to comment on the proposed CFI scheme. It seeks the opportunity to engage in a constructive dialogue to improve the benefits of the CFI scheme by properly acknowledging the interests of Traditional Owners.