Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017

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Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.
All hyperlinks in this Bills Digest are correct as at May 2017.
Purpose of the Bill

The purpose of the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017 (the Bill) is to amend provisions in the Carbon Credits (Carbon Farming Initiative) Act 2011 (the CFI Act) relating to the process for crediting greenhouse gas emissions reductions under the Emissions Reduction Fund, primarily to facilitate savanna fire management projects in Northern Australia.

Structure of the Bill

The Bill contains one schedule, divided into four parts:

- Part 1 amends provisions relating to the consent requirements for emissions-avoidance projects
- Part 2 clarifies the consent rights of certain government ministers for projects conducted on exclusive possession native title land
- Part 3 contains amendments relating to the variation of sequestration offsets projects and
- Part 4 contains amendments to allow the variation of regulatory approval or consent conditions for eligible offsets projects.

Background

The Carbon Farming Initiative and the Emissions Reduction Fund

The CFI Act was first enacted in 2011 to establish a voluntary carbon offsets scheme known as the Carbon Farming Initiative (CFI). The CFI allowed farmers and land managers to register projects and earn carbon credits through eligible carbon abatement activities which stored or reduced greenhouse gas (GHG) emissions on land. This included activities such as improved farming and landfill management practices as well as sequestration activities (that is, activities that store carbon in soil or plants).

The CFI was originally designed to complement the former ALP government’s carbon pricing mechanism. However, following the repeal of the carbon price in July 2014, the CFI Act was amended in 2014 to implement the ‘Emissions Reduction Fund’ (ERF). The 2014 amendments to the CFI Act effectively expanded the range of activities eligible to earn carbon credits, allowing the registration of projects from all sectors of the economy. In addition, the amendments established a system whereby the government can purchase those carbon credits (primarily via auction). These carbon credits are known as Australian Carbon Credit Units (ACCUs). ACCUs represent one tonne of carbon dioxide equivalent (CO₂-e) net abatement achieved by eligible activities (through either emissions reductions or carbon sequestration). Projects that were already registered under the CFI transitioned automatically to the ERF on its commencement on 13 December 2014.

The ERF is now the central component of the Government’s climate change policy, designed to reduce Australia’s greenhouse gas emissions. In short, the ERF is a voluntary scheme designed to provide financial incentives for businesses, landholders and communities to reduce GHG emissions. Under the ERF, the Government purchases greenhouse gas abatement, quantified by ACCUs, through an auction process administered by the Clean Energy Regulator (CER).

2. For further information on the carbon price mechanism, see Clean Energy Regulator (CER), ‘About the mechanism’, CER website, 11 May 2015.
6. Carbon dioxide equivalent or CO₂-e is a measure of the global warming potential of a greenhouse gas, based on its ability to absorb heat and its lifetime in the atmosphere, compared to carbon dioxide.
8. The Commonwealth Government is currently reviewing its climate change policies to ‘take stock of Australia’s progress in reducing emissions, and ensure the Government’s policies remain effective’: see further DEE, ‘Review of Australia’s climate change policies’, DEE website.
The first five auctions held under the ERF have resulted in the purchase of 189 million tonnes CO₂-e in emissions reductions at an average price of $11.83 per tonne. Of the $2.55 billion allocated to the ERF, $2.2 billion has now been spent, leaving $300 million remaining. Further funding for the ERF will ‘be considered in future budgets’. More broadly, the Commonwealth Government is currently reviewing Australia’s climate change policies, including the ERF.

Carbon credits

Before a project can participate (or bid) in an ERF auction, it must be eligible and registered with the CER. The process for crediting emissions reductions is a key element of the ERF. The CER issues ACCUs for greenhouse gas abatement activities from registered projects. The number of ACCUs issued is determined based on emissions reduction methods, which are legislative instruments setting out the rules for estimating the GHG reductions from different activities. Once ACCUs have been issued they can be purchased by the Government through the Emissions Reduction Fund or sold to organisations that wish to offset their emissions. Projects are credited under the ERF for a single defined crediting period, which is the period of time over which a project can create ACCUs. In general, emissions reduction projects have a crediting period of seven years and sequestration projects have a crediting period of 25 years (see further below).

As noted above, the Clean Energy Regulator is responsible for administering the ERF, including registering eligible projects, running auctions, managing contracts and issuing ACCUs. The Department of the Environment and Energy is responsible for developing new emissions reduction methods, made through ‘methodology determinations’.

What are sequestration offsets projects?

Carbon abatement under the ERF comes in two forms as described in the CFI Act. Emissions avoidance offsets projects receive credits for activities that avoid greenhouse gases from being released into the atmosphere. Once emissions have been avoided, there is a permanent saving and such projects can leave the ERF at any time.

Sequestration refers to the permanent storage of carbon in the landscape, in trees, soil, or dead organic matter. Sequestration offsets projects generate abatement by removing carbon dioxide from the atmosphere and storing it as carbon, for example, in plants as they grow. Examples of sequestration activities include reforestation and revegetation. Sequestration offsets projects receive credits for carbon dioxide that is stored in the landscape and should represent long-term storage of carbon in vegetation or soil. These projects are therefore subject to permanence obligations under the ERF and are required to choose either a 25-year or a 100-year permanence period. If the 25-year option is chosen, there is a 20 per cent reduction in the number of ACCUs issued for the project. This reduction is in addition to the five per cent risk of reversal buffer (a total reduction of 25 per cent). A ‘risk of reversal buffer’ also applies to all sequestration projects, which reduces the carbon abatement achieved during a reporting period by five per cent. If they leave the ERF before the end of their permanence period, sequestration projects need to hand back any credits issued over the life of the project.

18. See further, for example, Department of the Environment, *The emissions reduction fund: storing carbon*, 2014.
Savanna fire management
One method for reducing emissions under the ERF that is particularly relevant to this Bill is savanna fire management.22 Savanna fire management projects aim to avoid greenhouse gas emissions by undertaking early, dry season burns to reduce the numbers, size and intensity of wild fires in the late dry season in northern Australia (these later fires emit more greenhouse gas emissions than lower intensity early fires).23 The Government is currently proposing to develop a new method to credit both the avoided emissions from early dry season burning as well as the increase in the storage of carbon in dead organic matter, which would be the first method to credit both the storage of carbon and avoidance of emissions in the same project.24 The Government is proposing to revoke the existing Carbon Credits (Carbon Farming Initiative—Emissions Abatement through Savanna Fire Management) Methodology Determination 2015.25 The Explanatory Memorandum to the Bill states:

Consultation on the new methodology determinations has highlighted a number of elements of the [CFI] Act which are an unnecessary impediment to participation in both the existing methods and the new proposed method to credit the storage (sequestration) of carbon and avoidance of emissions.26

As such, many of the amendments in the Bill ‘seek to address those impediments in a manner which will also assist other projects to store carbon in the landscape’27

Committee consideration

Environment and Communications Committee
The Bill was referred to the Senate Environment and Communications Legislation Committee for inquiry.28 The Committee received 13 submissions and reported on 9 May 2017.29 Further details are available at the inquiry homepage.

The Committee’s majority report recommended that the Bill be passed. However, ALP Senators wrote a dissenting report, raising concerns in relation to the proposed amendments to consent requirements in Part 1 of Schedule 1 of the Bill. The Australian Greens’ additional comments raised similar concerns. These concerns, along with comments made in submissions to the inquiry, are discussed in further detail later in this Digest.

Senate Standing Committee for the Scrutiny of Bills
The Senate Standing Committee for the Scrutiny of Bills had no comment on the Bill.30

Policy position of non-government parties/independents
In their dissenting report in the Senate Committee report on the Bill, ALP Senators recommended that the Bill not be passed in its current form, given their concerns in relation to amendments to consent requirements in Part 1 of Schedule 1 of the Bill (see further ‘Key issues and provisions’ for an explanation of these provisions).31 ALP Senators expressed deep concern that ‘the Government has used remediying a so-called drafting error to remove consent rights for emission avoidance offset projects from native title holders’.32 ALP Senators recommended that the Bill ‘explicitly include a requirement for project proponents to obtain the consent of native title holders prior to the registration of the project’.33 ALP Senators indicated that the ALP has prepared a

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23. Ibid., p. 3.
24. Ibid., p. 3.
27. Ibid.
32. Ibid., p. 17.
33. Ibid., p. 20.
‘second reading amendment to protect native title holders from having their consent requirements removed’.\(^{34}\)

At the time of writing, this amendment was not publicly available.

ALP Senators were broadly supportive of the remaining amendments proposed in the Bill, which they considered ‘will improve the functioning of Australia’s carbon credit system’.\(^{35}\)

The Australian Greens have also expressed concern about the amendments to consent requirements in the Bill, and more broadly about the ‘differential treatment of native title claimants compared with determined native title holders’ in the Bill.\(^{36}\) The Australian Greens recommended that item 1 of Part 1 of Schedule 1 be removed from the Bill, and that further consultation with Aboriginal and Torres Strait Islander peoples be carried out in relation to item 2 of Schedule 1 of the Bill.\(^{37}\)

**Position of major interest groups**

The Cape York Land Council, the Kimberley Land Council, and Law Council of Australia have raised concerns with the proposed amendment relating to consent requirements in Part 1 of Schedule 1 of the Bill.\(^{38}\) These issues are discussed in further detail in the ‘Key issues and provisions’ section of this Digest.

Other submissions made by ERF participants generally supported the Bill, including the proposed changes to consent requirements. For example, Corporate Carbon Advisory considered that the ‘amendments seek to remove impediments within the [CFI] Act that would otherwise hamper the abatement potential from savanna projects’.\(^{39}\)

The Australian Wildlife Conservancy noted that five of its carbon abatement projects were affected by the unintended introduction of the consent requirements in 2014, which had prevented them from receiving carbon credits due to those projects. The Australian Wildlife Conservancy also supported the other changes proposed by the Bill, noting that ‘the process of setting up and reporting on abatement projects is already onerous, and it is important that the ability to claim for sequestration introduces as few extra difficulties as possible’.\(^{40}\)

**Financial implications**

According to the Explanatory Memorandum, the Bill has no financial implications.\(^{41}\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^{42}\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights considered that the Bill does not raise human rights concerns.\(^{43}\)

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34. Ibid., p. 18.
35. Ibid., p. 17.
37. Ibid., pp. 23–24.
41. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 5.
42. The Statement of Compatibility with Human Rights can be found at pages 19–20 of the Explanatory Memorandum to the Bill.
Key issues and provisions

Amendments to consent requirements

As noted earlier in this Digest, before a project can earn ACCUs under the CFI Act, a project must be eligible and registered with the CER. The process and criteria for the CER to make a declaration that a project is an ‘eligible offsets project’ are set out in Part 3 of the CFI Act. In particular, section 27 provides for the CER to declare a project to be an eligible offsets project, subject to certain criteria. Section 28A then provides that the declaration must be subject to a condition requiring the consent of ‘relevant interest holders’ in the land in the project area. Under subsection 28A(2), that consent must currently be obtained before the end of the first reporting period for the project.44 Consent must be in a form approved, in writing, by the CER.45

A person is a ‘relevant interest holder’ if they hold an ‘eligible interest’ in the project area. Section 5 of the CFI Act provides that an eligible interest, in relation to an area of land, has the meaning given by sections 43, 44, 45 or 45A. For example, under section 45A, the registered native title body corporate for an area of native title land holds an eligible interest in the land.

When the CFI was first initiated, this consent requirement was contained in paragraph 27(4)(k) of the CFI Act and required that all eligible interest holders consent only to applications for sequestration offsets projects.46 This consent requirement was limited to sequestration offsets projects because they were the only projects subject to a ‘permanence’ obligation. A permanence obligation ensures that stored carbon is maintained for a certain period of time (see the discussion earlier in this Digest).47

When the CFI Act was amended in 2014, paragraph 27(4)(k) was repealed and section 28A was inserted to maintain the requirement to obtain consent.48 The intention in 2014 was set out in the Explanatory Memorandum:

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.49

However, the wording of section 28A as currently drafted is not limited to sequestration projects. The Explanatory Memorandum to the current Bill states that ‘an error was introduced in the Act when it was amended in 2014’, which ‘inadvertently applied the consent requirements’ to all offsets projects, not just sequestration projects. This means the consent requirement applies to other projects such savanna fire management projects and irrigated cotton projects.50 These projects are not subject to permanence obligations, and the Explanatory Memorandum argues that ‘there is no need for the consent of a wide range of eligible interest holders to be obtained’ and thus such projects have been ‘unintentionally subject to an unnecessary regulatory burden’.51

According to the Explanatory Memorandum, a number of projects have been affected by the consent requirement in section 28A:

As at the beginning of March 2017, over 20 savanna emissions-avoidance projects are subject to a requirement to obtain these consents and would benefit from the amendments.52

The amendments in items 1 and 2 purport to rectify this issue, meaning that consent under section 28A would not be required for emissions avoidance projects. Item 1 of Part 1 of Schedule 1 of the Bill amends paragraph 28A(1)(a) of the CFI Act to replace the term ‘offsets project’ with ‘sequestration offsets project’. This means that

44. The relevant reporting timeframes and requirements are set out in section 76 of the CFI Act. Note also the proposed amendments to the variation of conditional declarations may affect this requirement, as discussed later in this Digest.
45. CFI Act, subsection 28A(3).
46. Carbon Credits (Carbon Farming Initiative) Act 2011 (as made).
47. Replacemnet Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011, p. 43; see also Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 7.
49. Explanatory Memorandum, Carbon Farming Initiative Amendment Bill 2014, p. 27.
50. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 3.
51. Ibid., p. 8.
52. Ibid., p. 3.
the obligation to obtain consent of relevant interest-holders would only apply to sequestration offsets projects and not to emissions-avoidance projects. The Explanatory Memorandum notes that, while the consent requirements will not apply, emissions avoidance projects must still demonstrate that they have the legal right to carry out the project, ‘which will often necessitate consultation or agreement from other landholders’.\(^{53}\)

**Item 2** is a transitional provision which would remove the effect of any conditional declarations requiring the consent of relevant interest holders for non-sequestration offsets projects made since the commencement of the 2014 amendments.

Note that these same provisions were contained in the *Omnibus Repeal Day (Spring 2015) Bill 2015* (Spring Omnibus Bill).\(^{54}\) The Explanatory Memorandum to this Bill states that those amendments were introduced ‘in response to representations from proponents of savanna fire management projects’.\(^{55}\) The Spring Omnibus Bill lapsed at the prorogation of parliament on 17 April 2016. The Explanatory Memorandum to this Bill indicates that, during consultation in November 2016, savanna fire management proponents had reiterated the need to remove the requirement for consent for savanna fire management from the *CFI Act*.\(^{56}\)

**Stakeholder views on consent**

The positions of ALP Senators and the Australian Greens in relation to these amendments were discussed earlier in this Digest. These were a response to concerns raised in submissions to the Senate inquiry into the Bill. Although the Government argued that **items 1 and 2** are effectively correcting a drafting error made in 2014, several stakeholders were opposed to these amendments.

The Cape York Land Council, for example, strongly objected to the proposal to amend section 28A to remove the requirement to impose a condition related to the consent of Aboriginal land holders and native title holders.\(^{57}\) The Cape York Land Council suggested that the requirement should be retained, and a review conducted of the CER’s enforcement of the ‘legal right’ and ‘eligible interest holder consent’ provisions in the *CFI Act*.\(^{58}\)

Similarly, the Law Council of Australia considered that ‘the impact of removing a consent right for Indigenous interest holders is a significant issue’, given that activities such as savanna fire management have a clear capacity to interfere with Indigenous people’s rights and interests in areas of their traditional country:

> … consent should be required for any land-based project that may interfere with their rights and interests. In effect, this applies to both sequestration projects (due to permanence obligations), but also emissions avoidance projects that may impair /interrupt co-existing rights and interests.\(^{59}\)

The Law Council further suggested:

> If the eligible interest holder consent requirement is removed from a sub-set of area-based offset projects, it will be incumbent on native title holders and their representative bodies to monitor registration of ERF projects and challenge a potential proponent’s legal right to undertake a project on an ad-hoc basis.\(^{60}\)

The Law Council considered that there ‘should be no change to the nature of consent requirements under the *CFI Act* ahead of the Australian Government’s climate change policy review’, but that, at a minimum, the Bill should be amended to empower the Regulator to require consent or engagement as a discretionary condition with respect to emissions avoidance projects.\(^{61}\)

In contrast, ERF participants, such as Corporate Carbon Advisory, Consolidated Pastoral Company and the Australian Wildlife Conservancy were supportive of the proposed changes to consent requirements in their submissions to the Senate inquiry into the Bill. For example, Consolidated Pastoral Company (CPC) submitted

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53. Ibid., p. 3. See also CER, ‘*Legal right*’, CER website, 1 December 2016.
55. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 5.
56. Ibid., p. 6; see also DEE, ‘*Savanna fire management draft methods: consultation*’, op. cit.
57. CYLC, Submission to the Senate, op. cit., p. 2.
58. Ibid., p. 3.
59. Law Council of Australia, Submission to the Senate, op. cit., p. 2.
60. Ibid., p. 4.
61. Ibid., pp. 5–6.
that, it will ‘meet fully its obligations to properly engage with Registered Native Title Body Corporates (RNTBC) and all other stakeholders’. However, at the same time, CPC suggested that ‘the current consent requirements are a significant impediment to advancing its savanna emissions avoidance project’, particularly ‘the cost and time to obtain consent’ from traditional owners, which it estimated at over $100,000 and between 12 to 18 months. CPC concluded:

While this process should be undertaken, it should not be an impediment to the CPC Savanna project being issued ACCUs from a project which has barely generated only enough ACCU’s to break even from 2016. In summary, the consultation process would render the CPC project financially unviable with no guarantee of success.

The Australian Wildlife Conservancy advised that it currently had six registered carbon abatement projects, five of which were affected by the drafting error in the 2014 amendments. The Conservancy noted ‘this has prevented us from receiving the carbon credits due to us on those projects for 2015 and 2016’, and ‘therefore it is not only important to correct the errors, but to make the corrections apply retroactively to existing projects’.

The Department of the Environment and Energy reiterated in its submission that ‘it was never the intention that projects that avoid emissions, such as savanna fire management projects under current methods, would require consent from third parties’ as they do not impose long term legal obligations. The Department explained that ‘projects that fail to obtain these consents risk being revoked, and consequently will not be able to reduce emissions and earn revenue’. The Department advised that ‘over 20 registered savanna fire management projects’ are subject to unintended requirements to obtain consent from third parties and that ‘the Bill needs to take effect by July 2017 to avoid contracted projects being revoked’. It is unclear from the Department’s submission exactly how many of the 20 projects have actually failed to obtain the required consent, although the Law Council of Australia’s submission suggests that 12 savanna fire management projects awarded ERF contracts remain subject to eligible interest holder consents.

Eligible interests in exclusive possession native title land

As noted above, under the CFI Act, consent must be given by all ‘relevant interest holders’ in the land in an offsets project area. Under paragraph 28A(1)(c), relevant interest holders are those who hold an ‘eligible interest’ in the project area or areas. Section 5 of the CFI Act provides that an ‘eligible interest’, in relation to an area of land, has the meaning given by sections 43, 44, 45 or 45A. Subsections 44(4) and 45(2) provide that, if the area of land is Crown land, the eligible interest holder is the Crown lands Minister in the relevant state or territory. This means that the relevant Crown lands Minister needs to give consent in relation to an offsets project on Crown land.

Items 3 and 4 of the Bill propose to amend sections 44 and 45 of the CFI Act to clarify that relevant state and territory Crown lands ministers may only have an eligible interest in certain land where that land is not exclusive possession native title land and not land rights land.

The Explanatory Memorandum states that this reflects the original intention of the CFI Act:

The 2011 Act expressed a clear intention that those with determined exclusive possession native title should not need the consent of a State, Territory or Commonwealth Minister to participate in the scheme. Items 3 and 4 of Schedule 1 to this Bill remove any doubt that State and Territory Government Crown lands Ministers and Commonwealth Ministers responsible for land rights legislation do not have consent rights for projects conducted on exclusive possession native title land ...

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63. Ibid.
64. AWC, Submission to the Senate, op. cit., p. 1.
65. DEE, Submission to the Senate Standing Committee on Environment and Communications, Inquiry into the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, submission no. 5, 10 April 2017, p. 3.
66. Ibid.
67. Law Council of Australia, Submission to the Senate, op. cit., p. 5 and Attachment A.
68. Note that section 44 only applies to Torrens system land, while section 45 applies to Crown land that is not Torrens system land.
69. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, pp. 3–4; see also p. 9.
This amendment was welcomed by the Law Council of Australia and the Kimberley Land Council because it would provide clarity ‘that Crown land Ministers do not have eligible interest consent rights with respect to exclusive possession native title land’.70

**Varying sequestration projects**

**Net total number**

In certain circumstances, project proponents relinquish ACCUs to the CER. This includes, for example, where a sequestration offsets project is voluntarily terminated (section 32), or where a project is revoked by the CER (sections 89, 90 and 91).

In these circumstances, the project proponent has to hand back the same number of ACCUs that were issued for the project.71 This number is referred to as the ‘net total number’ of ACCUs issued in relation to an eligible offsets project. Section 42 of the CFI Act provides a formula for determining the ‘net total number’ of ACCUs issued in relation to an eligible offsets project. Currently, this formula provides that the ‘net total number’ is the number of ACCUs issued, minus any ACCUs previously required to be relinquished.

**Item 6** of the Bill proposes to replace section 42 with a new formula to calculate the ‘net total number’ of ACCUs. Under the new formula, ‘net total number’ will be calculated by counting the total number of ACCUs issued, minus any ACCUs issued for emissions avoidance activities, minus ACCUs relinquished.

The terms used in the formula will also be defined. In particular, ‘units relinquished’ will be defined to mean:

- the total number of ACCUs relinquished in order to remove an area from a project area (under section 29, as proposed to be amended by the Bill: see ‘varying the project area’ below)
- comply with a sequestration related requirement under Part 7 of the CFI Act72 or
- to apply a specified methodology determination to the project (under section 130).

As the Explanatory Memorandum states, this will ensure a sequestration project’s net total liability under the scheme does not include credits for emissions avoidance or credits that have already been relinquished. The Explanatory Memorandum further suggests that ‘without this amendment there would be a significant impediment to the uptake of the proposed savanna sequestration method’.73 As noted earlier, this proposed savanna sequestration method would allow carbon credits to be earned for both emissions avoidance and stored carbon. The Explanatory Memorandum gives the following example to explain the need for this change:

> For example, a savanna sequestration project may have been issued 300,000 sequestration and 100,000 emissions avoidance credits in 2017. Under the current legislation, it would have a net total number of 400,000. After the amendments, the net total number would be 300,000. Therefore, to exit the scheme only 300,000 ACCUs would need to be relinquished rather than 400,000. The 100,000 credits issued for emissions avoidance are retained by the project because those emissions have been permanently avoided.74

The proposed new definition of ‘net total number’ would also reduce the complexities involved in varying the size of a project area (as discussed below).75

**Varying the project area**

Section 29 of the CFI Act enables regulations or legislative rules to be made empowering the CER to vary a declaration of an eligible offsets project in relation to the project area or areas on application by the project proponent. This provision was designed to allow areas of land to be added to or removed from a project.76

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70. Law Council of Australia, Submission to the Senate, op. cit., p. 3; KLC, Submission to the Senate, op. cit., p. 4.
71. CFI Act, subsection 32(2).
72. That is, for example, where relinquishment is required as the result of providing false or misleading information (Division 2 of Part 7) or as a result of the revocation of a sequestration offsets project (Division 3 of Part 7).
73. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 4.
75. See further Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 11.
76. Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011, p. 31.
However, the Explanatory Memorandum suggests that ‘it is currently very difficult to remove part of a sequestration project if credits have been issued for that area’. 77

Item 5 of the Bill would amend section 29 to specifically allow the regulations or legislative rules to deal with the situation where a declaration is varied to remove part of a project area. In particular, new paragraph 29(3)(l) would allow the rules or regulations to make provision for a determination by the CER of the net total number of ACCUs issued in relation to the area to be removed and for conditions to be met relating to those ACCUs.

According to the Explanatory Memorandum this amendment will ‘make it easier for a proponent to voluntarily remove an area of land from their project and ensure carbon credits required to be returned to the Government only relate to the area of land being removed’. 78 In particular, the rules will ‘deal with how the estimation of this net total number will be undertaken given the potential difficulties in recalculating crediting for periods in the past for a subset of a project previously reported on as a whole’. 79

Arguably, section 29 already allowed for the rules and regulations to do this as subsection 29(1) provides a broad power to make rules and regulations empowering the CER to vary a declaration in so far as it identifies the project area or areas. Subsection 29(3) lists matters that the rules and regulations may make provisions for, but subsection 29(4) provides that this list does not limit the regulation-making power. Nevertheless, this amendment would provide clarity in relation to the breadth of the regulation making power.

Climate Friendly, a carbon farming project developer, supported the amendments to facilitate the remove of parts of projects, describing them as ‘of critical importance’. Climate Friendly considered that these amendments will provide ‘increased flexibility to adjust projects over time while maintaining scheme integrity’ and remove unnecessary administrative burdens on project participants. 80

Transferring between offsets project types

The Bill also contains a number of amendments designed to facilitate the transfer of projects between emissions avoidance and sequestration projects.

As noted earlier in this Digest, sequestration projects are subject to permanence obligations. 81 When initially enacted, the CFI scheme provided for a 100-year permanence period, meaning that the project needed to be maintained on a net basis for 100 years. This requirement was amended with the introduction of the ERF in 2014 to allow proponents of sequestration projects to nominate a 100- or 25-year permanence period when they apply to register their project. 82 At the same time, section 31A was inserted into the CFI Act to provide that the CER cannot vary the permanence period following the CER’s declaration of the project ‘as this would create complexity calculating credits’. 83

Item 15 proposes to amend section 31A to clarify that the section only applies to sequestration offsets projects, which are, in any case, the only projects subject to permanence periods. Item 16 would then add a proposed subsection 31A(3) to provide that the CER would not be prevented from removing a declaration relating to a permanence period if the project is no longer a sequestration offsets project (proposed paragraph 31A(3)(a)). Under proposed paragraph 31A(3)(b), the CER would also not be prevented from making a different declaration in relation to the permanence period if the project becomes a sequestration offsets project at a later date.

The Explanatory Memorandum states that ‘this will allow the Clean Energy Regulator to remove a declaration relating to a permanence period for projects which have transitioned from a sequestration offsets project to an

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77. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, p. 4.
78. Ibid.
79. Ibid., p. 11.
80. Climate Friendly, Submission to the Senate Standing Committee on Environment and Communications, Inquiry into the Carbon Credits (Carbon Farming Initiative) Amendment Bill 2017, submission no. 7, 11 April 2017, p. 3.
82. CFI Act, paragraph 23(1)(g). Note that items 10 to 13 of the Bill change the location of the definitions of ‘25-year permanence period’ and ‘100-year permanence period’ in the CFI Act. The changes do not alter the meaning of these terms.
83. Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2014, p. 66.
emissions-avoidance offsets project. In particular, these amendments ‘will facilitate transfer of projects to the proposed savanna sequestration method that credits both emissions avoidance and sequestration’. Items 21 to 24, 26 and 27 also contain amendments designed to facilitate the transfer of projects. Section 128 of the CFI Act allows a project proponent to request the CER to change the approved methodology determination applicable to their project. Item 21 would insert a requirement that, where such a request would result in the project becoming a sequestration offsets project, the proponent must also specify in their request whether the project should be treated as either a 100-year permanence project or a 25-year permanence project.

Section 130 of the CFI Act then provides the CER may approve a request to change the methodology applicable to a project if satisfied that the project is covered by the relevant methodology determination. Item 22 would amend section 130 to clarify that the CER must not approve the transfer of projects between emissions avoidance and sequestration projects unless the CER is satisfied of certain additional matters. In particular, before a project can become a sequestration project, the written consent of all eligible interest holders (see the earlier discussion on this topic) is required under proposed paragraph 130(3)(c). Under proposed paragraph 130(3)(b), if a project moves to an emissions avoidance project, sequestration credits must be relinquished. In addition, item 23 inserts a new paragraph 130(4A)(aa) which would require the CER to amend the project declaration to remove conditions relating to permanence and consent.

Crediting periods

Under the ERF, projects are registered for a specific crediting period. The crediting period is the period of time over which a project can create ACCUs. In general, the crediting period for emissions avoidance offsets projects is seven years, while sequestration projects have a crediting period of 25 years. Methodology determinations can also specify crediting periods of different lengths, including periods longer than 25 years. However, an issue has been identified in relation to some provisions of the CFI Act which may be problematic for sequestration projects with a permanence period of 25 years and a crediting period longer than 25 years.

For example, section 89 currently provides that the CER may require a proponent to relinquish a specific number of ACCUs where their sequestration offsets project has been revoked by the CER. However, the application of this section is limited. In particular, where the revoked project’s declaration has been varied to add one or more project areas, section 89 only applies if the period that has passed since the last variation is shorter than the permanence period for the project (see paragraph 89(1)(e)). Where the revoked project’s declaration has never been varied to add one or more project areas, section 89 only applies if the period that has passed since first ACCUs were issued for the project is shorter than the permanence period for the project (see paragraph 89(1)(d)). In short, this means that if crediting periods longer than 25 years were to be implemented for particular sequestration projects, the current Act ‘would operate so that permanence obligations could not be enforced for projects which took this option along with a 25-year permanence period’.

Thus these provisions may create issues for sequestration projects with a permanence period of 25 years, if their crediting period is longer than 25 years. Items 17 to 20 of the Bill propose to address this issue by ensuring that relinquishment requirements and carbon maintenance obligations still apply to projects where the crediting period extends beyond a 25-year permanence period.

Item 17 would amend paragraphs 89(1)(d) and (e) to provide that section 89 also applies in these situations if the crediting period, or the last of the crediting periods, for the project has not yet ended. Items 18 to 20 of the Bill contain similar amendments to sections 90, 91 and 97 of the CFI Act. According to the Explanatory Memorandum, these amendments will facilitate consideration of longer crediting arrangements for savanna sequestration projects. In particular, these amendments ‘will provide flexibility to extend the crediting period of savanna sequestration projects without providing credits to projects that are not subject to enforcement of their permanence obligations relating to those credits’.

85. Ibid., p. 4.
86. Proposed subsections 130(3A) to (3D) in Item 22 then mirror existing subsections in section 28A as to the form of the consents.
87. CFI Act, section 68.
89. Ibid.
90. Ibid., pp. 4–5.
Section 167 of the *CFI Act* provides for a register of eligible offsets projects to be maintained and made publicly available on the CER’s website. Section 168 sets out the information that must be provided in that register. **Item 25** would amend section 168 to require the end date of a project’s crediting period to be included in the register.

**Variation of conditional declarations**

Before a project can be declared an eligible offsets project under the *CFI Act*, the CER must generally be satisfied that the project proponent has obtained all regulatory approvals, such as Commonwealth, state or territory planning and environmental approvals. If the relevant regulatory approvals have yet to be obtained, section 28 of the *CFI Act* provides that the CER can issue a declaration that is conditional on the project obtaining these approvals before the end of the project’s first reporting period.91 Section 28A further provides that the CER’s declaration may also be subject to a condition requiring the consent of relevant interest holders before the end of the first reporting period for the project.

Section 31 then provides for regulations or legislative rules to be made to empower the CER to vary a declaration by removing conditions imposed under section 28 and 28A. However, the regulations or rules cannot empower the CER to vary a declaration unless:

- the project proponent has applied to the CER to vary the declaration to remove the relevant condition (paragraph 31(3)(a)) and
- the CER is satisfied that the condition has been met (paragraph 31(3)(b)).

**Item 29** of the Bill proposes to amend paragraph 31(3)(b) to provide that the relevant rules or regulations cannot empower the CER to vary a declaration unless the CER is satisfied that all regulatory approvals have been obtained for the project and the written consent of each relevant interest-holder has been obtained.

This will allow the CER to vary a declaration to remove conditions relating to regulatory approvals or consents of eligible interest holders ‘where any regulatory approval or consent was obtained after the end of the first reporting period for the project’.92 This amendment is designed to recognise that ‘there are circumstances where approvals or consents may not be obtained until after that period’.93 However, the Explanatory Memorandum does state:

> Project proponents are still intended to use all reasonable endeavours to obtain regulatory approvals or consents before the end of the first reporting period for the project as required by subsections 28(2) and 28A(2). Failure to do so risks the revocation of the declaration of the project and no credits may be issued while these conditions are not met.94

93. Ibid., p. 5.
94. Ibid., p. 18.