

3 October 2023

By email only: ACCUScheme@dcceew.gov.au

Dear Sir/Madam,

RE: Independent Review of ACCUs – implementation

1. QSNTS provides the following submissions in response to the ACCU Review Discussion Paper.
2. These submissions, much like the Discussion Paper, will focus on Recommendation 11 and Recommendation 5 of the Chubb Report.
3. These submissions are prepared from a practitioner's perspective. That is, we draw on our experience representing Registered Native Title Prescribed Bodies Corporate (RNTBCs) in carbon negotiations. For this reason, our submissions are largely shaped by the projects, proponents and nature of native title rights and interests common to our representative body region.
4. The projects registered in our area have the following characteristics:
 - a. The project site is a pastoral property over which the pastoralist holds a non-exclusive lease
 - b. Our clients hold non-exclusive native title rights and interests over the lease area
 - c. As explained by the High Court in Wik¹, our clients' rights co-exist with the pastoral interests, subject to the extent of any inconsistency
 - d. Typically, the pastoralist either enters into an agreement with a Carbon Project Developer or aggregator (collectively referred to as the "**carbon developer**"). Under the agreement:
 - i. ., The pastoralists sign over the "legal right" to develop and carry out the project to the carbon developer which then allows the carbon developer to be registered as the project proponent.
 - ii. The project proponent is entitled to **all** of the Australian Carbon Credit Units (**ACCUs**) generated from the project.
 - iii. In exchange for signing over the "legal right" to carry out the project, the pastoralist negotiates to receive a decent percentage of the ACCUs.

or , enters into an agreement with a Carbon Service Provider. Under those agreements:

¹ *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 (**Wik**)

- iv. The pastoralist is said to hold the “legal right” to carry out the project.
 - v. As the project proponent, the pastoralist is entitled to all of the ACCUs generated from the project.
 - vi. The pastoralists agrees to exchange some of the ACCUs to the Carbon Service Provider or aggregator, in exchange for the service provider’s assistance in the implementation and management of the project.
- 5. That is, in our representative region, under both forms of these agreements, the pastoralist and carbon developer or service provider initially **negotiate and reach a concluded agreement without any involvement from native title holders**. It is via these negotiations that key aspects of the project are discussed and locked in, including:
 - a. Who the project proponent (the person entitled to all the ACCUs) will be.
 - b. The length of the project
 - c. The project area
 - d. The project method.
- 6. In many of these instances, the project is then conditionally registered well before relevant Traditional Owners are even aware of the project.

Recommendation 11 – conditional registration

- 7. The factual summary above, makes clear that our clients are not being afforded the right to free, prior and informed consent. That failure is not cured by the RNTBC’s status as an eligible interest holder. Where the native title holder’s consent is being sought so late in the process, the room to negotiate changes to the project and the benefits being offered are often restricted because of the preceding agreement reached between the pastoralist and the carbon developer.
- 8. In addition to our concerns around free, prior and informed consent, we question the legality of projects that have been conditionally registered where:
 - a. the pastoralist has assigned the legal right to a carbon project proponent or;
 - b. registered a project on the basis that the pastoralist holds the legal right.
- 9. Given the co-existence principles established in *Wik* we consider that our clients and the pastoralist **jointly** hold the legal right to carry out the project and be issued ACCUs created as a result of the project activities.
- 10. It follows that, in our view, the pastoralist does not hold the power to unilaterally assign the legal right (which our clients jointly hold) to a project developer or aggregator under an

agreement to which the RNTBC is not a party and had no significant input.

11. In our submission, in order for RNTBCs to make an informed decision in accordance with their right to FPIC as to whether (a) it will assign its legal right to a project developer or (b) provide consent on behalf of common law native title holders as an eligible interest holder, RNTBCs must:
 - a. be engaged in the initial project design, including in relation to the project area, project methodology, permanence period and distribution of ACCUs
 - b. be provided with, and actively contribute to the development of:
 - i. The Project Management Plan
 - ii. The material referred to at CI 2.2 (3) (iii)(A) of the Australian Carbon Industry Code of Conduct
 - iii. The details of the potential project set out at pages 17-19 Indigenous Carbon Industry Network's *Best Practice Guide for Carbon Developers on Seeking Free, Prior and Informed Consent (FPIC) from Indigenous Communities*, 2020
 - c. be a party in any agreement between the pastoralist and project developer or service provider, in order to ensure the legal right is not assigned by the pastoralist alone, and to actively participate in any negotiations about the distribution of ACCUs
 - d. Have independent economic advice on the costs and potential benefits associated with the project, including the distribution of ACCUs
12. None of this is possible if projects are able to be registered prior to native title holders' consent being provided.
13. The Discussion Paper proposes three different options:
 - a. Option 1; initial written consent to the registration of the project be provided by the native title holders, with full consent being provided at a later time
 - b. Option 2; continue to allow conditional registration of projects with a fee payable by the proponent to the RNTBC
 - c. Option 3; Full native title consent provided before registration of a project.
14. The difficulty with Option 1, is that on QSNTS's recommendation, RNTBCs in our region treat the provision of a consent to a carbon project as a "native title decision" as defined by the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

That is, RNTBCs are required to consult with and gain the consent from native title holders. That consultation generally takes place via convening a resource intensive native title holders meeting.

Preliminary, or initial, consent still impacts on the exercise of native title rights and interests and would be treated as a native title decision and require consultation with, and consent of,

the native title holders. It is difficult to see the utility in holding such a meeting when the detail of the project and the benefits that may flow from it are not yet known. That leads to the question, what are the native title holders consenting to?

15. An alternative that perhaps reflects the intention of Option1, is to have the parties agree to attempt to reach agreement with agreed guiding principles as to how the negotiations will take place, set out in a negotiation protocol.

The negotiation protocol could:

- a. acknowledge the “joint” legal right held by the native title party and the pastoralist
 - b. confirm commitments by carbon proponents to fund the native title parties’ costs associated with economic advice, legal advice and negotiation meetings
 - c. confirm the exchange of relevant information to ensure transparency and informed decision making
 - d. provide a commitment towards working together to design key aspects of the project and the distribution of ACCUs.
16. Option 2, and the monetary payments contemplated is not a substitute for FPIC. That is, proponents should not be able to buy their way out of applying FPIC principles.
17. Option 3, allows for the most certainty for both the project proponent and the RNTBC. By not allowing projects to be registered without native title holder consent, proponents will be required to negotiate more comprehensively and meaningfully with native title holders.

QSNTS would go further and suggests DCCEEW consider the matters raised at paragraph 11 above to ensure project proponents have applied the principles of FPIC when negotiating with native title holders.

Recommendation 5 – Proponent led method development and the integrity committee

18. The discussion paper does not clearly define “proponent” in the context of this discussion.

Given the destruction of country by big mining, oil and gas companies, QSNTS on behalf of its clients urges caution in allowing such profit driven companies to lead the design and development of new methodologies.

19. Introducing third party, profit driven project design will require comprehensive oversight by a representative, expert integrity committee, as contemplated in the recommendation. This committee must include First Nations representation. The committee must also have access to legal and other expert advice in order to assess the impact and alleged benefit said to be generated from the proposed methodology.

20. Should the concept of proponent lead methodology design be implemented by DEECW, QSNTS strongly suggests that a requirement of the EOI process is demonstrated consultation and collaboration with relevant First Nations people. This presents an obvious advantage to the proponent, in that, methodologies co-designed with First Nations groups, are more likely to lead to projects registered with consent from native title holders.

Please contact the writer if you wish to discuss the matters outlined in these submissions.

Yours faithfully,



Sheree Sharma

Acting Principal Lawyer