

KIMBERLEY LAND COUNCIL

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Thursday, 6 June 2024

Regulatory Reform and Implementation
Australian Securities and Investments Commission
By e-mail: RG236.Feedback@asic.gov.au

Submission on proposed updates to ASIC's regulatory guidance in the current version of Regulatory Guide 236 *Do I need an AFS licence to participate in carbon markets?*

The Kimberley Land Council (KLC) is an Aboriginal organisation established in 1978 for the purpose of working for and with Traditional Owners to get back country, care for country and get control of the future. The KLC's mandate is driven by its broad membership of Kimberley Aboriginal people, and delivered by a board of culturally and regionally representative directors.

As the native title representative body for the region, the KLC has achieved native title determinations across 97 per cent of the Kimberley, with 32 prescribed bodies corporates (PBCs) formed in the Kimberley managing native title rights and interests. The KLC works with PBCs to expand capacity and capability, as well as economic development opportunities and activities. The KLC also supports 18 Aboriginal ranger groups through the Kimberley Ranger Network, and conducts a range of land and sea management activities.

The KLC actively facilitates the registration and operation of Indigenous carbon projects on behalf of native title holders and other Kimberley Aboriginal people, including those holding pastoral leases. All projects supported by the KLC are owned directly by Traditional Owners. All revenue from these projects goes back to the proponents, is re-invested, and contributes directly to the regional economy, Aboriginal employment, PBC governance and capacity development, as well as ongoing and improved project operations and the co-benefits generated as a result.

Thanks to its long-standing experience in native title and carbon project development the KLC has been an effective advisor and negotiator for PBCs approached by third parties wishing to obtain eligible interest holder consent for projects registered on native title land. This includes legal advice as well as education on the Australian Carbon Credits Unit (ACCU) Scheme and technical advice about proposed or conditionally registered ACCU Scheme projects.

The KLC does not hold an Australian Financial Services Licence (AFSL) and the KLC is not a holder or authorised representative of an AFSL holder. There are a limited number of AFSL holders who could provide financial services relevant to native title holders' special position within the ACCU scheme, and we believe that these entities have interests in ACCU markets which would be inconsistent with the aspirations of Kimberley traditional owners.

As ACCUs are a financial product, the KLC undertakes carbon work with regard to the AFSL regime and relies on ASIC guidance to ensure it complies with the AFSL regime. Given the specialist nature of the guidance, this means any updates to ASIC's guidance requires careful consideration by KLC's legal advisors at the expense of its other functions. We hope that any changes to ASIC's guidance will clarify the KLC and native title holders' rights and responsibilities as advisors and recipients of advice. We also hope that any changes to ASIC's regulatory posture protect native title holders' rights and support their aspirations.

GETTING BACK COUNTRY.
LOOKING AFTER COUNTRY.
GETTING CONTROL OF OUR FUTURE.

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With respect to the questions ASIC has asked in its consultation paper, the KLC wishes to focus on question B2Q3 - *Is the updated example for an ACCU Scheme aggregated project at Example 3 useful in understanding when such an arrangement may involve the operation of a managed investment scheme? If not, how can this example be enhanced to provide improved guidance?*

It is the KLC's position that neither the updated example or the related guidance are useful for Indigenous participants in the ACCU Scheme to understand when arrangements involve the operation of a managed investment scheme. Below is a brief, non-comprehensive list of areas where the current example and supporting guidance are unclear with respect to Indigenous participation in carbon markets:

- Example 3 does not clarify when agreements surrounding eligible interest holder consent to a project would involve operation of a managed investment scheme
- Example 3 does not consider situations where there is exclusive possession native title land overlapping with Indigenous pastoral leases and whether these would be considered managed investment schemes
- Example 3 provides no clarity to native title holders (whether as legal right holders or eligible interest holders) to whether their participation in a project would constitute a managed investment scheme
- The note in Example 3 states that beneficiaries of a trust are generally relevant to considering whether a scheme is a managed investment scheme. It is unclear how this advice applies to native title held on trust by a PBC
- RG236.103 states that investors can 'pool' contributions such as land. This is vague with respect to non-exclusive possession native title land, where there are overlapping rights and interests to land
- RG236.110 does not clarify whether native title rights and interests could be a contribution made under an aggregated project

This clearly reflects a broader lack of understanding of Indigenous tenure, Indigenous Australians' longstanding involvement in the ACCU scheme and the importance of Indigenous ownership of ACCU Scheme projects within ASIC's guidance on carbon markets. This is a barrier to Indigenous participation at all levels of the ACCU scheme and perpetuates the findings of ASIC's own Indigenous Financial Services Framework that First Nations people have been excluded from financial systems.¹

We note that the National Indigenous Australians Agency has received \$11.8 million over four years from 2024-25 to support First Nations groups to participate in upfront consent processes for ACCU Scheme projects on native title lands. For this funding to have any effect, clearer guidance on advisor responsibilities with respect to native title and ACCU Scheme projects will be required.

Yours sincerely



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¹ <https://download.asic.gov.au/media/35wn0xyp/asic-indigenous-financial-services-framework-published-february-2023.pdf>