

Engagement with Native Title Stakeholders **Guidance for Signatories**

June 2021



Australian
Carbon Industry
Code of Conduct
SIGNATORY



Purpose and Scope

The Code seeks to set a higher standard of practice than current legislation requires, and in doing so create consistency of practice across industry and improve the baseline performance of market participants. This is in line with the Code’s mission to enhance the integrity, transparency and accountability of Australia’s carbon industry.

This guidance document relates specifically to sections 2.2 and 3.6 of the Code. It aims to provide clarity on the Code’s requirements of Signatories for their engagement with native title stakeholders, including:

- Native Title Holders and their Registered Native Title Bodies Corporate (RNTBC); and
- Registered Native Title Claimants.

It details the Code Administrator’s intention, summarises key guidance materials, outlines a phased approach to raising industry standards, and provides answers to common questions.

Table 1 below shows the distinction between different stakeholders as relevant to this guidance document. This shows a mix of stakeholders that are legally recognised as eligible interest-holders (EIHs), and those that are not legally recognised as EIHs. The Clean Energy Regulator’s guidance (explained below) provides more detail on EIHs and the requirements under legislation.

Table 1: Inclusions and Exclusions

INCLUDED IN GUIDANCE	EXCLUDED FROM GUIDANCE
<ul style="list-style-type: none"> • Native Title Holders (including Native Title Body Corporates) <i>RECOGNISED EIHS</i> 	<ul style="list-style-type: none"> • People who hold carbon sequestration rights • Banks, mortgagees • Landholders • Crown Lands Ministers <p><i>ALL OF THE ABOVE ARE RECOGNISED EIHS</i></p>
<ul style="list-style-type: none"> • Registered Native Title claimants <i>NOT RECOGNISED EIHS</i> 	

Intention of the Code’s Native Title Engagement Requirements

The Code intentionally distinguishes between its requirements for engagement with different types of stakeholders. This is due to the uneven treatment and protection of different stakeholder groups in Australia’s carbon market. The Code particularly notes that appropriate engagement with Indigenous stakeholders is important in this context. The Code now requires stronger levels of engagement with Indigenous stakeholders to support implementation of best practice engagement across the carbon industry.

The Code encourages Signatories to meaningfully engage in similar but differentiated ways with:

- relevant Indigenous persons and Indigenous representative bodies (specifically Registered Native Title Body Corporates (RNTBCs)) who hold a legal right and/or eligible interest in land and waters where a carbon project is being developed (referred to in Code text as “Native Title Holders”); and
- registered native title claimants (referred to in Code text as “Native Title Holders with a claim”).

This is because there are different legal considerations for Native Title Holders and registered Native Title Claimants. The Code Administrator strongly encourages Signatories to engage with claimants where possible, as a matter of best practice, noting that native title determination does not create new rights but merely recognises existing rights of Traditional Owners.



Section 2.2 of the Code states the expectations and requirements of Signatories in engaging with Native Title Holders and claimants, which have been guided by the principles set out in Table 2, below.

Table 2: Relevant Domestic & International Human Rights Principles

From the United Nations' September 2007 *Declaration on the Rights of Indigenous Peoples* (UNDRIP):

- Consultation and cooperation in good faith with Traditional Owners should take place in order to seek free and informed consent prior to the approval of any project affecting their lands or territories and other resources.
- There is a need to respect and promote the inherent rights of Indigenous peoples, especially their rights to their lands, territories and resources.

From the Clean Energy Regulator's June 2018 guidance *Native title, legal right and eligible interest-holder consent guidance* (CER Guidance):

- Project success is best realised with genuine, early and formal engagement with stakeholders.
- Minimal upfront engagement with native title groups constitutes high-risk practice.
- It is critical that those providing consent know what is being agreed to.
- Entering into an Indigenous land use agreement (ILUA) is strongly recommended by the CER. As well as providing the strongest legal certainty, it ensures that Native Title Holders are engaged, and protects the proponent from any future changes to native title on the land.
- Although proponents are not legally required to engage with registered claimants, they should be aware that native title can subsequently be determined to exist on unclaimed land. Therefore, engaging with claimants is not only best practice, but it can also help to reduce project risks.
- Proponents can seek advice and information from relevant land councils, the [Native Title Register](#), and the [National Native Title Tribunal](#).

From the Indigenous Carbon Industry Network's February 2020 guidance *Seeking free, prior and informed consent from Indigenous communities for carbon projects* (ICIN Guidance):

- Early, ongoing and respectful engagement should occur. This can help to: ensure fair treatment of Traditional Owners, create trust, , provide project assurance, mitigate project risk, provide confidence and improve long-term financial outcomes for all parties involved.
- As a matter of best practice, engagement with Native Title Holders (through the relevant RNTBCs) should occur and consent should be obtained before the project is registered.
- As native title determination does not create new rights but merely recognises existing rights, Native title claimants should also be engaged and provide consent prior to registration.
- The nine steps for best practice identified by ICIN in its guidance should be followed. Refer to the guidance document for the detail on these steps.

**Signatories must be aware of the key principle of free, prior and informed consent (FPIC).**

Free, prior and informed consent (FPIC) means that consent is: free from force, intimidation, manipulation, coercion, or pressure; obtained prior to the project starting; and obtained after Indigenous people are fully informed about the costs, benefits, risks and any other implications of the project, and have the opportunity to seek independent advice.

Free, prior and informed consent is both a process and an outcome. The outcome is the right of Indigenous people to say 'yes' or 'no' to a carbon project which impacts on their rights, based on comprehensive, accurate, timely, and easy-to-understand information. This is a higher standard than the mere right to be consulted. FPIC is also a decision-making process and a framework for ensuring that project developers properly engage and involve Indigenous people in carbon project decision-making.

Approach to Raising Industry Practice Standards

The Administrator is neither a dispute resolution body nor an arbiter of native title consent processes, and does not seek to duplicate such processes managed by other institutions. The Administrator's approach to raising best practice standards for engagement with Traditional Owner stakeholders is to:

1. Encourage alignment with the above principles through the Code requirements;
2. Encourage and allow for Signatories to be transparent in providing the Administrator with contextual and circumstantial information; and
3. Support Signatories to adopt a phased approach to improving industry practices over time.

This approach also applies to the Administrator's compliance reporting, review, assessment and breach processes with relation to native title requirements. The approach is expanded on below.

1. Encouraging alignment with key principles

This guidance document is to be accompanied by additional educational and informative materials to assist Signatories in aligning with best practice over time. They will be prioritised in the first operational year of the Code (commencing 1 July 2021) but continue to be developed and promoted on an ongoing, as-needs basis reflecting industry practice over time. This will include the facilitation of interaction between a range of stakeholder groups, including Indigenous stakeholders, Signatories, Government Partners and Industry Supporters.

2. Encouraging and allowing for transparency

The Code text allows for the Administrator to exercise a degree of discretion in assessing and treating non-compliance with the Code. The Administrator acknowledges that Signatories have varying levels of knowledge, capacity and resources which means that engagement with Traditional Owners varies. Because of this, the Administrator encourages Signatories to show transparency and accountability with relation to their engagement with Traditional Owners, and particularly encouraging knowledge sharing around the complexities of engagement across different regions, project/method types, legislative contexts and business models. The Administrator will work to lift the baseline of how the industry engages with Traditional Owners, and seek to ensure a level of transparency and consistency of practice from all Code Signatories.

This approach includes allowing Signatories to provide ongoing evidence and supporting documentation on the level, quality and positivity of engagement with Traditional Owner stakeholders. The Administrator will look favourably upon transparency from Signatories, as it allows for better understanding of the level of



practice across the industry, and enables the Administrator to better differentiate between those that are engaging in a meaningful and positive way, and those that are not.

The Code’s breach investigation process also allows for multiple stages of investigation by the Administrator, and case referral to the Code Review Panel for assessment if required. In these processes, the Administrator will consider in particular:

- The timing and quality of the engagement process;
- The level of knowledge and understanding of best practice;
- Understanding of risks to stakeholders and efforts to mitigate these risks;
- The perspectives of the Indigenous stakeholder groups involved; and
- The Signatory’s commitment and willingness to improve standards of practice over time.

When specifically looking to remedy any poor practice or suspected breaches of the Code, the Administrator may require Signatories to provide explanations and specific evidence to corroborate their actions, including written documentation (including possibly from RNTBCs where appropriate) attesting to their stakeholder engagement processes. The Administrator will work with a range of Signatory and non-Signatory stakeholders over time to understand the most efficient and effective types of evidence that could be consistently provided, noting any legal, commercial or other considerations.

3. Supporting a phased approach to improving industry standards

To ensure that this discretion is applied consistently and appropriately, and to provide Signatories with more certainty on how the Administrator will handle non-compliance with relation to engagement with native title stakeholders, a phased approach to raising industry practice standards over time has been developed.

The Compliance Assessment Scale detailed in Table 3, below guides the Administrator’s compliance review, assessment and decision-making process during the four years of the Operational Stage commencing 1 July 2021 (FY22). This phased approach to handling instances of non-compliance allows for a differentiation between Signatories that are leading (operating at best practice), those that have well established processes (e.g. they may not have attained consent prior to project application but are engaging in a meaningful and positive way), those that are emerging (actively working to improve their knowledge and level of engagement), and those that are absent (not engaging with relevant stakeholders at all).

Table 3: Best Practice Assessment Scale				
	Aligned ←		→ Misaligned	
	Leading	Well-established	Emerging	Absent
Year 1 (FY22)	No Breach	No Breach	No Breach	Minor Breach
Year 2 (FY23)	No Breach	No Breach	Minor Breach	Medium Breach
Year 3 (FY24)	No Breach	Minor Breach	Medium Breach	Major Breach
Year 4 (FY24)	No Breach	Medium Breach	Major Breach	Major Breach
Year 5+ (FY25...)	No Breach	Major Breach	Major Breach	Major Breach

Scale	
	<i>Low likelihood of breach</i>
	<i>Some likelihood of breach</i>
	<i>Moderate likelihood of breach</i>
	<i>High likelihood of breach</i>



Initial engagement between the Administrator and Signatories from 1 July 2021 (FY22) will be focused on understanding the current state of Signatory engagement with Indigenous stakeholders, and differentiating between them. In approaching this differentiation, the Administrator will focus its education and monitoring efforts on Signatories who are actively committed to being transparent and improving their level of practice in this regard (those that are leading, well-established, and emerging), and focus its compliance and enforcement efforts on those who are absent.

Transparent engagement with the Administrator on a Signatory’s activities and processes throughout the compliance year will assist the Administrator in working to support compliance and negative outcomes. This approach is outlined in more detail in the Administrator’s education, monitoring and enforcement guidance, which can be found on Code website’s [Resources](#) page.

Given this approach, it is expected that the level of transparency and quality of practice will improve across the Signatory cohort over a period of four years. To support this approach, each compliance year the Administrator will:

- review and shift its focus of education, monitoring and enforcement, in order to continually improve the level of practice year on year; and
- review and increase the severity of breaches, acknowledging the increased levels of practice, knowledge and meaningful engagement; and

The Administrator’s consideration and treatment of suspected breaches will be done in the context of a Signatory’s:

- overall level of practice (leading, well-established, emerging, absent);
- ability to evidence meaningful and positive engagement with Indigenous stakeholders;
- commitment to continuous improvement of their own practices and those of the industry; and
- ongoing interaction with the Administrator that provides an understanding of ‘reasonable efforts’ to comply (accounting for the individual legislative, commercial, legal, relationship and project/method-based complexities that may impact full compliance).

Coverage

The Compliance Assessment Scale and Administrator’s use of it as described above only covers Signatory activities and compliance relating to the following Code sections:

- 2.2(3)(d) to 2.2(3)(g) inclusive; and
- 2.3(5)(e).

Reporting

If a Signatory is in breach of the native title requirements of the Code, they must self-report this to the Administrator within 10 business days of becoming aware of the suspected breach, as per section 2.5(6)(f) of the Code. Reporting is to be undertaken using the standard online Signatory Breach Form which can be found on the Code Administrator’s website.

The Administrator will work in an ongoing manner with Signatories, initially to understand current activities in relation to their engagement with Indigenous stakeholders, and then ongoing through education, monitoring and support to progress Signatories towards full alignment and compliance with the Code over time.

More detail on what constitutes the above levels of best practice is provided in Table 4, below.


Table 4: Compliance Definitions

A **'leading'** Signatory demonstrates compliance with all aspects of the Code's requirements in relation to native title engagements and consent processes. The Signatory demonstrates that:

1. The quality of engagement with all relevant native title stakeholders follows best practice standards as outlined in ICIN guidance.
2. The timing of the engagement process is in line with ICIN guidance.
3. The Signatory's level of knowledge and understanding of best practice native title consents processes and outcomes as outlined in ICIN guidance is high.
4. The Signatory has understanding of, and taken all appropriate actions to mitigate, potential and actual risks to all relevant native title consumers and stakeholders.
5. The Signatory is willing and committed to transparently raising the standards of their own native title engagement and consents practices over time as appropriate.

A **'well-established'** Signatory demonstrates compliance which is not likely to result in adverse material impacts to native title stakeholders. The Signatory demonstrates that:

1. The quality of engagement with all relevant native title stakeholders follows best practice standards as outlined in ICIN guidance.
2. The timing of the engagement process is mostly in line with ICIN guidance.
3. The Signatory's level of knowledge and understanding of best practice native title consents processes and outcomes as outlined in ICIN guidance is reasonable.
4. The Signatory has understanding of, and taken some actions to mitigate, potential and actual risks to all relevant native title consumers and stakeholders.
5. The Signatory is willing and committed to transparently raising the standards of their own native title engagement and consents practices over time as appropriate.

An **'emerging'** Signatory demonstrates compliance which has potential to result in adverse material impacts to native title stakeholders. The Signatory demonstrates that:

1. The quality of engagement with all relevant native title stakeholders somewhat follows best practice standards as outlined in ICIN guidance.
2. The timing of the engagement process is somewhat in line with ICIN guidance.
3. The Signatory's level of knowledge and understanding of best practice native title consents processes and outcomes as outlined in ICIN guidance is limited.
4. The Signatory has some understanding of, and taken some actions to mitigate, potential and actual risks to all relevant native title consumers and stakeholders.
5. The Signatory is willing and committed to transparently raising the standards of their own native title engagement and consents practices over time as appropriate.

An **'absent'** Signatory demonstrates practices that are misaligned with the Code, and have a high potential to result in adverse material impacts to native title stakeholders. The Signatory has demonstrated that:

1. The quality of engagement with all relevant native title stakeholders does not at all follow best practice standards as outlined in ICIN guidance.
2. The timing of the engagement process is not at all in line with ICIN guidance.
3. The Signatory's level of knowledge and understanding of best practice native title consents processes and outcomes as outlined in ICIN guidance is limited or very poor.
4. The Signatory has limited or no understanding of, and taken limited or no actions to mitigate, potential and actual risks to all relevant native title consumers and stakeholders.
5. The Signatory is neither willing nor committed to transparently raising the standards of their own native title engagement and consents practices over time as appropriate.

Answers to key questions on native title-related requirements are outlined in Table 5, below.

**Table 5: Native Title-Related Requirement FAQ****How can relevant stakeholders and interest-holders be identified?**

Refer to ICIN Guidance, step 1. More information can be sought from relevant land councils, the Native Title Register, and the National Native Title Tribunal.

What is the difference between "reasonable efforts", "all reasonable efforts", and "due diligence"?

- "Reasonable efforts" implies efforts within the control of the Signatory without risking unmanageable or detrimental consequences to the organisation.
- "All reasonable efforts" is the same as above with greater expectation on the extent of those efforts.
- "Due diligence" implies the active exercise of care within reason.

What does "current market conditions and industry practices" imply?

This implies that regulatory and commercial contexts are fluid and dynamic, and expected to change over time. Industry practices particularly relating to engagement with Traditional Owners are intended to be improved, and the Code is one lever to contribute towards this. As such, the Administrator expects that Signatories' business practices will change over time in line with market conditions and industry practices.

What does active dissent refer to?

Active dissent refers to the expression of opinion of a Native Title representative body (RNTBC) that is at odds with the plans to develop the project (including opposition to a project). In other words, if a RNTBC is actively opposed to the project plans, the Signatory will consider discontinuing the development of that project. This is of particular importance in the early stages of engagement (e.g. steps 2 & 3 in ICIN's Guidance). It is intended to avoid undue financial and cultural impacts to all parties involved, and reduce anti-competition in project development.

What is meant by "mode of communication and language that is most appropriate for the relevant stakeholders"?

Refer to ICIN Guidance, step 3.

What is meant by "the relevant Indigenous stakeholders' perspectives and their priorities for the land or resource"?

Refer to ICIN Guidance, step 6.

What is meant by "ongoing and dynamic engagement... applying the principles of free, prior and informed consent throughout the life of the project"?

Refer to ICIN Guidance, particularly steps 6 and 9.

What is meant by "rights to give or deny consent"?

Signatories must be aware that eligible interest-holders have the right to provide or not provide consent for projects. EIHS including Traditional Owners are not obliged in any way to provide consent to any project. Signatories should not assume that the default position of the relevant Traditional Owners and RNTBCs will be to provide consent to a project on their land.

How can Signatories seek to ensure that the relevant stakeholders "have the opportunity to seek independent advice" prior to project application?

Signatories can ask stakeholders directly whether they have sought independent advice. If the answer is no, the Signatory can ask the stakeholder whether they intend to seek independent advice or not.

What is expected in relation to the keeping of "written records of engagement with Indigenous stakeholders and their representative bodies"?

Refer to ICIN Guidance, particularly steps 3 and 8.

for more information please contact

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