

The Australian Carbon Industry Code of Conduct (the Code) aims to define industry best practice for project services and advisory services provided within Australia's Carbon Industry and represents the minimum standards that all Signatories agree to meet. The principles underlying the rules of the Code are:

1. transparency and accountability;
2. environmental and social integrity;
3. legislative and regulatory compliance; and
4. community trust.

Signatories to the Code of Conduct have obligations relating to the types of information, advice, and documentation that they provide to their clients. When providing services to clients, Signatories are required to apply best practices to business activities both before a project commences, and throughout the project.

## Background

The Human-induced regeneration of a permanent even-aged native forest (HIR) method will expire on **30 September 2023**. This may affect proponent applicants who are considering registering a new project or in the process of registering a new project under this method. The Clean Energy Regulator (Regulator) has released Guidance for ACCU Scheme participants impacted by the expiry (or sunset) of an ACCU Scheme method.

This guidance outlines how ACCU Scheme projects may be impacted by the expiry of a method and clarifies administrative processes and options for these projects. Amongst other things, the Regulator has requested that participants intending to submit an application to register a project under the HIR method should do so by **2 July 2023** to increase the likelihood of such a project being registered by the expiry date. As part of this guidance the Regulator has also requested all project participants to adhere to the Regulator's Native Title, legal right and eligible interest holder consent guidance, and to follow the best practice principles of Free, Prior and Informed Consent (FPIC) when planning to run a project on land subject to Native Title. The Regulator has stated that wanting to register a project before a method expires is not a valid reason for failing to adhere to the guidance.

As Code Signatories would be aware, a key recommendation of the Chubb Independent Review of ACCUs was to remove the option of conditionally registering ACCU projects on Native Title lands prior to obtaining consent. The Government is currently consulting with stakeholders, and in particular with First Nations Australians, on the legislative amendments needed to implement this recommendation, and how the Government can best support Native Title Representative Bodies to engage in consent processes.

## Human-induced Regeneration Method Sunset

Legally, it is possible for project applicants to request conditional registration pending consent from eligible interest holders (provided the project proponent has the legal right to run the project). The Regulator may declare the project subject to a condition that consents from eligible interest holders and regulatory approvals must be obtained before the end of the project's first reporting period. ACCUs cannot be issued for such a project until all relevant eligible interest holder consents and regulatory approvals are obtained.

However, under the Code, Signatories agree to not only meet their legal obligations but also strive to implement best practice standards, including to engage with and obtain the FPIC of Indigenous peoples when planning to run a project on land subject to Native Title, Native Title Claims, Traditional Owners or other Indigenous stakeholders. The Code asks Signatories to practice a higher standard for this than what is legally required. The relevant Code requirements specifically applying to this situation **are listed in the table below**.



The expiry of the HIR method may lead to risks to more vulnerable groups with a stake in such projects, such as Native Title Holders, especially where project applicants try to rush their project applications and seek to defer key engagement about consents until after the project is registered. Code signatories should therefore:

- be mindful to continue to follow best practice guidance under the Code;
- not engage in behaviours that may result in, or be perceived to result in, inappropriate benefit at the expense of Native Title Holders, Native Title Claimants, Traditional Owners or other Indigenous stakeholders; and
- avoid real or perceived market behaviours that fall within the purview of other parts of the Code, including behaviours that do not promote consumer protection, or that impact on the reputation of the carbon industry or that do not facilitate community trust in the ACCU scheme.

To assist Signatories in maintaining best practice engagement, integrity and accountability during this period, the Administrator has issued this statement as a reminder of their existing FPIC commitments as set out in the Code.

## Key Signatory Obligations

By signing up to the Code, Signatories have committed to acting ethically and with integrity, ensuring that their conduct does not negatively impact the carbon industry or the Code itself.

The Administrator specifically notes the below Code sections:

Section 2.2(3)	<p>(d) Where an area-based project occurs on <b>native title land</b>, Signatories must use <b>reasonable efforts</b> to follow the best practices set out in the ‘Seeking free, prior and informed consent from Indigenous communities for carbon projects’ guidance published by the Indigenous Carbon Industry Network (ICIN) (version published February 2020), and must follow the ‘Native title, legal right and eligible interest-holder consent guidance’ published by the Regulator (available at the above link to the Regulator’s website), <b>taking into account current market conditions and industry practices.</b></p> <p>(e) Signatories <b>must undertake</b> due diligence to ensure that:</p> <ul style="list-style-type: none"> <li>(i) Relevant representative bodies within Indigenous communities are utilized to identify affected Indigenous peoples and organisations and the appropriate mechanisms for engagement;</li> <li>(ii) <b>Native Title Holders</b> and their legal representatives <b>are advised of the intention to register</b> a project over Native Title Land or Waters;</li> <li>(iii) <b>Native Title Holders are provided with guidance</b> on project registration and implementation, including but not limited to: <ul style="list-style-type: none"> <li>(A) The information set out in clauses 2.2(5) - 2.2(8), 2.2(10), 2.2(11), 2.2(12) and 2.3(2), as relevant to the Native Title Holder’s interest in the project, whilst remaining compliant with confidentiality clauses in Carbon Abatement Contracts;</li> <li>(B) The existence of the Code, the Code Administrator’s complaints handling process and the Signatory’s own complaints handling process;</li> <li>(C) Any approvals that have been obtained or are required to be obtained from any government or regulatory authority;</li> </ul> </li> <li>(iv) <b>All reasonable efforts</b> have been made <b>to ensure that genuine and early engagement with Native Title Holders (and where possible, Native Title Claimants)</b> has been undertaken in</li> </ul>
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	<p>the mode of communication and language that is most appropriate for the relevant stakeholders, to ensure all parties have a mutual understanding about project conditions and requirements;</p> <ul style="list-style-type: none"> <li>(v) The Signatory understands and has <b>used reasonable efforts</b> to comply with the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples, including in particular the principle of free, prior and informed consent, when running a project on land subject to native title;</li> <li>(vi) <b>Reasonable efforts</b> have been used <b>to enter into legally binding agreements with Native Title Holders before the application</b> to register the project. <b>Where timely agreement is unable to be reached, Native Title Holders have been engaged with and have provided relevant forms of agreement to the registration of a project, as appropriate, including a process by which final consent will be sought;</b></li> <li>(vii) <b>Reasonable efforts</b> have been used to <b>consult with Native Title Claimants</b> and to <b>obtain agreement, as appropriate, prior to the application</b> to register a project;</li> <li>(viii) The requirements of the <i>Native Title Act 1993</i> (Cth) have been complied with;</li> <li>(ix) All <b>reasonable efforts</b> have been used <b>to ensure that Native Title Holders have provided consent to the ongoing operation of the project, prior to the application</b> to register a project; and</li> <li>(x) <b>Reasonable efforts</b> have been used to obtain <b>consent from Native Title Claimants prior to the application</b> to register a project;</li> <li>(xi) Signatories must use all reasonable efforts to ensure that they genuinely understand the relevant Indigenous stakeholders’ perspectives and their priorities for the land or resource which is to be the subject of the carbon project;</li> <li>(xii) All reasonable efforts have been used to ensure <b>ongoing and dynamic engagement with Native Title Holders, Native Title Claimants and other relevant Traditional Owner stakeholders</b> including through the planning, development and implementation phases of the project, applying the principles of free, prior and informed consent throughout the life of the project; and</li> <li>(xiii) <b>All reasonable efforts</b> have been used to ensure that the relevant Native Title Holders <b>are fully informed about their rights to give or deny consent</b>, as well as the costs, benefits, risks and any other implications of the relevant project, and have the opportunity to seek independent advice, prior to the application to register the project being submitted.</li> </ul> <p>(f) All reasonable efforts have been used to ensure that the requirements set out in (e)(i) through (xiii) above occur with reasonable time for Native Title Holders and Native Title Claimants to reach an informed decision.</p> <p>(g) Signatories will consider the option of <b>discontinuing plans to develop a project if the relevant Native Title Holder representative bodies express active dissent</b> for a project.</p> <p>(h) Signatories will ensure that consents from eligible interest holders are sought in accordance with the requirements of the CFI Act.</p>
Section 2.6 (5)	Signatories must not act in any way that might bring the Code into disrepute.

Best practices for securing legal right and obtaining eligible interest-holder consents are further highlighted in the ICIN and CER guides picked up under section 2.2(3)(d) of the Code. While the best practice actions recommended in these guides may not be the only way to address a particular situation, projects that utilise these best practices will reduce legal and commercial risks associated with any uncertainties. Additional benefits may include greater



community support for projects, and further streamlining of project assessment and more timely crediting by the Regulator.

Project success is best realised with genuine and early engagement to ensure all parties and stakeholders have a mutual understanding about project conditions and requirements. It is critical that proponents consult as early as possible with all eligible interest-holders to ensure all consents will be received on time. Undertaking best practice consultation will decrease the likelihood that a project will have difficulty obtaining timely eligible interest-holder consents.

Eligible interest-holders need to determine whether they are willing to provide consent after having time and sufficient information to understand the project proposal. It is critical that those being asked to provide consent know what is being asked to be agreed to, and, where consent is being provided by native title holders, the requirements of the Native Title Act are taken into account in determining the process for consent. Any Signatory proponents found to be placing undue pressure on eligible interest-holders may put at risk their compliance with the Code, including their fit and proper person status, or find themselves subject to other legal action.

**To mitigate the risk of projects failing due to lack of consent, it is in the best interests of proponents to ensure eligible interest holders are engaged well prior to project application. Obtaining eligible interest holder (EIH) consent prior to registration of a project is consistent with reasonable efforts to uphold best practice standards under the Code.**

## Engagement with the Code Administrator

As a response to the expiry of the HIR method and the increased pressure this may put on project applicants, the Code Administrator is happy to respond to Signatories individually to understand any concerns, or questions they may have about application of these Code requirements. The Administrator appreciates the ongoing support and commitment of Signatories to best practice operation and will continue to work openly and transparently with Signatories, Government Partners, and other carbon market stakeholders during this time.

If you have any questions or comments about the above guidance note, please contact the Code Administrator via email at [code.administrator@carbonmarketinstitute.org](mailto:code.administrator@carbonmarketinstitute.org).

