



**Carbon Market Institute**  
**Australian Carbon Industry Code of  
Conduct - Independent Review 2024**  
**Draft Report**

10 April 2024

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Dear John

## Australian Carbon Industry Code of Conduct - Independent Review 2024 Draft Report

*This draft report is provisional, provided for discussion purposes and should not be relied upon for making commercial decisions. The information in this Report does not constitute advice of any kind. No liability to any party will be accepted for the consequences of relying on the contents of this Report.*

I refer to our letter of engagement of 29 November 2023 in relation to the second Independent Review (Review) of the Australian Carbon Industry Code of Conduct.

We have now directly consulted with key stakeholders and other relevant stakeholders in accordance with the Expression of Interest for the Review, and the Review's Terms of Reference. We have received formal and informal submissions from various parties. We have also undertaken our own desktop research to develop an appropriate understanding of regulatory and market developments to inform the findings and recommendations in this draft Report.

In accordance with the assignment scope and the deliverables, and on behalf of the Review team, I am pleased to provide our draft Report and recommendations for the Review.

We look forward to assisting the CMI with the presentation of the draft Report and recommendations to the CMI Board, Code Signatories and stakeholders, and with the finalisation of the Report.

Yours sincerely



Vicki Mullen BA LLM GAICD

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## Acknowledgement of Country

Finity acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community.

We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.



*Walker, Graeme, Abstraction II, 2022, acrylic on canvas  
Finity Consulting Pty Limited Reception artwork*

## Glossary

Term	Definition
ACCC	Australian Competition & Consumer Commission
ACCU	Australian Carbon Credit Unit
AFSL	Australian Financial Services Licence
ASIC	Australian Securities and Investments Commission
CA	Code Administrator under section 3 of the Code
CCA	Climate Change Authority
CER	Clean Energy Regulator
CFI Act	<i>Carbon Credits (Carbon Farming Initiative) Act 2011</i> (Cth)
Chubb Review	The Independent Review of Australian Carbon Credit Units (ACCUs), led by Professor Ian Chubb AC – delivered on 9 January 2023
CMI	Carbon Market Institute
Code	Australian Carbon Industry Code of Conduct Version 2.0 (June 2021)
Consumer(s)	Supply-side consumers (including landholders, Native Title holders and indigenous communities/representative bodies) and demand-side consumers
Corporations Act	<i>Corporations Act 2001</i> (Cth)
CRP	Code Review Panel under section 3 of the Code
DCCEEW	Department of Climate Change, Energy, the Environment and Water (Australian Government)
FPIC	Free, Prior and Informed Consent
New Code body	This Review recommends that the body responsible for the administration of the Code is structurally separate from the CMI, with its own governance arrangements. This proposed body is referred to as the ‘new Code body’.
RG 236	ASIC Regulatory Guide 236 – Do I need an AFS licence to participate in carbon markets? (Issued 20 May 2015)
Signatory	An entity that is a Signatory to the Australian Carbon Industry Code of Conduct
The Core Carbon Principles	The Core Carbon Principles of the Integrity Council for the Voluntary Carbon Market
VCMII	The Voluntary Carbon Markets Integrity Initiative

# 1 Introduction

Australia's carbon market is in the midst of substantial regulatory and market developments and reforms.

The vital role of carbon markets in the net zero transition has been profiled in the Carbon Market Institute's Carbon Market Report 2024<sup>1</sup>. In the Introduction to this Report, CMI CEO, John Connor remarks that:

*'The report comes as carbon markets are now clearly into a new phase, witnessing major readjustments in how companies use and choose carbon credits. The net zero challenge has rightly become central to all carbon policy, with companies needing to manage their use of carbon credits in that context, rather than simply as a tool for neutrality offsetting.'*

The Australian Carbon Industry Code of Conduct promotes and supports market integrity, consumer protection and accountability for industry practitioners and service providers across Australia.

This second Independent Review of the Code has been undertaken in accordance with the requirements of the Code, the Terms of Reference for the Review, and to reflect legislative or policy changes and evolving industry concerns. The aim of the Review is to ensure the Code remains relevant and is consistent with current best practice.

Further, it is hoped that the development of the Code in accordance with the recommendations provided for this Review will encourage more industry participants to become Code Signatories, and thereby increase the impact and influence of the Code. Greater industry support for, and recognition of the Code across the value chain will increase confidence in the integrity of the market and provide more consumers with the important protections available under the Code.

Ideally, any party engaging with a key carbon market participant in Australia should ask that business if they are a Code Signatory, and if not, why not?

## Overview of recommendations

This Review provides 53 recommendations for consideration by the CMI, CMI members, Code Signatories and key stakeholders.

The recommendations are designed to:

- Further promote and support market integrity
- Clarify Signatory obligations
- Promote the importance and application of the Code for a wider range of industry participants
- Enhance consumer protections – for consumers on the supply and demand-sides of the market
- Specifically support the implementation of FPIC for carbon projects on the lands of Indigenous people
- Further develop the Code appropriately in the context of key policy reforms such as the Australian Government's response to the recommendations of the Chubb Review and the development of Australia's Nature Repair Market
- Align the Code, to the extent that it is practicable, with international integrity standards for carbon markets

<sup>1</sup> CMI & Westpac, *Carbon Markets & Australia's Net Zero Challenge*, Carbon Market Report 2024, April 2024.

- Establish an independent entity for the administration of the Code, and support the further development of robust, clear and fair processes for Code compliance monitoring and enforcement.

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## 2 List of Recommendations

Recommendation number in this Report	Recommendation
	<b>Part 4: Recommendations to further develop and strengthen the Code</b>
1	It is recommended that the Code is further developed with a stronger emphasis on the integrity of carbon credits. In this regard, the Code could incorporate or refer to leading international standards such as the VCMI Claims Code and the Core Carbon Principles of the Integrity Council for the Voluntary Carbon Market.
2	In accordance with the Vision, Mission and Scope of the Code, it is recommended that the Code is redrafted to ensure that the core principles and conduct/integrity standards are applicable to carbon industry participants in Australia, regardless of whether they are involved in market activities (supply or demand-side) linked to the ACCU Scheme, or another crediting scheme.
3	Given the potential for further reforms to be made to the CFI Act and the regulatory framework for the ACCU Scheme, it is recommended that the Code is redrafted to establish market conduct principles and obligations for industry participants that are complementary of/additional to legislative and regulatory requirements for industry participants.
4	Acknowledging the potential for any legislative and regulatory reforms to impact or influence the content of the Code from time to time, it is recommended that the new Code body has a clear discretion to consult with the CMI and Code Signatories in relation to necessary adjustments for the Code – without the need to undertake a complete review of the Code.
	<b>Part 5: The Code requirements and current scope</b>
5	It is recommended that section 1.5 of the Code is redrafted to include a wider scope of services, in accordance with the recommendations made in section 4 of this Review.
6	It is recommended that the distinction between Signatories providing project services and advisory services be retained and clarified.
7	In accordance with section 1.5, it is recommended that the new Code body develops clear compliance guidance covering the specific Code requirements for key Signatory categories and sectors across the market.
8	It is recommended that the Code cross-references or acknowledges professional standards schemes and Codes that apply to certain providers of advisory services (for example, lawyers, financial advisers, accountants and assurance professionals).
9	It is recommended that, if section 1.5 is redrafted to include a wider scope of services across the market, the listing of types of Signatories in section 1.6 of the Code is not necessary, and section 1.6 could be removed.
10	In revising the Code, it is recommended that the general principles/compliance standards in section 2 of the Code apply consistently to industry participants across the market.
11	Given the importance of the obligations under the Corporations Act, and the AFSL requirements for certain industry participants, it is recommended that section 2.4(2) of the Code is retained, and that Signatories must provide an annual disclosure to the new Code body as to whether they hold an AFSL, if they are an Authorised Representative of an AFSL holder, and if they are providing financial products or services to wholesale and/or retail clients.
12	For clarity and consistency with international developments, it is recommended that the reference to 'Voluntary Offset Schemes' in the Code is amended to 'Voluntary emissions reduction crediting schemes'.



13	It is recommended that section 2 is revised to provide for conduct and integrity standards in relation to consumer and stakeholder engagement for industry participants on the supply and demand-sides of the market. It is acknowledged that more detailed consumer protection obligations are appropriate for industry participants on the supply-side of the market.
14	As far as is practicable, it is recommended that consumer protection obligations in relation to pre-project and project activities for industry participants on the supply-side of the market are consistent for Signatories engaged with the ACCU Scheme and Signatories engaged with other crediting schemes.
15	It is recommended that key consumer protection obligations under the Code for supply-side industry participants be retained, enhanced and promoted.
16	It is recommended that specific obligations under the Code in relation to pre-project and project activities under the ACCU Scheme are reviewed when the Australian Government has completed the implementation of the Chubb Review recommendations, and any recommendations made by the CCA in relation to the CFI Act.
17	It is recommended that all definitions in the Appendix of the Code are reviewed to support clarity of the scope and application of the Code across the market.
	<b>Part 6: Code administration</b>
18	Given the consistent and strong support for the structural separation of the administration of the Code from the CMI, it is recommended that the CMI proceeds expeditiously with this 'keystone' reform, and that the new Code body commences operations under a revised Code and its Charter or Constitution by 1 July 2025 at the latest.
19	In determining the details of the arrangements for the new Code body, it is recommended that the CMI considers and addresses all of the matters covered in section 6.1.2 above, in consultation with the Code Administrator, the Code Review Panel, Code Signatories and key stakeholders.
20	On deciding the arrangements for the new Code body, it is recommended that the CMI (assisted by the Code Administrator and the Code Review Panel) prepares a succinct information paper for Code Signatories and other CMI members outlining: <ul style="list-style-type: none"> <li>a the options for the legal structure of the new Code body and the reasons (which could include a cost/benefit analysis) for the CMI Board's decision on this matter</li> <li>b the proposed administrative arrangements, and</li> <li>c the proposed financial arrangements and prospective annual budget for the new Code body.</li> </ul>
21	In executing the arrangements for the new Code body, it is recommended that the CMI obtain feedback from the administrators of long-standing industry Codes (such as the GICOP and the Banking Code of Practice) to obtain insights as to the process for the structural separation of the administration of a Code from the industry association that owns the Code.
22	In establishing the new Code body, it is recommended that the CMI specifically considers the establishment of a consumer advisory body to assist the new Code body with expert guidance on how the Code can be further developed (if necessary) to protect consumers.
23	In establishing the new Code body, it is recommended that the annual Code compliance process is streamlined and simplified, consistently managed via an electronic portal with transparent and strong data protection safeguards, and with specific compliance reporting requirements aligned with the Code obligations applicable for project proponents/developers, project advisors (legal, financial and technical) and other industry participants.
24	Given the importance of Code compliance and appropriate governance for each Signatory, it is recommended that all Code Signatories must, at the very least, submit an annual Code compliance attestation signed by a senior representative of the Signatory.

25	Noting that certain Signatories may only be required to comply with the core principles and objectives of the Code (and not specific obligations that may apply to certain industry participants such as project proponents/developers), it is recommended that the annual attestation incorporates the core principles and objectives of the Code.
26	In establishing the Code compliance monitoring framework for the new Code body, consideration should be given to the most effective use of the resources available for compliance monitoring. In accordance with an appropriate aim of an industry Code to support and identify best practice across the market, it is recommended that the new Code body actively deploys a range of compliance monitoring activities including desktop audits, Own Motion inquiries – in addition to annual reporting by Signatories.
27	In considering section 3.3 of the Code, it is recommended that a revised Code clarifies that the new Code body does not consider complaints in relation to commercial/contractual disputes between parties.
28	In considering section 3.5 of the Code, it is recommended that a revised Code provides the new Code body with the discretion to refer a finding against a Signatory of a serious and/or systemic Code breach to the relevant regulator(s).
29	It is recommended that the new Code body has an annual compliance strategy to identify high and emerging risks to inform the Code body's compliance monitoring activity.
30	Consistent with the current practice of the Code Administrator, it is recommended that the new Code body publishes annual data on the number and types of complaints received under the Code, the outcomes of investigations into alleged Code breaches, and the nature and number of sanctions imposed on Signatories.
31	It is recommended that the discretion of the new Code body to publicly name a Code Signatory that has been found to be in breach of the Code is consistent with the principles of procedural fairness and consistent with the practices of other industry code oversight bodies (for example, that a Signatory is only publicly named for a significant/systemic Code breach, and only after a reasonable period of time for rectification of a breach has passed).
32	It is recommended that the Code continues to mandate that Signatories provide the Code Fact Sheet to consumers on the supply-side (at the commencement of project negotiations) and that the Code Fact Sheet clearly highlights a consumer's right to raise a complaint under the Code about an alleged Code breach (but not in relation to a commercial/contractual dispute with a Signatory).
33	With the establishment of a new Code body, and a revised Code, it is recommended that the CMI consult with members in relation to making the Code mandatory for all CMI members.
34	If the above recommendation is not supported by the CMI and its members, it is recommended that the CMI promotes the benefits of the Code for the development and integrity of the industry, and strongly encourages all members to become a Code Signatory.
35	With the establishment of a new Code body, it is recommended that the CMI provides all necessary assistance to the new Code body to ensure that it has appropriate staff and financial resources to commence its operations, and to develop a revised annual fee framework for Code Signatories.
36	It is recommended that a revised Signatory fee framework is developed in accordance with Signatory categories and the size of a Signatory's business.
37	To encourage market development and support new market entrants, it is recommended that a revised Signatory fee framework could include a low 'start-up' annual fee for small businesses entering the market, for a reasonable period of time (for example, for three years).
38	It is recommended that the CMI approach the Australian and State/Territory governments for start-up funding for the commencement of the operations of the new Code body.
39	It is recommended that the CMI assists the new Code body to develop an annual budget forecast linked to anticipated income from annual Code Signatory fees.

40	Acknowledging that the Code Administrator is not responsible for providing advice to Signatories on regulatory matters, it is recommended that the current Code Administrator arrange an education workshop for Signatories with the release of the updated RG236 by ASIC.
41	It is recommended that the CMI continues the work on example contract clauses, as a significant contribution to assisting industry participants and consumers with fair bargaining awareness in relation to carbon projects.
42	It is recommended that the new Code body consult with Code Signatories in relation to guidance that may be required in relation to a revised Code, and any other significant market and regulatory developments in relation to conduct of the Australian carbon industry.
Part 7: Strategic Review – key issues for the Code	
43	In considering the Government’s implementation plan for the Chubb Review recommendations, it is recommended that the CMI, in consultation with the DCCEEW, the CER and Signatories, establishes a clear timetable for the response to this Review’s recommendations and the redrafting of the Code.
44	In undertaking the redrafting of the Code, it is recommended that the CMI engages with the Government, CMI members and consumer stakeholders to identify current industry practices that may require stronger oversight and guidance under the Code.
45	It is recommended that the CMI discusses with the CER and CMI members the option of making it mandatory for the CER’s Fit and Proper Person framework that a carbon service provider under the CFI Act is a Code Signatory.
46	In revising the Code, it is recommended that a section of the Code is dedicated to FPIC.
47	It is recommended that Signatory obligations in relation to FPIC at least meet requirements set by the Australian Government, and ideally provide for a higher standard of engagement with First Nations people on carbon projects.
48	It is recommended that Signatories’ FPIC obligations apply whether the project is under the ACCU Scheme, or any other crediting scheme.
49	It is recommended that the FPIC section of the Code specifically provides for Signatory obligations in relation to claims made about project benefits in favour of First Nations people.
50	It is recommended that the FPIC section of the Code supports engagement with Native Title holders, Native Title claimants and other First Nations people and their representative bodies.
51	Given the importance of FPIC for carbon projects and project participants, it is recommended that the CMI commence work immediately on consultations in relation to the FPIC section of the Code.
52	In implementing recommendation 15, and enhancing consumer protection obligations under the Code for supply-side industry participants, it is recommended that increased focus is placed on Signatories’ obligations to transparently engage with landholders during project negotiations in relation to the specific risks and benefits of a project for all parties to the project.
53	In reviewing and further developing the Code, and in the context of recommendations 1 and 2, it is recommended that the CMI consults with Signatories and stakeholders across the value chain in relation to the incorporation of relevant principles from the ACCC’s Guide for Business on making environmental claims. It is recommended that if such principles are included in the Code, they shall apply in relation to any claims made by a Signatory about carbon credits to any party – including claims made about carbon project co-benefits.

## 3 Background

### 3.1 The Australian Carbon Industry Code of Practice

The Australian Carbon Industry Code of Conduct (Code) was introduced on 1 July 2018 by the Carbon Market Institute (CMI). The Code is one of the world's earliest voluntary codes for the carbon industry. It is designed to promote and support market integrity, consumer protection, transparency and accountability for market participants across Australia.

Specifically, the Code aims to:

- Define industry best practice for Australian carbon market participants including project developers and advisers
- Promote consumer protection and transparent and appropriate interaction with landowners, Native Title holders and claimants, and stakeholders
- Provide best practice guidance to Code Signatories
- Promote market integrity, transparency and accountability, and
- Display international leadership in Australia's carbon market.

The Code has been implemented to date in two stages, namely: the initial Foundation Stage (1 July 2018 to 30 June 2021) and the Operational Stage (commencing on 1 July 2021).

The Code currently has 42 Signatories. Code Signatories now operate 65% of the land-based carbon projects registered after July 2018 under Vegetation, Savanna Burning, Savanna Fire Management, Carbon capture or Agriculture-based carbon abatement methods.

The Code has one industry supporter (the Clean Energy Finance Corporation) and three State Government Partners (New South Wales, Queensland and Western Australia).

The Code forms part of the eligibility requirements for the Queensland Government's Land Restoration Fund, the Western Australian Carbon Farming and Land Restoration Program, and Tasmania's Carbon Farming Advice Rebate Pilot Program.

#### 3.1.1 The first Independent Review 2020

The first Independent Review was undertaken in 2020 by Virginia Malley (prior to her appointment as Chair of the Code Review Panel in 2021) in advance of the commencement of the Operational Stage for the Code.

This Review provided 46 recommendations to:

- Clarify Code obligations
- Reduce the regulatory and administrative burden
- Improve consumer protections for indigenous stakeholders
- Establish the Code Review Panel
- Enhance the integrity of the industry as a whole
- Manage risk and confidentiality of information
- Improve the administration of the Code.

Following the receipt of the first Independent Review Report, the Code Administrator undertook a public consultation process to inform the implementation of the Review's recommendations.

### 3.1.2 The operational stage – 1 July 2021

The Code was amended to incorporate recommendations from the first Independent Review.

The Code became fully operational on 1 July 2021 under the second version of the Code, with expanded powers for the Code Administrator to investigate consumer complaints, monitor Signatories' compliance and take enforcement action in relation to Code breaches.

## 3.2 About the second Independent Review

The Code requires that it is updated from time to time to reflect legislative or policy changes and evolving industry issues. The Code provides that it must be subject to an independent review every three years.

The CMI launched the second Independent Review (Review) of the Code on 18 December 2023.

The final Review Report is to be delivered by 31 May 2024.

The CMI will determine the implementation of recommendations made by the second Independent Review.

### 3.2.1 The Terms of Reference

The Terms of Reference for the second Independent Review of the Code can be found here: [https://carbonmarketinstitute.org/app/uploads/2023/12/Code-Independent-Review-2023\\_Terms-of-Reference-final.pdf](https://carbonmarketinstitute.org/app/uploads/2023/12/Code-Independent-Review-2023_Terms-of-Reference-final.pdf).

The Terms of Reference cover a range of key matters for the Code, namely:

- Code requirements and the scope of the Code, including the reduction of duplication between legal/regulatory requirements for Signatories and Code requirements
- Administration of the Code, including compliance auditing and oversight procedures set out in section 3 of the Code
- The Code Review Panel, including its operation and effectiveness and required expertise for the next three years
- The Code Administrator, including its operation and effectiveness, its legal structure and resourcing
- Strategic Review matters, including the role of the Code in the context of recommendation 12 of the Report of the Independent Review of ACCUs (the 'Chubb Report')<sup>2</sup>, the provisions of the Code concerning engagement with indigenous stakeholders, the facilitation of co-benefits, and international industry standards such as the Core Carbon Principles from the Integrity Council for the Voluntary Carbon Market (ICVCM) and the Voluntary Carbon Market Initiative Code of Practice.

<sup>2</sup> The Independent Review of ACCUs, led by Professor Ian Chubb AC, was commissioned by the Australian Government in 2022 to ensure that the crediting framework was fit for purpose for intended reforms to the Safeguard Mechanism, and to respond to concerns raised about ACCUs and legitimate abatement.

### 3.2.2 The Independent Reviewer

Finity Consulting has been appointed to undertake the second Independent Review.

The Review is being led by Vicki Mullen, a Senior Consultant with Finity's Climate and Sustainability Practice. Ms Mullen is a lawyer with 30 years of experience in public policy and regulatory affairs, including prior experience with industry and professional codes in the financial services sector.

Ms Mullen has been supported during the Review by leading climate actuary, Rade Musulin, and environmental scientist, Olivia Brodhurst.<sup>3</sup>

### 3.2.3 Approach to this Review

#### Administration of the Review

The Reviewer would like to thank Virginia Malley for her invaluable guidance and advice on undertaking an Independent Review for the Code.

The Reviewer would also like to thank Samuel Dawes and Dayana Flores in the Code Administration team for their administrative support for the Review and expert guidance in relation to stakeholder engagement.

#### Guiding principles for the Review

During the Signatory and stakeholder workshops, the following guiding principles were proposed for the Review:

- Support for global best practice for Australian industry participants
- Promotion of market integrity (supply and demand-side)
- Promotion of consumer protection
- Open and transparent engagement with landholders and indigenous communities
- Appropriate market coverage
- Avoidance of overlap with regulatory frameworks for carbon industry participants
- Clear Signatory categories and clear definitions
- Distinction between mandatory obligations under the Code and the potential for (non-mandatory) guidance under the Code
- Ongoing framework for Code compliance monitoring and independent oversight and enforcement
- Code longevity – in the context of rapid market developments such as the Government's response to the Chubb Review recommendations, the implementation of the Safeguard Mechanism framework, the development in Australia of the nature repair market and the development of international carbon markets.

#### Stakeholder engagement and research

The Reviewer has consulted with a wide range of stakeholders including the CMI, the Code Administrator, the Code Review Panel, Code Signatories, CMI members, regulators, peak bodies and representatives of farming and indigenous communities.

<sup>3</sup> The biographies for the members of the Independent Review team are provided in an Appendix to this Report.

An information session for the Review was provided to Code Signatories on 30 January 2024 and for other stakeholders on 6 February 2024.

The Reviewer has directly contacted key stakeholders to offer meetings to discuss the Review and to request stakeholders to provide a submission to the Review.

The original date for submissions of 23 February 2024 was extended to 1 March 2024 to ensure that key parties would have sufficient time to provide a submission.

The Reviewer has undertaken 19 meetings with stakeholders.

Written submissions have been made in the form of feedback via email on specific issues under the Terms of Reference or via more formal written submissions.<sup>4</sup>

The Reviewer would like to thank all individuals and organisations that have provided information, insights and submissions in relation to the Review. We acknowledge the time that parties have taken to provide feedback – noting that some organisations have significant limitations on their resources.

The Reviewer has:

- carefully considered all information received, and submissions made
- undertaken research in relation to the operation of carbon markets, the regulatory environment for the carbon industry, and relevant Australian and international developments.

#### A note on stakeholder submissions and representations

Several stakeholders have specifically requested that their submissions remain confidential.

If a stakeholder is directly quoted and attributed in this Report, the Reviewer has first obtained approval to do so.

### 3.3 The Australian carbon industry

#### 3.3.1 About carbon markets in Australia<sup>5</sup>

The Clean Energy Regulator administers national carbon markets for:

- The Australian Carbon Credit Unit (ACCU) Scheme (formerly the Emissions Reduction Fund)
- The Renewable Energy Target, which creates tradable large-scale generation certificates (LGCs) and small-scale technology certificates (STCs).

The ACCU Scheme offers landholders, businesses and communities the opportunity to run projects in Australia that avoid the release of greenhouse gas emissions or remove or sequester carbon from the atmosphere. It is enacted through the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) and the Carbon Credits (Carbon Farming Initiative) Rule 2015. Safeguard Mechanism facilities can surrender ACCUs to offset emissions over their mandatory baseline requirements.

State and Territory carbon markets include the NSW Energy Saving Scheme and the Victorian Energy Efficiency Target which incentivise the installation of energy efficient equipment and appliances.

<sup>4</sup> The lists of submissions received, and stakeholder meetings held are set out in appendices to this Report.

<sup>5</sup> The information in section 3.3.1 is primarily sourced from the website of the Clean Energy Regulator.

In addition to carbon projects that generate ACCUs, Australian-based projects can be developed in the programs of international crediting schemes such as the Verified Carbon Standard (VCS) and the Gold Standard. Demand in Australia for units from international crediting schemes is primarily driven by voluntary emissions reduction ambition, including businesses certifying their actions against the government-backed Climate Active Carbon Neutral Standard.<sup>6</sup>

### 3.3.2 The current regulatory environment for Australia's carbon industry

A key guiding principle for this Review is the avoidance of overlap with regulatory frameworks for carbon industry participants. It is therefore important to outline the key regulatory frameworks for carbon industry participants.<sup>7</sup>

#### The Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth) and the Clean Energy Regulator

The *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (the CFI Act) established the Carbon Farming Initiative to provide incentives for land-based and waste sector projects.

The Clean Energy Regulator (CER) registers carbon farming projects and issues ACCUs for emissions reduction projects.

The CFI Act also sets out the requirements for methods and provides for the CER to conduct auctions and enter into carbon abatement contracts on behalf of the federal Government.

The CER provides guidance in relation to the minimum performance for project proponents who are carbon service providers under the CFI Act. A project proponent's performance can be considered when the CER assesses a person or company's fit and proper person (FPP) status. The CER notes that the FPP test is applied at various stages of a project lifecycle, including when ACCUs are applied for.

The CER also notes it has a wide discretion to take into account any matter it considers relevant, and if a carbon service provider (under the CFI Act) contracts on unfair terms with landholders/landowners and/or carries out their role in an incompetent manner or inconsistent with sound business practices, this may be grounds for the CER to determine that the carbon service provider is not fit and proper and is therefore ineligible to participate in the ACCU Scheme.<sup>8</sup>

#### The Corporations Act 2001 (Cth)

##### 1. Carbon markets and the regulation of financial services

Chapter 7 of the *Corporations Act 2001* (Cth) (Corporations Act) deals with the regulation of financial products and services.

<sup>6</sup> It is noted that Recommendation 16 of the Chubb Review is that the mandatory requirement for Climate Active organisations to use a minimum 20 per cent of ACCUs to achieve their emissions offsets should not come into effect. The Australian Government has accepted in principle all of the recommendations made by the Chubb Review – see

<https://www.dcceew.gov.au/sites/default/files/documents/australian-govt-response-accu-review.pdf>

<sup>7</sup> The Reviewer notes that a wide range of businesses are involved in Australia's carbon industry, including project proponents/project developers (generating credits for the ACCU scheme and other crediting schemes), advisory services (legal, financial, technical), intermediaries, aggregators, IT services, investors and traders. This section does not provide a comprehensive summary of the regulatory requirements under Australian law for various businesses involved in the industry. Rather, it provides an outline of key regulatory frameworks for the industry.

<sup>8</sup> See the CER's Guidance Note on FPP status - <https://cleanenergyregulator.gov.au/schemes/australian-carbon-credit-unit-scheme/how-participate/apply-participate>



If a person provides a financial service, they may need to hold an AFS licence in accordance with the requirements of the Corporations Act. Generally, a person provides a financial service if they (among other things) provide financial product advice, deal in a financial product or make a market for a financial product.

ASIC's Regulatory Guide 236 (RG 236) provides guidance in relation to the need to hold an AFS licence to participate in or provide financial product advice and other financial services in relation to carbon markets.

RG 236 states that ACCUs and certain other emissions units are financial products under the Corporations Act<sup>9</sup>. It provides background to the ACCU (ERF) Scheme and the role of the CER. It notes that voluntary carbon markets operate in Australia and trade a variety of emissions units – some of which are financial products under the Corporations Act.

However, a carbon abatement product under the CFI Act is not a financial product.<sup>10</sup>

RG 236 outlines the meaning of 'provide financial product advice'. That is, a recommendation or a statement of opinion, or a report of either of those things constitutes 'financial product advice' if it is provided with the intention of influencing a person's decision on a financial product, or could reasonably be regarded as being intended to have such an influence.<sup>11</sup>

RG 236 provides that simply providing factual information (that is, objectively ascertainable information the truth or accuracy of which cannot be reasonably questioned) will generally not involve the expression of opinion or a recommendation and will not, therefore, constitute financial product advice. However, RG 236 also notes that it is important to consider the overall context in which the information is presented – for example – where factual information is presented in a manner that may be reasonably regarded as suggesting or implying a recommendation to buy, sell or hold a particular financial product, it may constitute financial product advice.

RG 236 provides that if a person provides information to other persons on *regulated emissions units* that may influence a person's decision about a financial product in the context of carbon markets or otherwise, this may constitute financial product advice. Similarly, information provided on financial products that are associated with emissions units in some way (eg, derivatives or managed investment schemes) may also constitute financial product advice.

RG 236 importantly outlines the distinction between 'personal advice' and 'general advice', and the distinction between 'wholesale' and 'retail' clients.

Generally, if a person is providing *personal advice* to *retail clients*, they must meet the conduct obligations under Div. 2 of Part 7.7A of the Corporations Act to:

- Act in the best interests of the client
- Provide the client with appropriate advice
- Warn the client if the advice is based on incomplete or inaccurate information, and
- Where there is a conflict with the interests of the person providing the advice (or those of a related party), prioritise the interests of the client.

RG 236 addresses AFS licensees and authorised representatives, and notes that in many cases, an AFS licensee carries on its business through representatives. Persons acting as representatives of AFS licensees are exempt

<sup>9</sup> See RG 236.57-60 in relation to 'Eligible international emissions units', and RG236.90-93 in relation to other emissions and environmental units.

<sup>10</sup> See section 765A of the Corporations Act, and Regulation 7.1.07J.

<sup>11</sup> See section 766B of the Corporations Act.

from needing to hold a licence themselves. However, AFS licensees are ultimately responsible for supervising the conduct of their representatives.<sup>12</sup>

## 2. Climate-related financial disclosures<sup>13</sup>

The Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024 has been tabled in the House of Representatives of the Australian Parliament.

Schedule 4 to the Bill generally requires entities that lodge financial reports under Chapter 2M of the Corporations Act and meet certain minimum size thresholds, or have emissions reporting obligations under the NGER scheme, to make climate-related financial disclosures in accordance with relevant sustainability standards made by the Australian Accounting Standards Board (AASB).

The disclosure requirements generally apply to reporting entities from financial years starting on or after 1 January 2025.

Transitional provisions phase in the new obligations over a period of four years, depending on the size and type of the reporting entity.

Climate-related financial disclosures will be subject to similar assurance requirements to those currently in the Corporations Act for financial reports and will require entities to obtain assurance from an auditor.

Relevant entities will be required to disclose information about their exposure to material climate-related financial risks and opportunities, including their climate-related plans, greenhouse gas emissions and governance processes, in accordance with the relevant sustainability standards made by the AASB.

Transitional provisions provide that liability for misleading and deceptive conduct in relation to the most uncertain parts of a climate statement (defined as 'protected statements') is temporarily protected.

## 3. Financial services and products and sustainability-related claims

The Corporations Act and the *Australian Securities and Investments Commission Act 2001* (ASIC Act) contain general prohibitions against a person making statements (or disseminating information) that are false or misleading, or engaging in dishonest, misleading or deceptive conduct in relation to a *financial product or financial service*.

ASIC notes that particular risks of breaching these prohibitions arise in relation to representations made about future matters that are not supported with reasonable grounds.<sup>14</sup> ASIC provides the example of a person making a statement that they will achieve a certain carbon emissions target by a particular date, and provides a list of questions to consider when offering or promoting sustainability-related products.<sup>15</sup>

<sup>12</sup> See RG236.155 to 236.175 for details of the conduct and disclosure obligations of AFS licensees.

<sup>13</sup> Information in this section is sourced from the Explanatory Memorandum for the Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024. For details of these reforms, see Chapter 4 of the Explanatory Memorandum.

<sup>14</sup> See ASIC's Information Sheet 271 issued in June 2022 – *How to avoid greenwashing when offering or promoting sustainability-related products*.

<sup>15</sup> Above.

ASIC supports the framework for climate-related financial disclosures as an ‘antidote’ to ‘greenwashing’<sup>16</sup>. ASIC’s 2024 enforcement priorities include misleading conduct in relation to sustainable finance, including greenwashing.<sup>17</sup>

### The *Competition and Consumer Act 2010* (Cth) and environmental claims

The primary responsibilities of the Australian Competition and Consumer Commission (ACCC) include enforcing compliance with the *Competition and Consumer Act 2010*, which includes the Australia Consumer Law (ACL).

The ACL makes it unlawful for businesses to engage in conduct that is misleading or deceptive or likely to mislead or deceive. It is also unlawful for a business to make false or misleading claims about specific aspects of goods or services. The law applies even if a person did not intend to mislead anyone, or no one has suffered any loss or damage.<sup>18</sup>

In recognition of growing consumer demand for environmentally sustainable products and services, the ACCC has issued an important business guide on making environmental claims. Eight clear principles are provided for trustworthy environmental claims.<sup>19</sup>

### 3.3.3 Recent developments that will shape Australia’s carbon industry

In surveying the regulatory and market environment for the carbon industry, numerous developments are expected to rapidly shape the Australian carbon market and influence supply and demand for carbon/emissions reductions credits, including:

- the Australian Government’s implementation of the Chubb Review recommendations
- the implementation of the Safeguard Mechanism for reducing emissions at Australia’s largest industrial facilities, and the decline of emissions limits on a trajectory consistent with achieving Australia’s emission reduction targets of 43% below 2005 levels by 2030 and net zero by 2050
- the forthcoming framework for mandatory climate-related financial disclosures which will provide Australians and investors with greater transparency and information about an entity’s climate-related plans and strategies – including mandatory disclosures on greenhouse gas emissions and Net Zero Transition Plans<sup>20</sup>
- significant and increasing regulatory attention on ‘greenwashing’ in relation to environmental claims made about products and services
- the commencement on 15 December 2023 of the *Nature Repair Act 2023* (Cth) and the anticipated development of Australia’s nature repair market – with demand expected to be driven by ‘ESG’ motivated investment, and carbon market participants seeking projects which also benefit nature<sup>21</sup>
- the development by the CER of a unit and certificate register (to consolidate the CER’s current registers, and progressively hold ACCUs, international units and generation and technology certificates) and the joint development of a carbon exchange model with the Australian Securities Exchange (ASX)<sup>22</sup>

<sup>16</sup> See article by ASIC Deputy Chair, Karen Chester, ‘ASIC greenwashing antidote’, 10 July 2023 - <https://asic.gov.au/about-asic/news-centre/articles/asic-greenwashing-antidote/>

<sup>17</sup> ASIC, Media Release, ‘ASIC announces 2024 enforcement priorities’, 21 November 2023 - <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-310mr-asic-announces-2024-enforcement-priorities/>

<sup>18</sup> See the ACCC’s Guide for Business – *Making environmental claims*, December 2023.

<sup>19</sup> Above.

<sup>20</sup> See The Treasury’s Policy Statement, ‘Mandatory climate-related financial disclosures’, January 2024.

<sup>21</sup> For further detail, refer to the DCCEEW’s website.

<sup>22</sup> For further detail, refer to the CER’s website.

- an increasing focus (internationally and in Australia) on ensuring that the principles of Free, Prior and Informed Consent (FPIC) and appropriate processes are implemented to support and protect the rights of Indigenous peoples in relation to projects carried out on their lands
- standards for the monitoring, reporting and verification of co-benefits<sup>23</sup> and programs to accredit high integrity carbon credits
- the ongoing development of the voluntary carbon market, including increased collaboration between carbon crediting programs and increased recognition and adoption of international integrity standards such as the ICVCM's Core Carbon Principles and the Voluntary Carbon Markets Integrity Initiative's (VCMI) Claims Code of Practice
- in the wake of COP28, further work that is being done on Article 6 of the Paris Agreement to facilitate emissions reductions trading between countries and to promote sustainable development co-benefits
- new international guidance on the urgent need for investment in climate solutions (beyond scope 1, 2 and 3 emissions reductions) and a greater focus on high-integrity credits that remove carbon from the atmosphere and store it long-term<sup>24</sup>.

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<sup>23</sup> For example, see the Queensland Government's Co-benefits Standard for the Land Restoration Fund (LRF) – March 2023, which provides a basis for the measuring, reporting and verifying of environmental, socio-economic and First Nations co-benefits generated by carbon projects supported by the LRF.

<sup>24</sup> Carbon Market Institute, *Opinion*, 'Carbon markets shift as best practice matures', 19 March 2024 – see <https://carbonmarketinstitute.org/2024/03/19/carbon-markets-shift-as-best-practice-matures/>

## 4 Recommendations to further develop and strengthen the Code

### 4.1 The nature of industry self-regulation

The Code is supported and promoted by the CMI for the Australian carbon industry. The Code is voluntary for CMI members.

The Code specifically states that it is not intended to replace existing consumer, carbon farming, emissions reduction or environmental legislation, policy, regulations or guidance at local, state or federal government levels<sup>25</sup>.

It is therefore useful to outline the role of industry codes and their interaction with the law and regulatory requirements. While there is a variety of industry codes with differing levels of prescription and interaction with relevant laws and regulation, ASIC's Regulatory Guide 183 (Approval of financial services sector codes of conduct) is helpful in this regard<sup>26</sup>.

ASIC provides the following comments on the role and purpose of an industry code.

*'Industry codes of conduct play an important part in how financial products and services are regulated in Australia. Where they enjoy the support and commitment of the sponsoring industries, codes can deliver real benefits to both consumers and those who are bound by and must comply with the provisions of the code to which they subscribe.*

*...a code is essentially a set of enforceable rules that sets out a progressive model of conduct and disclosure for industry members that are signed up. Codes should therefore improve consumer confidence in a particular industry or industries.*

*...the primary role of a financial services code is to raise standards and to complement the legislative requirements that already set out how product issuers and licensed firms (and their representatives) deal with consumers.*

*[ASIC expects] an effective code to do at least one of the following:*

- > address specific industry issues and consumer problems not covered by legislation*
- > elaborate on legislation to deliver additional benefits to consumers and/or*
- > clarify what needs to be done from the perspective of a particular industry, practice or product to comply with legislation.'*

### 4.2 Key themes and issues for the Review

In considering stakeholder feedback and submissions for this Review, the following key themes and issues have been identified, which are important for the further development of the Code.

- The Code is becoming more important as market integrity expectations increase.
- The Code plays an important role in complementing regulatory oversight by strengthening the integrity and accountability of industry practitioners and service providers in the carbon industry and supporting their compliance with the law.
- It is important for the Code to expand its reach in terms of Signatories and to apply across the value chain.

<sup>25</sup> See section 1.1 of the Code.

<sup>26</sup> It is acknowledged that a Code Signatory may not be required to hold an AFSL and it may not be regulated by ASIC. ASIC's RG183 is quoted generally as a useful and authoritative guide as to the role and purpose of a voluntary industry code. In referring to RG183, the Reviewer is not implying or suggesting that the CMI should seek ASIC's approval of the Code.

- Ideally, every CMI member could consider being a Code signatory, including industry participants on the demand-side of the market.
- The Code needs its own governance framework and should be functionally separate from the CMI.
- The Code should be streamlined and hold Signatories to a higher standard.
- The Code structure should be shorter, simpler and avoid overlap with regulatory requirements.
- The Code should have specific obligations targeted towards the different services provided by Signatories, with more detailed obligations applying to Signatories on the supply-side of the market.
- Certain terms and definitions in the Code should be clarified.
- The Code should evolve alongside the Australian Government’s implementation of the Chubb Review recommendations and it can evolve as a Code to more broadly cover environmental credits/units.
- The Code must maintain a fit-for-purpose and transparent complaints handling mechanism.
- There must be awareness for Signatories’ consumers of their rights under the Code, including the right to make a complaint about an alleged breach of the Code by a Signatory.
- The Free, Prior and Informed Consent process should be a mandatory and continuous obligation for projects involving Native Title holders, First Nations people and their representative bodies.
- The Code could be developed to co-ordinate with international standards.
- The Code could support the fair bargaining process in relation to carbon project contracts.
- The Code is important for Signatories on the demand and supply-side of the market in mitigating the risk of incorrect/misleading claims being made about carbon credits.
- The Code could support a government accreditation scheme for specific market participants such as project proponents/project developers and project advisors.
- The Code could provide a specific requirement for Signatories to disclose potential conflicts that may arise if they are providing project/advice services to consumers, as well as trading in credits.
- The annual compliance audit process for the Code should be clarified and simplified.
- The Code Administrator could provide information and education in relation to ‘product differentiation’ – that is, between projects for emissions avoidance, carbon sequestration, and credits/units with verified co-benefits.

### 4.3 The role of the Code

*‘Recent criticisms of voluntary carbon markets, as well as the ACCU Scheme, have highlighted the need for transparency and accountability of all actors to support robust oversight and continuous improvement.’<sup>27</sup>*

The Vision of the Code is for a strong Australian carbon industry that operates at the scale and quality required to significantly contribute to Australia’s greenhouse gas reduction commitments under the Paris Agreement.<sup>28</sup>

The Code’s Mission is to enhance the integrity, transparency and accountability of Australia’s carbon industry, using the Code framework to monitor, review and define industry best practice.<sup>29</sup>

<sup>27</sup> Climate Change Authority, *2023 Review of the Carbon Credits (Carbon Farming Initiative) Act 2011*, p 25.

<sup>28</sup> See section 1.2 of the Code.

<sup>29</sup> See section 1.3 of the Code.

It is a testament to the successful inception and administration of the Code since 2018 that the Chubb Review made a key finding that the Code contributes to the integrity of the ACCU Scheme.

In the context of the 2022 Chubb Review in relation to the ACCU Scheme, and the CCA's 2023 Review of the CFI Act, the Reviewer is mindful that significant reform recommendations have been made in relation to the ACCU Scheme and its regulatory framework that are yet to be fully implemented by the Australian Government.

The Code currently clearly articulates that it has been predominantly designed to suit the regulatory regime of the ACCU Scheme (formerly the ERF). However, it also states that it is relevant to other Voluntary Offset Schemes, such as Gold Standard and the Verified Carbon Standard.

The Terms of Reference note that the aim of the Review is to ensure the Code remains relevant and is consistent with current best practice.

## Recommendations

- 1 It is recommended that the Code is further developed with a stronger emphasis on the integrity of carbon credits. In this regard, the Code could incorporate or refer to leading international standards such as the VCM Claims Code<sup>30</sup> and the Core Carbon Principles of the Integrity Council for the Voluntary Carbon Market<sup>31</sup>.
- 2 In accordance with the Vision, Mission and Scope<sup>32</sup> of the Code, it is recommended that the Code is redrafted to ensure that the core principles and conduct/integrity standards are applicable to carbon industry participants in Australia, regardless of whether they are involved in market activities (supply or demand-side) linked to the ACCU Scheme, or another crediting scheme<sup>33</sup>.
- 3 Given the potential for further reforms to be made to the CFI Act and the regulatory framework for the ACCU Scheme, it is recommended that the Code is redrafted to establish market conduct principles and obligations for industry participants that are complementary of/additional to legislative and regulatory requirements for industry participants<sup>34</sup>.
- 4 Acknowledging the potential for any legislative and regulatory reforms to impact or influence the content of the Code from time to time, it is recommended that the new Code body<sup>35</sup> has a clear discretion to consult with the CMI and Code Signatories in relation to necessary adjustments for the Code – without the need to undertake a complete review of the Code.

<sup>30</sup> The VCM Claims Code was released in November 2023, and aims to guide credible voluntary use of carbon credits.

<sup>31</sup> See section 5.5 of the Terms of Reference for this Review in relation to other best practice standards or frameworks that the Code could align with to better engage with the demand-side of the carbon market.

<sup>32</sup> See section 1.5 of the Code.

<sup>33</sup> Recommendations as to the scope of the Code and specific obligations for certain industry participants are set out in section 5 of this Report.

<sup>34</sup> In this regard, see sections 1.4.1 and 1.4.2 of the Terms of Reference for this Review.

<sup>35</sup> See the recommendations in Part 6 of this Report in relation to the administration of the Code.

## 5 The Code requirements and current scope

Part 1 of the Terms of Reference for this Review covers the current scope and interpretation of section 1.5 of the Code, the extent to which section 2 of the Code currently meets the objectives and purposes in section 1.1 of the Code, and how section 2 of the Code could be amended or streamlined to better achieve the Code's purpose and objectives, vision, mission, and general principles.

In addressing these matters, section 1.4 of the Terms of Reference asks the Reviewer to consider key matters, such as the recommendations of the Chubb Review and any relevant legislative or regulatory changes.

For ease of reference, Part 1 of the Terms of Reference for this Review are addressed under two headings, namely:

- The scope and interpretation of the Code – section 1.5
- General rules and standards for Code Signatories – section 2.

### 5.1 The scope and interpretation of the Code – section 1.5

#### 5.1.1 Background

Section 1 of the Code currently sets out the following for the Code (in sections 1.1 to 1.4):

- The purpose and objectives
- The Vision
- The Mission
- Expected outcomes and underlying principles.

Section 1.5 sets out the scope and interpretation of the Code. This section provides that the Code aims to define industry best practice for project services and advisory services and applies to entities providing project services and advisory services to clients<sup>36</sup>. Section 1.5 provides that 'the variety of Signatories covered by the Code means the Code will apply differently to different Signatories.' Section 1.5 also provides that the Code applies to the extent it is consistent with Australian laws and regulation.

In considering matters arising under section 1.5, it is useful to note that section 1.4 of the Code provides that the Code has been predominantly designed to suit the regulatory regime of the ACCU Scheme (previously the ERF) and it is also relevant to other Voluntary Offset Schemes such as the Gold Standard and the Verified Carbon Standard<sup>37</sup>.

Section 1.6 of the Code provides an inclusive list of entities that could be Signatories to the Code.

#### 5.1.2 Stakeholder views and relevant information

Stakeholder feedback includes the following proposals:

- The core principles and objectives of the Code should apply across the market (on the supply and demand-sides) and across the value chain, regardless of the business model or services provided by the Signatory

<sup>36</sup> Defined in Appendix 1 of the Code to mean both supply-side consumers and demand-side consumers in the carbon market. 'Carbon market' is defined to mean all activities related to the generation and trading (buying and selling) of carbon credits. 'Demand-side consumers' are defined to mean buyers of carbon credits generated from carbon offsets projects and are categorised as government, business, community/other organisations that purchase carbon credits for compliance or voluntary purposes.

<sup>37</sup> Refer to recommendations made for the Code in section 4 of this Report.



- The distinction in the Code between project services and advisory services should be retained, and the Code could clarify requirements and obligations that apply to these categories of Signatories – noting this could support a wider range of entities to become Signatories to the Code.

### 5.1.3 Recommendations

- 5 It is recommended that section 1.5 of the Code is redrafted to include a wider scope of services, in accordance with the recommendations made in section 4 of this Review.
- 6 It is recommended that the distinction between Signatories providing project services and advisory services be retained and clarified.
- 7 In accordance with section 1.5, it is recommended that the new Code body develops clear compliance guidance covering the specific Code requirements for key Signatory categories and sectors across the market.
- 8 It is recommended that the Code cross-references or acknowledges professional standards schemes and Codes that apply to certain providers of advisory services (for example, lawyers, financial advisers, accountants and assurance professionals).
- 9 It is recommended that, if section 1.5 is redrafted to include a wider scope of services across the market, the listing of types of Signatories in section 1.6 of the Code is not necessary, and section 1.6 could be removed.

## 5.2 General Rules and Standards for Code Signatories – section 2

### 5.2.1 Background

Section 2 of the Code provides the ‘rules and standards’ for Signatories to the Code.

Section 2.1 provides general principles for market conduct.

Section 2.2 provides requirements for Signatories in relation to ‘pre-project’ activities (being requirements to be satisfied before an application is lodged for project registration).

Section 2.3 provides requirements for project activities.

Sections 2.4, 2.5 and 2.6 provide for general compliance requirements, and other general obligations not specifically related to pre-project and project activities.

### 5.2.2 Stakeholder views and relevant information

Stakeholder feedback includes the following views and proposals in relation to the ‘general rules and standards’ for Code signatories:

- The Code could be expanded/clarified to provide principles-based standards for a wide range of industry participants (e.g., including law firms), with more detailed obligations for specific participants
- The Code could be expanded beyond Australian carbon projects to cover intermediaries operating in relation to the sale of carbon credits into Australia
- The more detailed Code obligations should apply to carbon service providers/project developers and project advisors operating under any crediting scheme
- Detailed obligations for industry participants on the supply-side of the market should have/maintain a strong focus on consumer protection obligations (in favour of landholders, Native Title holders and First Nations people)

- The Code could be developed to apply to participants in Australia’s nature repair market and to cover projects that generate both carbon and biodiversity credits
- Obligations under the Code that specifically refer to legal/regulatory requirements (such as the potential need to hold an AFSL) could be simplified
- However, the Code obligations in relation to the AFSL are an important due diligence requirement for Code Signatories
- The Code should have clear and specific requirements for project service providers and providers of advisory services, and the annual compliance reporting for these categories of Signatories should be informed by these specific requirements
- The distinction between pre-project and project activities should be retained, pending the implementation of the Chubb Review recommendation to amend the CFI Act and remove the option to conditionally register ACCU projects on Native Title lands
- Specific consumer protection obligations under the Code should be reinforced, such as the requirement to provide the *Code Fact Sheet* to consumers.

### 5.2.3 Recommendations

- 10 In revising the Code, it is recommended that the general principles/compliance standards<sup>38</sup> in section 2 of the Code apply consistently to industry participants across the market<sup>39</sup>.
- 11 Given the importance of the obligations under the Corporations Act, and the AFSL requirements for certain industry participants, it is recommended that section 2.4(2) of the Code is retained, and that Signatories must provide an annual disclosure to the new Code body as to whether they hold an AFSL, if they are an Authorised Representative of an AFSL holder, and if they are providing financial products or services to wholesale and/or retail clients.
- 12 For clarity and consistency with international developments, it is recommended that the reference to ‘Voluntary Offset Schemes’ in the Code is amended to ‘Voluntary emissions reduction crediting schemes’.
- 13 It is recommended that section 2 is revised to provide for conduct and integrity standards in relation to consumer and stakeholder engagement for industry participants on the supply and demand-sides of the market. It is acknowledged that more detailed consumer protection obligations are appropriate for industry participants on the supply-side of the market.
- 14 As far as is practicable, it is recommended that consumer protection obligations in relation to pre-project and project activities for industry participants on the supply-side of the market are consistent for Signatories engaged with the ACCU Scheme and Signatories engaged with other crediting schemes.
- 15 It is recommended that key consumer protection obligations under the Code for supply-side industry participants be retained, enhanced and promoted<sup>40</sup>.
- 16 It is recommended that specific obligations under the Code in relation to pre-project and project activities under the ACCU Scheme are reviewed when the Australian Government has completed the implementation of the Chubb Review recommendations, and any recommendations made by the CCA in relation to the CFI Act.

<sup>38</sup> Sections 2.1, 2.4, 2.5 and 2.6 of the Code.

<sup>39</sup> It is acknowledged that certain requirements in section 2.5, such as recommending that a consumer obtains independent advice, and the provision of the Code Fact Sheet could be included in the provisions of section 2 that set out specific consumer protection obligations for industry participants on the supply-side of the market.

<sup>40</sup> Section 7 of this Report provides more detail in relation to consumer protection obligations under the Code, including implementing FPIC principles.

- 17 It is recommended that all definitions in the Appendix of the Code are reviewed to support clarity of the scope and application of the Code across the market.

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## 6 Code administration

Parts 2, 3 and 4 of the Terms of Reference for this Review cover the administration of the Code, including the operations of the Code Administrator and the Code Review Panel. Accordingly, this section covers matters raised in sections 2.1 to 4.5 of the Terms of Reference under four headings, namely:

- The Code Administrator and Code Review Panel
- The auditing, breach, governance and operational procedures of the Code
- Funding and resourcing for Code administration
- Guidance in relation to Code Signatory obligations.

### 6.1 The Code Administrator and the Code Review Panel

#### 6.1.1 Background – section 3 of the Code

The Code Administrator (CA) is part of the CMI. The role of the CA is set out in sections 3.1, 3.3, 3.4 and 3.5 of the Code. The CA is responsible for compliance monitoring and auditing. The CA determines when breaches of the Code have occurred, it determines appropriate action when a breach has occurred, and it enforces sanctions. The procedure for the investigation of potential Code breaches is set out in section 3.5 of the Code. The CA can refer cases to the Code Review Panel for consideration as required. A Code breach matrix is set out in section 3.6 of the Code, and the sanctions matrix is set out in section 3.7 of the Code.

The role of the Code Review Panel (CRP) is set out in sections 3.2 and 3.9 of the Code. The CRP is an independent body that operates in accordance with its Terms of Reference. The CRP is responsible for:

- Arbitrating cases referred to it by the CA
- Arbitrating appeals against sanctions imposed by the CA
- Conducting its own inquiries into Code compliance.

All decisions of the CRP are final<sup>41</sup>.

#### 6.1.2 Stakeholder views and relevant information

##### **The operation and effectiveness of the Code Administrator and the Code Review Panel<sup>42</sup>**

Stakeholder feedback includes the following proposals:

- The streamlining and simplification of the annual compliance process and the collection of all relevant data and correspondence from a Signatory in a single portal and in a consistent format
- Clarification of annual data to be provided (including a distinction between general industry data requested and data required to assess Code compliance) and how compliance data corresponds to specific Signatory obligations under the Code
- Clarification of annual compliance data requirements for Signatories on the demand or supply-sides of the market
- Clearer promotion by the CA of the benefits of being a Code Signatory
- The clarification of the role of the CA in the context of the roles, powers and duties of the industry regulators (such as the CER) - including whether certain sanctions available to the CA are appropriate

<sup>41</sup> See Code section 3.2(7).

<sup>42</sup> See sections 3.1 and 4.1 of the Terms of Reference for this Review.

- Clarification of the process and timing for the assessment of complaints about alleged Code breaches
- Clarification of specific terms in the Code such as ‘reasonable endeavours’, ‘feasibility’ and ‘contractually involved’
- Ensuring that strong data privacy safeguards are in place to ensure that commercially sensitive/confidential information provided by a Signatory to the CA is protected<sup>43</sup>
- Code monitoring and enforcement could be supported by a compliance strategy to identify high and emerging risks.

### Structural separation of Code administration from the CMI<sup>44</sup>

A number of stakeholders - including representatives of the CMI Board, the Code Review Panel and the CA - support the structural separation of the body responsible for the administration of the Code from the CMI. Submissions and representations provided note that this approach will ensure that the administration and governance of the Code is independent and free from any potential conflicts of interest with the CMI and its members.

In this regard, a stakeholder has raised the specific need to ensure that confidential/commercially sensitive information provided by Signatories is not inadvertently shared between the Code administrator and the CMI.

The example of the *New Energy Tech Consumer Code* has been raised as an example of an industry Code that is administered by an independent Council that appoints the Administrator (responsible for the day to day administration of the Code) and the Code Monitoring and Compliance Panel.<sup>45</sup>

The structural separation of the body responsible for the administration of the Code from the CMI would also be consistent with arrangements under established industry Codes in the financial services sector, such as the General Insurance Code of Practice (GICOP) and the Code Governance Committee (CGC)<sup>46</sup>, and the Banking Code of Practice and the Banking Code Compliance Committee (BCCC)<sup>47</sup>.

The Reviewer understands that this matter has been under consideration by the CMI Board, and that several options exist for the establishment of the ‘new Code body’, namely:

- a wholly-owned subsidiary of the CMI, as a company limited by guarantee
- an incorporated association under State legislation<sup>48</sup>
- a separate not-for-profit company limited by guarantee.

<sup>43</sup> It is noted that the Code Administrator has a *Confidentiality, Privacy and Data Use Policy* for the Code, dated February 2024. The purpose of this policy is to provide an overview of confidentiality under the Code, the processes adopted by the Code Administrator to maintain security and confidentiality of data, and describe relevant roles and responsibilities.

<sup>44</sup> See sections 4.2 and 4.3 of the Terms of Reference for this Review.

<sup>45</sup> The website for the New Energy Tech Consumer Code (NETCC) notes that the standards under the Code have been designed by peak industry and consumer bodies to protect consumers’ interests and increase consumer confidence when purchasing new energy tech – see <https://www.newenergytech.org.au/netcc-standards>

<sup>46</sup> The CGC states that it monitors Code subscribers’ compliance, and investigates alleged breaches of the GICOP. The CGC highlights best practice and emerging risks, and guides insurers on how to lift compliance and improve service. The CGC’s functions, processes and responsibilities are set out in its Charter, and it is supported by a secretariat at the Australian Financial Complaints Authority. The CGC is a committee of the Code Governance Committee Association (an incorporated association under NSW law), and it comprises a consumer representative, an industry representative and an independent Chair. The three CGC members are appointed by the Association in accordance with the Association’s Constitution – see <https://insurancecode.org.au/about/about-the-code-governance-committee/>.

<sup>47</sup> The BCCC is an independent body that monitors banks’ compliance with the Banking Code of Practice. The functions and powers of the BCCC are set out in its Charter – see <https://bankingcode.org.au/about/the-committee/our-charter/>.

<sup>48</sup> For example, see the *Associations Incorporation Act 2009* (NSW) and the *Associations Incorporation Reform Act 2012* (Vic).

The separation of the new Code body from the CMI is a ‘keystone’ reform that will enhance market and consumer confidence in the independent and transparent operation of the Code. The execution of this reform will also provide a useful opportunity for the CMI to consider and consult on the detailed arrangements for Code administration, including:

- whether code administration functions, processes and responsibilities should be provided by a Code Administrator and a Code Review Panel (per the current Code arrangements outlined above), or whether all aspects of code administration are to be provided by a single entity, that is supported by a properly resourced secretariat responsible for the day-to-day tasks of administering the Code (similar to the arrangements for the GICOP and the Banking Code of Practice)
- whether the new Code body could benefit from direct access to advice from key consumer groups such as landholders and indigenous communities - in the form of a consumer advisory panel<sup>49</sup>
- the potential removal of details of code administration processes from the Code and the placement of these details in the Charter or Constitution for the new Code body (noting that all details of Code administration must be transparent and easily available on the Code’s website)<sup>50</sup>
- the replacement of the current Terms of Reference for the CRP with the Charter or Constitution for the new Code body (depending on the legal structure for the new Code body)
- the robust and sustainable resourcing of code administration in accordance with a program to encourage and support all CMI members to be Code Signatories, and a revised Signatory fee structure that is informed by metrics such as the size of a Signatory’s business<sup>51</sup>
- clarifying that the CMI ‘owns’ the Code and is responsible for the content of the Code<sup>52</sup>
- whether Code compliance would be supported by requiring Signatories to enter into a contract with the CMI or the new Code body.<sup>53</sup>

#### Additional expertise for the CRP for the next three years<sup>54</sup>

Section 3.2(2) of the Code provides for the composition of the CRP and requires that it consists of at least three independent members with combined skills and experience in consumer advocacy, protection and law, carbon projects in the carbon industry, regulatory or government administration of consumer law, and an independent Chair with a suitable background to ensure due process is followed at all times.

A stakeholder has proposed that a First Nations representative be appointed as part of the Code’s administration or oversight.

The current composition of the CRP includes representatives with extensive consumer and industry expertise and an independent Chair. This composition represents an appropriate balance of skills and experience and it is broadly consistent with oversight bodies of other industry codes<sup>55</sup>. It is appropriate that members of a

<sup>49</sup> See the next section concerning stakeholder representation as part of code administration.

<sup>50</sup> For example, Part 13 of the GICOP provides for Code enforcement, sanctions and compliance in two pages. Further details of the role and processes of the CGC are provided in its Charter.

<sup>51</sup> For further details, see section 6.3 of this Report.

<sup>52</sup> This is consistent with the arrangements for other industry Codes such as the GICOP and the Banking Code of Practice.

<sup>53</sup> For example, section 14 of the General Insurance Code of Practice provides that in adopting the Code, general insurers voluntarily enter into a contract with the Insurance Council of Australia to comply with the Code.

<sup>54</sup> See section 3.2 of the Terms of Reference for this Review.

<sup>55</sup> For example, see section 165 of the GICOP.

governing body for a Code with a consumer background have expertise across a wide range of consumer issues, and that they do not represent a specific segment of consumers in the market.

However, given the growing focus on appropriate engagement with landholders and indigenous communities involved in carbon and environmental markets, and in particular, fair bargaining processes for projects, the administration of the Code could be supported by the establishment of a consumer advisory committee. To ensure appropriate representation of key consumer groups, the advisory committee could include a First Nations representative and a representative of the farming sector<sup>56</sup>. Members of a consumer advisory committee would not have any role in relation to complaints raised under the Code. Rather, the advisory committee would be available to provide the CRP (or the new Code body) with general advice and support in relation to consumer matters under the Code. This could be particularly important for the development of further guidance for Code Signatories, and for any Own Motion inquiry undertaken in relation to Code matters.

### 6.1.3 Recommendations

#### The independent and effective administration of the Code

- 18 Given the consistent and strong support for the structural separation of the administration of the Code from the CMI, it is recommended that the CMI proceeds expeditiously with this 'keystone' reform, and that the new Code body commences operations under a revised Code and its Charter or Constitution by 1 July 2025 at the latest.
- 19 In determining the details of the arrangements for the new Code body, it is recommended that the CMI considers and addresses all of the matters covered in section 6.1.2 above, in consultation with the Code Administrator, the Code Review Panel, Code Signatories and key stakeholders.
- 20 On deciding the arrangements for the new Code body, it is recommended that the CMI (assisted by the Code Administrator and the Code Review Panel) prepares a succinct information paper for Code Signatories and other CMI members outlining:
  - a the options for the legal structure of the new Code body and the reasons (which could include a cost/benefit analysis) for the CMI Board's decision on this matter
  - b the proposed administrative arrangements, and
  - c the proposed financial arrangements and prospective annual budget for the new Code body.
- 21 In executing the arrangements for the new Code body, it is recommended that the CMI obtain feedback from the administrators of long-standing industry Codes (such as the GICOP and the Banking Code of Practice) to obtain insights as to the process for the structural separation of the administration of a Code from the industry association that owns the Code.
- 22 In establishing the new Code body, it is recommended that the CMI specifically considers the establishment of a consumer advisory body to assist the new Code body with expert guidance on how the Code can be further developed (if necessary) to protect consumers<sup>57</sup>.
- 23 In establishing the new Code body, it is recommended that the annual Code compliance process is streamlined and simplified, consistently managed via an electronic portal with transparent and strong data protection safeguards, and with specific compliance reporting requirements aligned with the Code

<sup>56</sup> For example, see section 208 of the *Banking Code of Practice*, which provides that the BCCC can appoint, on terms it thinks appropriate, a person or a panel of persons, with expertise in small business and/or agribusiness to act as a consultant in small business and agribusiness issues when requested by the BCCC.

<sup>57</sup> It is noted that a consumer advisory body may be particularly beneficial if the new Code body is entirely separate from the CMI and not able to engage with consumer representatives via the CMI's program of stakeholder engagement.

obligations applicable for project proponents/developers, project advisors (legal, financial and technical) and other industry participants<sup>58</sup>.

- 24 Given the importance of Code compliance and appropriate governance for each Signatory, it is recommended that all Code Signatories must, at the very least, submit an annual Code compliance attestation signed by a senior representative of the Signatory<sup>59</sup>.
- 25 Noting that certain Signatories<sup>60</sup> may only be required to comply with the core principles and objectives of the Code (and not specific obligations that may apply to certain industry participants such as project proponents/developers), it is recommended that the annual attestation incorporates the core principles and objectives of the Code.
- 26 In establishing the Code compliance monitoring framework for the new Code body, consideration should be given to the most effective use of the resources available for compliance monitoring. In accordance with an appropriate aim of an industry Code to support and identify best practice across the market, it is recommended that the new Code body actively deploys a range of compliance monitoring activities including desktop audits, Own Motion inquiries – in addition to annual reporting by Signatories.
- 27 In considering section 3.3 of the Code, it is recommended that a revised Code clarifies that the new Code body does not consider complaints in relation to commercial/contractual disputes between parties.
- 28 In considering section 3.5 of the Code, it is recommended that a revised Code provides the new Code body with the discretion to refer a finding against a Signatory of a serious and/or systemic Code breach to the relevant regulator(s)<sup>61</sup>.
- 29 It is recommended that the new Code body has an annual compliance strategy to identify high and emerging risks to inform the Code body's compliance monitoring activity.

## 6.2 The auditing, breach, governance and operational procedures<sup>62</sup>

### 6.2.1 Background – sections 2, 3 and 4 of the Code

Section 2 of the Code provides for the general rules and standards, including specific requirements for pre-project activities, project activities, and general compliance requirements and obligations.

Section 3 of the Code provides for Code administration and compliance. Section 3.4 sets out the specific provisions for the monitoring and audit of Code compliance, and section 3.5 provides for the investigation of Code breaches by the Code Administrator.

Section 4 of the Code provides for the process of becoming a Code Signatory.

<sup>58</sup> For example, given the objects of the Code, it would be appropriate that the annual Code compliance Report requires more detailed information from project proponents (under the CFI Act) and other project developers, including in relation to compliance with Code obligations concerning engagement with landholders, Native Title holders and indigenous communities. Noting the rapid evolution of the carbon market and its regulatory environment, it is anticipated that all Code Signatories should provide general information each year to the Code Administrator to outline the nature and the size of the business, the carbon market services or products it provides (on the supply or demand-side), and whether it is subject to oversight by ASIC, the CER and/or the ACCC.

<sup>59</sup> In accordance with the recommendation in section 5 of this Review, Signatories should be required to annually disclose to the new Code body if they hold an AFSL, if they are an Authorised Representative of an AFSL holder, and if they are providing financial services and/or products to wholesale and/or retail clients.

<sup>60</sup> For example, a Signatory operating on the demand-side as an investor in, or purchaser of carbon credits.

<sup>61</sup> For example, ASIC and/or the CER. The CER may take such a referral of a Code breach into account in accordance with its Fit and Proper Person framework. See section 178 of the GICOP which provides that the Code Governance Committee will report Significant Breaches or serious misconduct to ASIC.

<sup>62</sup> See section 2.1 of the Terms of Reference for this Review.



## 6.2.2 Stakeholder views and relevant information

Submissions and feedback received in relation to the operation of the Code and the various procedures are principally concerned with the monitoring and enforcement of the Code. For example, the CER submission for this Review states:

*'Continued trust in the Code is critical for it to expand its reach. This requires the Code to maintain a fit for purpose and transparent complaint handling mechanism. The review may be able to identify opportunities to increase the transparency of activities undertaken through the Code's accountability mechanisms beyond the existing reporting in the Annual Report. This could enhance market confidence and consumer trust in industry compliance with the Code.'*

### Monitoring Code compliance

Stakeholder feedback and recommendations in relation to the monitoring and auditing of Code compliance are set out above in section 6.1.

### The process for investigating complaints about alleged Code breaches

Stakeholder feedback on the complaints mechanism in relation to alleged Code breaches includes the following comments:

- the complaints mechanism must be clear and robust
- awareness of the mechanism for making complaints about alleged Code breaches should be raised with consumers
- public information about complaints handling and Code breaches supports transparency and confidence that the Code is effectively being enforced.

## 6.2.3 Recommendations

- 30 Consistent with the current practice of the Code Administrator, it is recommended that the new Code body publishes annual data on the number and types of complaints received under the Code, the outcomes of investigations into alleged Code breaches, and the nature and number of sanctions imposed on Signatories
- 31 It is recommended that the discretion of the new Code body to publicly name a Code Signatory that has been found to be in breach of the Code is consistent with the principles of procedural fairness and consistent with the practices of other industry code oversight bodies (for example, that a Signatory is only publicly named for a significant/systemic Code breach, and only after a reasonable period of time for rectification of a breach has passed).
- 32 It is recommended that the Code continues to mandate that Signatories provide the Code Fact Sheet to consumers on the supply-side (at the commencement of project negotiations) and that the Code Fact Sheet clearly highlights a consumer's right to raise a complaint under the Code about an alleged Code breach (but not in relation to a commercial/contractual dispute with a Signatory).

## 6.3 Funding and resourcing for Code administration<sup>63</sup>

### 6.3.1 Background

Section 4.2 of the Code provides for the payment of an annual fee by Signatories.

The annual Code Signatory fee is currently linked to the number of projects that a Signatory is involved with.

<sup>63</sup> See sections 4.4 and 4.5 of the Terms of Reference for this Review.

### 6.3.2 Stakeholder views and relevant information

Stakeholder feedback is clearly supportive of the need for the administration of the Code to be properly resourced. It is vital for the effective administration of the Code that the body responsible for Code administration has robust and reliable funding.

In accordance with the recommendations of section 5 of this Report, and reflective of the rapid development of the carbon market, all CMI members should consider becoming a Code Signatory and be strongly encouraged to do so. With the establishment of a new Code body, and the revision of the Code with clearer obligations for specific categories of industry participants, the CMI could consider making it mandatory for all members to be a Code Signatory.

The annual fee for a Code Signatory could be calculated in accordance with:

- Signatory categories (for example, project proponents/developers and project advisers on the supply-side; investors, buyers and traders on the demand-side)<sup>64</sup>
- Depending on the Signatory category, the size of the Signatory's business (number of employees and/or annual turnover).

The sustainable funding of Code administration would clearly be supported if all CMI members became Code Signatories, in accordance with an annual fee framework linked to the Signatory category and the size of each Signatory's business.

A sustainable funding model will be particularly vital for a new and independent Code body and effective and ongoing oversight of the Code.

### 6.3.3 Recommendations

- 33 With the establishment of a new Code body, and a revised Code, it is recommended that the CMI consult with members in relation to making the Code mandatory for all CMI members.
- 34 If the above recommendation is not supported by the CMI and its members, it is recommended that the CMI promotes the benefits of the Code for the development and integrity of the industry, and strongly encourages all members to become a Code Signatory<sup>65</sup>.
- 35 With the establishment of a new Code body, it is recommended that the CMI provides all necessary assistance to the new Code body to ensure that it has appropriate staff and financial resources to commence its operations, and to develop a revised annual fee framework for Code Signatories.
- 36 It is recommended that a revised Signatory fee framework is developed in accordance with Signatory categories and the size of a Signatory's business.
- 37 To encourage market development and support new market entrants, it is recommended that a revised Signatory fee framework could include a low 'start-up' annual fee for small businesses entering the market, for a reasonable period of time (for example, for three years).
- 38 It is recommended that the CMI approach the Australian and State/Territory governments for start-up funding for the commencement of the operations of the new Code body.
- 39 It is recommended that the CMI assists the new Code body to develop an annual budget forecast linked to anticipated income from annual Code Signatory fees.

<sup>64</sup> The Signatory category fee could be set to reflect the relative effort required from the new Code body to monitor and enforce the Code obligations for that category.

<sup>65</sup> The CMI could approach members on the basis of 'If not, why not?' in relation to being a Code Signatory.

## 6.4 Guidance in relation to Code Signatory obligations<sup>66</sup>

### 6.4.1 Background

The Code Administrator has published:

- Becoming a Signatory: Guidance for Signatories
- Complying with the Code: Guidance for Signatories and Stakeholders.

The CMI has issued a Guidance Note on Carbon Farming Contracts, and example contract clauses for Project Development Agreements and Services Agreements.<sup>67</sup>

### 6.4.2 Stakeholder views and relevant information

Stakeholders have welcomed the work being done by the CMI on model contract terms to support fair bargaining between Signatories and consumers.

A proposal has also been provided for further guidance in relation to the requirement to hold an AFSL. The Reviewer understands that ASIC is currently preparing an updated Regulatory Guide in relation to carbon markets and the need to hold an AFSL.

Generally, guidance under an industry Code can be an effective way to support and develop industry best practice, without the burden of mandatory obligations for Code Signatories.<sup>68</sup>

### 6.4.3 Recommendations

- 40 Acknowledging that the Code Administrator is not responsible for providing advice to Signatories on regulatory matters, it is recommended that the current Code Administrator arrange an education workshop for Signatories with the release of the updated RG236 by ASIC.
- 41 It is recommended that the CMI continues the work on example contract clauses, as a significant contribution to assisting industry participants and consumers with fair bargaining awareness in relation to carbon projects.
- 42 It is recommended that the new Code body consult with Code Signatories in relation to guidance that may be required in relation to a revised Code<sup>69</sup>, and any other significant market and regulatory developments in relation to the conduct of the Australian carbon industry<sup>70</sup>.

<sup>66</sup> See sections 2.2 and 5.6 of the Terms of Reference for this Review.

<sup>67</sup> These guidance documents (dated November 2023) were prepared for the CMI by Norton Rose Fulbright Australia, for use by owners or lessees of land, carbon project developers and entities providing services to Landholders or carbon project developers in connection with the establishment and operation of carbon projects. The Guidance Note provides that it is the CMI's intention to support, in partnership with relevant Indigenous Australian carbon and land organisations, the development of a second set of example contract clauses for projects to be undertaken on land that is, or may be, subject to a native title determination.

<sup>68</sup> For example, the General Insurance Code of Practice is supported by industry guidance on consumer matters, including a guide on mental health, a guide on helping customers affected by family violence and a guide on best practice disclosure.

<sup>69</sup> See the recommendation in section 5 of this Report in relation to guidance on Code compliance requirements for specific Signatory categories.

<sup>70</sup> In accordance with section 5.6 of the Terms of Reference for this Review, such guidance could include information in relation to environmental claims in relation to carbon credits.

## 7 Strategic review – key issues for the Code

Part 5 of the Terms of Reference for this Review cover strategic issues for the Code.

Section 7 of this Report covers:

- Recommendation 12 of the Chubb Review
- The implementation by Signatories of the principles of Free, Prior and Informed Consent in engaging with indigenous stakeholders
- Signatories' obligations in relation to engagement with landholders/farmers
- How the Code can facilitate the delivery from Signatories of credible, independently verified and additional co-benefits.

### 7.1 Recommendation 12 of the Chubb Review

#### 7.1.1 Background

Section 5.1 of the Review's Terms of Reference addresses Recommendation 12 of the Chubb Review that carbon service providers and carbon market advisors, including agents, should be accredited and regulated. The associated key finding in the Chubb Review is that mandating performance standards for carbon service providers, including agents, would enhance market confidence and consumer protection.

The Australian Government has accepted in principle all 16 recommendations of the Chubb Review.

In June 2023, the DCCEEW released an Implementation Plan setting out the Government's intended timing and approach for each recommendation. The Implementation Plan notes that the government will consult with stakeholders on the best approach for Recommendation 12 and that options could include administrative solutions, building on the Code, as well as legislative amendments to integrate this recommendation with existing ACCU scheme regulatory tools and frameworks. It is also noted that the CER will provide advice and support to the department on the implementation of this recommendation.<sup>71</sup>

#### 7.1.2 Stakeholder views and relevant information

Stakeholders did not provide detailed commentary on Recommendation 12 of the Chubb Review.

However, broad support has been expressed for the important role of the Code in complementing regulatory oversight of the ACCU Scheme and strengthening the integrity and accountability of industry practitioners and service providers.

In its submission to this Review, the CER has noted that while its statutory fit and proper person process and the Code are not explicitly linked, determining whether a person is fit and proper will involve consideration of the person's compliance with industry standards and codes, as well as the nature of their contractual relationship with landholders/owners.<sup>72</sup>

In considering Recommendation 12, the Reviewer observes that it is preferable for an industry to set best practice market conduct standards and consumer protection obligations (that are additional to legal requirements) through the industry Code, and thus avoid increased levels of government regulation.

<sup>71</sup> DCCEEW, *Independent Review of Australian Carbon Credit Units: Implementation Plan*, June 2023, p 20.

<sup>72</sup> Refer to the recommendation in section 6 of this Report in relation to the discretion of the new Code body to refer findings of serious/systemic Code breaches to a relevant regulator.

It is also noted that industry Codes are more flexible, and more easily and quickly adjusted for market changes and consumer expectations than legal/regulatory requirements.

Further, if the government were to implement accreditation for market participants, it may need to consider specific competency and compliance requirements for project proponents (some of whom may hold an AFSL or be an Authorised Representative for an AFSL holder) and advisors (that may also be subject to the AFSL requirements and/or be subject to professional standards requirements).

DCCEEW has indicated that an option to respond to Recommendation 12 is via administrative solutions and building on the Code. Accordingly, it is observed that it would be a strong and appropriate response for the CMI, on behalf of its members and the industry, to expeditiously amend and reinforce the Code to ensure that it meets the government's expectations in mandating and enforcing conduct standards and consumer protection obligations for carbon service providers under the CFI Act.

### 7.1.3 Recommendations

- 43 In considering the Government's implementation plan for the Chubb Review recommendations, it is recommended that the CMI, in consultation with the DCCEEW, the CER and Signatories, establishes a clear timetable for the response to this Review's recommendations and the redrafting of the Code.
- 44 In undertaking the redrafting of the Code, it is recommended that the CMI engages with the Government, CMI members and consumer stakeholders to identify current industry practices that may require stronger oversight and guidance under the Code.
- 45 It is recommended that the CMI discusses with the CER and CMI members the option of making it mandatory for the CER's Fit and Proper Person framework that a carbon service provider under the CFI Act is a Code Signatory.

## 7.2 The implementation of the principles of Free, Prior and Informed Consent

### 7.2.1 Background

The implementation and operationalisation of FPIC under the Code has understandably been the subject of commentary from stakeholders.

The Reviewer has had the benefit of submissions from, and meetings with indigenous organisations and project developers.

Section 7 of the Indigenous Carbon Industry Network's *Indigenous Carbon Projects Guide* provides that:

- FPIC is both a process and an outcome
- FPIC requires that Indigenous people have enough time, information and resources to decide if consent will be given for a carbon project on their land
- The outcome is the right of Indigenous people to say 'yes' or 'no' to a carbon project which impacts their rights
- 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 Indigenous people and involve them in decisions about carbon projects.<sup>73</sup>

Section 2.2(3)(d) of the Code currently provides that where an area-based project occurs on native title land, the Signatory must use *reasonable efforts* (emphasis added) 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 ICIN, and must follow the 'Native title, legal right and eligible interest-holder consent guidance' published by the CER, taking into account current market conditions and industry practices.

Section 2.2(3) of the Code provides for further specific requirements relevant to engaging with indigenous stakeholders and Native Title Holders and their representatives, that are qualified by the words 'reasonable efforts'.

Since the promulgation of the current version of the Code, recognition of and support for the participation of First Nations people in the ACCU scheme in accordance with the FPIC principles has increased. Specifically:

- Chubb Review recommendation 11 provides that the CFI Act should be amended to remove the option to conditionally register ACCU projects on Native Title lands prior to obtaining consent, in alignment with the FPIC principles, and that the Australian Government should support Native Title Representative Bodies and other bodies to ensure consistent standards in the application of FPIC
- Chubb Review recommendation 14 provides that the Australian Government should continue to support the capacity and capability of rural and remote communities, including First Nations Australians, to participate in and benefit from the ACCU scheme
- Chubb Review recommendation 15 provides that reforms relating to First Nations Australians' participation in the ACCU scheme should align with the accepted recommendations of concurrent reviews and reforms.

<sup>73</sup> The Indigenous Carbon Industry Network (ICIN), section 7 of the *Indigenous Carbon Projects Guide*: 'Free, Prior and Informed Consent (FPIC)'.

Chubb Review recommendations 11<sup>74</sup> and 14<sup>75</sup> are in the process of being implemented by the Australian Government. Chubb recommendation 15 is subject to ongoing implementation<sup>76</sup>.

Further, the Climate Change Authority, in its 2023 Review of the CFI Act, has made several recommendations in relation to the participation of First Nations people and organisations in the ACCU scheme, including amending the CFI Act to require project proponents to apply best practice principles to seek free, prior and informed consent from Native Title holders and claimants over relevant land prior to the registration of an area-based project on that land.<sup>77</sup>

### 7.2.2 Stakeholder views and relevant information

Stakeholder feedback is supportive of the need for the Code to require Signatories to engage with Indigenous people in accordance with FPIC.

As noted above, it is possible that the CFI Act will be amended and/or regulatory guidance will be developed to provide this requirement for project proponents under that Act.

In considering this matter, the Reviewer has been referred to an insightful Report from The Nature Conservancy – ‘Beyond Beneficiaries: Fairer Carbon Market Frameworks’ - that outlines significant challenges for indigenous peoples and local communities (IPLCs) involved in carbon projects, gaps in current approaches, and solutions for achieving robust IPLC partnerships.

Stakeholders have provided informative feedback on FPIC under the Code and engagement with First Nations people on carbon projects, including the following points:

- The Code needs to be aligned with minimum standards set by the government, and keep pace with national and international norms for environmental markets
- Internationally there is growing recognition of the pivotal role of First Nations people in conservation and carbon projects and as decision makers and holders of rights in projects on their lands
- FPIC is relational, and not just transactional
- FPIC should be implemented both prior to a project commencing and on an ongoing basis for the life of the project
- The Code could ensure that claims made about co-benefits are accurate.

The Reviewer also acknowledges the section of the Carbon Market Report 2024 prepared by the Indigenous Carbon Industry Network, that sets out top priorities for a thriving indigenous carbon industry.<sup>78</sup>

### 7.2.3 Recommendations

46 In revising the Code, it is recommended that a section of the Code is dedicated to FPIC.

<sup>74</sup> See DCCEEW, *Independent Review of Australian Carbon Credit Units: Implementation Plan*, June 2023, p 19. DCCEEW notes that mitigating the risks of projects failing due to lack of consent is in the best interests of proponents and other landholders, as well as eligible interest holders.

<sup>75</sup> See above, pp 20-21.

<sup>76</sup> See above, pp 21-22.

<sup>77</sup> CCA, *2023 Review of the CFI Act*, December 2023, p 10. The CCA states that current requirements for seeking consent for ACCU projects from Native Title holders and claimants do not meet best practice FPIC principles, and ACCU projects and the process for seeking and giving consent are complicated and not well understood by project proponents and/or Native Title holders and claimants. For further detail, see the section ‘Seeking Consent from First Nations people for ACCU projects’ at pp 54-56.

<sup>78</sup> See CMI & Westpac, *Carbon Markets & Australia’s Net Zero Challenge*, Carbon Market Report 2024, April 2024, p 35.

- 47 It is recommended that Signatory obligations in relation to FPIC at least meet requirements set by the Australian Government, and ideally provide for a higher standard of engagement with First Nations people on carbon projects.
- 48 It is recommended that Signatories' FPIC obligations apply whether the project is under the ACCU Scheme, or any other crediting scheme.
- 49 It is recommended that the FPIC section of the Code specifically provides for Signatory obligations in relation to claims made about project benefits in favour of First Nations people.
- 50 It is recommended that the FPIC section of the Code supports engagement with Native Title holders, Native Title claimants and other First Nations people and their representative bodies.
- 51 Given the importance of FPIC for carbon projects and project participants, it is recommended that the CMI commence work immediately on consultations in relation to the FPIC section of the Code.

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## 7.3 Signatories' engagement with landholders/farmers

### 7.3.1 Background

As noted above, section 2.2 of the Code provides for rules and standards for Signatories in relation to pre-project activities, and section 2.3 of the Code provides for rules and standards in relation to project activities.

As also noted above, the CMI has issued a Guidance Note on Carbon Farming Contracts, and example contract clauses for Project Development Agreements and Services Agreements.

Support for carbon projects in rural and remote communities has been recognised by the Australian Government. Specifically:

- Chubb Review recommendation 14 provides that the Australian Government should continue to support the capacity and capability of rural and remote communities, including First Nations Australians, to participate in and benefit from the ACCU Scheme
- The Australian Government is providing \$20.3 million over 4 years from 2022-23 to establish a Carbon Farming Outreach Program to support Australian farmers and land managers, including First Nations peoples, to participate in carbon markets
- The Carbon Farming Outreach Program is providing grants to train trusted and independent advisers to build the capacity and capability of rural and remote communities
- The Australian Government is monitoring the progress of this Program.<sup>79</sup>

### 7.3.2 Stakeholder views and relevant information

The National Farmers Federation (NFF) has provided a submission for this Review. This submission outlines concerns that farmers may have in relation to carbon projects, namely:

- The potential for the loss of productive land to carbon projects, diminished earnings and business resilience
- The potential for landscape sequestration to plateau
- The potential for vegetative sinks to support invasive plant and animal species and the adverse impacts on crops, pastures, farm infrastructure and biodiversity
- The cost to establish and manage carbon projects
- The use by farmers of carbon credits for 'insetting' their own business<sup>80</sup>
- Regional impacts, such as reduced employment opportunities
- Greater fire risk from carbon projects.

The issues raised by the NFF highlight the critical importance of the Code in:

- requiring transparency and accountability from carbon industry participants
- supporting the environmental and social integrity of projects
- requiring appropriate consultation with project stakeholders.

<sup>79</sup> DCCEEW, *Independent Review of Australian Carbon Credit Units: Implementation Plan June 2023*, pp 20-21.

<sup>80</sup> For a detailed discussion of this issue, see Climate Change Authority, *2023 Review of the CFI Act*, Chapter 4 – Supply, demand and competition for resources, pp 60-68.

### 7.3.3 Recommendation

Recommendation 15 in this Report (see section 5) is that key consumer protection obligations under the Code for supply-side industry participants be retained, enhanced and promoted.

Recommendation 16 in this Report (see section 5) is that specific obligations under the Code in relation to pre-project and project activities under the ACCU Scheme are reviewed when the Australian Government has completed the implementation of the Chubb Review recommendations, and any recommendations made by the CCA in relation to the CFI Act.

52 In implementing recommendation 15, and enhancing consumer protection obligations under the Code for supply-side industry participants, it is recommended that increased focus is placed on Signatories' obligations to transparently engage with landholders during project negotiations in relation to the specific risks and benefits of a project for all parties to the project.

## 7.4 Credible and independently verified co-benefits<sup>81</sup>

### 7.4.1 Background

Section 2.2(12) of the Code provides that Signatories recognise that carbon projects may deliver a number of social, environmental and economic co-benefits and that they will take certain actions in relation to co-benefits in accordance with the general principles of section 2.1 of the Code.

The Chubb Review made the following key finding in relation to co-benefits:

*'Co-benefits extend beyond reduced emissions and carbon removals. They include non-carbon benefits to proponents, the broader community, and to the environment. Scheme arrangements should facilitate but not require provision of co-benefits. Current arrangements for attributing project characteristics and co-benefits to ACCUs are not mature. This weakens incentives for market participants to supply, demand, and resource these value-adding outcomes. Where a co-benefit is claimed, the proponent should use an appropriate method, verifying the claims made in relation to the co-benefit, and provide evidence to the CER before the claim can be published.'*

Chubb Review recommendation 13 provides that the CER, in consultation with market participants and stakeholders should develop procedures to support transparency of different project characteristics and types of co-benefits associated with ACCUs.

The DCCEEW's Implementation Plan for the Chubb Review recommendations notes the following in its response to recommendation 13:

- The Australian Carbon Exchange will provide for the identification of co-benefits
- The CER is also investigating how co-benefits could be identified in its new Information Technology and to end processes including the new smart forms
- The Government will consider further work on co-benefits following this work
- The Government will consider linking carbon and nature repair benefits in the CER's registries and it will consult with stakeholders to ensure alignment of ACCU project information with the Nature Repair Market and the implementation of the government's Nature Positive Plan.<sup>82</sup>

<sup>81</sup> Section 5.3 of the Review's Terms of Reference addresses the facilitation of the delivery of credible, independently verified and additional co-benefits from Signatories. Section 5.3 specifically asks if the scope of the Code should expand to better support and protect consumers on the demand-side of the market, including building in additional protections for purchasers of carbon credits or people relying on integrity or co-benefit claims made by Signatories?

<sup>82</sup> DCCEEW, *Independent Review of Australian Carbon Credit Units: Implementation Plan June 2023*, p 20.

## 7.4.2 Further relevant information

The Queensland Government's Land Restoration Fund (LRF) has developed a Co-benefits Standard that specifies how co-benefits generated from a carbon project are to be measured, reported and verified for the purposes of the LRF. The Standard provides for environmental, socio-economic and First Nations co-benefits.

As noted above, the ACCC and ASIC have increased their focus on incorrect/misleading environmental or sustainability claims made in relation to a relevant product or service. The ACCC has issued a Guide for Business in relation to making environmental claims - which includes eight principles for trustworthy environmental claims.

In the context of the above, the Reviewer notes that there are a number of significant legal and regulatory developments underway that will encourage and better equip carbon industry participants to identify, measure and verify co-benefits of a carbon project.

All claims made by carbon industry participants about carbon credits must be in accordance with the law.

All claims made by Code Signatories about carbon credits must be in accordance with the Code principles of integrity and transparency.

Given the current emphasis of the Code on the supply-side of the market, the Code could be further developed to support Signatories to meet consumer protection obligations in relation to purchasers of carbon credits or other parties relying on claims made by Signatories in relation to the nature and value of carbon credits.

## 7.4.3 Recommendation

Recommendation 1 for this Review (see section 4) is that the Code is further developed with a stronger emphasis on the integrity of carbon credits. In this regard, the Code could incorporate or refer to leading international standards such as the VCMI Claims Code and the Core Carbon Principles of the Integrity Council for the Voluntary Carbon Market.

Recommendation 2 for this Review (see section 4) is that the Code is redrafted to ensure that the core principles and conduct/integrity standards are applicable to carbon industry participants in Australia, regardless of whether they are involved in market activities (supply or demand-side) linked to the ACCU Scheme, or another crediting scheme.

53 In reviewing and further developing the Code, and in the context of recommendations 1 and 2, it is recommended that the CMI consults with Signatories and stakeholders across the value chain in relation to the incorporation of relevant principles<sup>83</sup> from the ACCC's Guide for Business on making environmental claims. It is recommended that if such principles are included in the Code, they shall apply in relation to any claims made by a Signatory about carbon credits to any party – including claims made about carbon project co-benefits.

<sup>83</sup> For example, Principle 1 is to make accurate and truthful claims; Principle 2 is to have evidence to back up your claims; Principle 3 is to not hide or omit important information; Principle 4 is to explain any conditions or qualifications on claims; Principle 5 is to avoid broad and unjustified claims; Principle 6 is to use clear and easy to understand language.

## Appendix

### A Independent Review team

#### Vicki Mullen BA LL.M. GAICD

Vicki is a lawyer with 30 years' experience in government and financial services, with a strong focus on public policy, regulatory affairs and stakeholder engagement. Vicki has worked in every arm of government, including roles with the High Court of Australia, the NSW Parliament, the NSW Cabinet Office, and a senior Minister.

She has worked extensively in industry advocacy across the financial services sector.

She is an expert on industry self-regulation and industry and professional codes of practice. During her time with the Insurance Council of Australia, she provided secretariat support for the 2012 Independent Review of the General Insurance Code of Practice (GICOP). She was then responsible for the arrangements to establish the independent Code Governance Committee for the GICOP.

Vicki is currently the independent Chair of AFIA's Insurance Premium Funding Code Compliance Committee.

She is a senior consultant with Finity Consulting, working with clients across the financial services sector, including working with clients of Finity's Climate and Sustainability Practice team.

#### Rade Musulin BA, ACAS, MAAA, CCRMP, GAICD

Rade is a leading actuary, with 40 years' experience in insurance specialising in property pricing, natural perils, reinsurance, agriculture, catastrophe risk modelling, public policy developments and climate risk. He has spent the majority of his career specialising in tropical cyclone risk in the United States, Asia and Australia. He was previously CEO of the FBAlliance, part of the Farm Bureau mutual organisation, providing insurance to the agricultural sector in the US.

Rade is a long-serving member of the Climate Risk Task Force of the International Actuarial Association (IAA). He has attended COP 27 and COP 28 as a delegate of the IAA. He was awarded Actuary of the Year by the Actuaries Institute in 2023 for his work on climate risk.

#### Olivia Brodhurst BSc, DipPM

Olivia is an environmental scientist and consultant. She works with organisations to build knowledge and understanding of climate change risks and opportunities and evaluate options for adjusting practices and infrastructure to improve sustainability and resilience.

Olivia has experience working within local government to develop emissions reduction strategies. She has conducted analysis of carbon credit markets and available credits on the spot market to facilitate offsetting of emissions and enable industry to understand the co-benefits that their investment may also be supporting.

Olivia has also worked in natural resource management in Queensland and for the South Australian government.

## B Written submissions received

Written submissions (formal submissions or via email) were received from the following organisations.

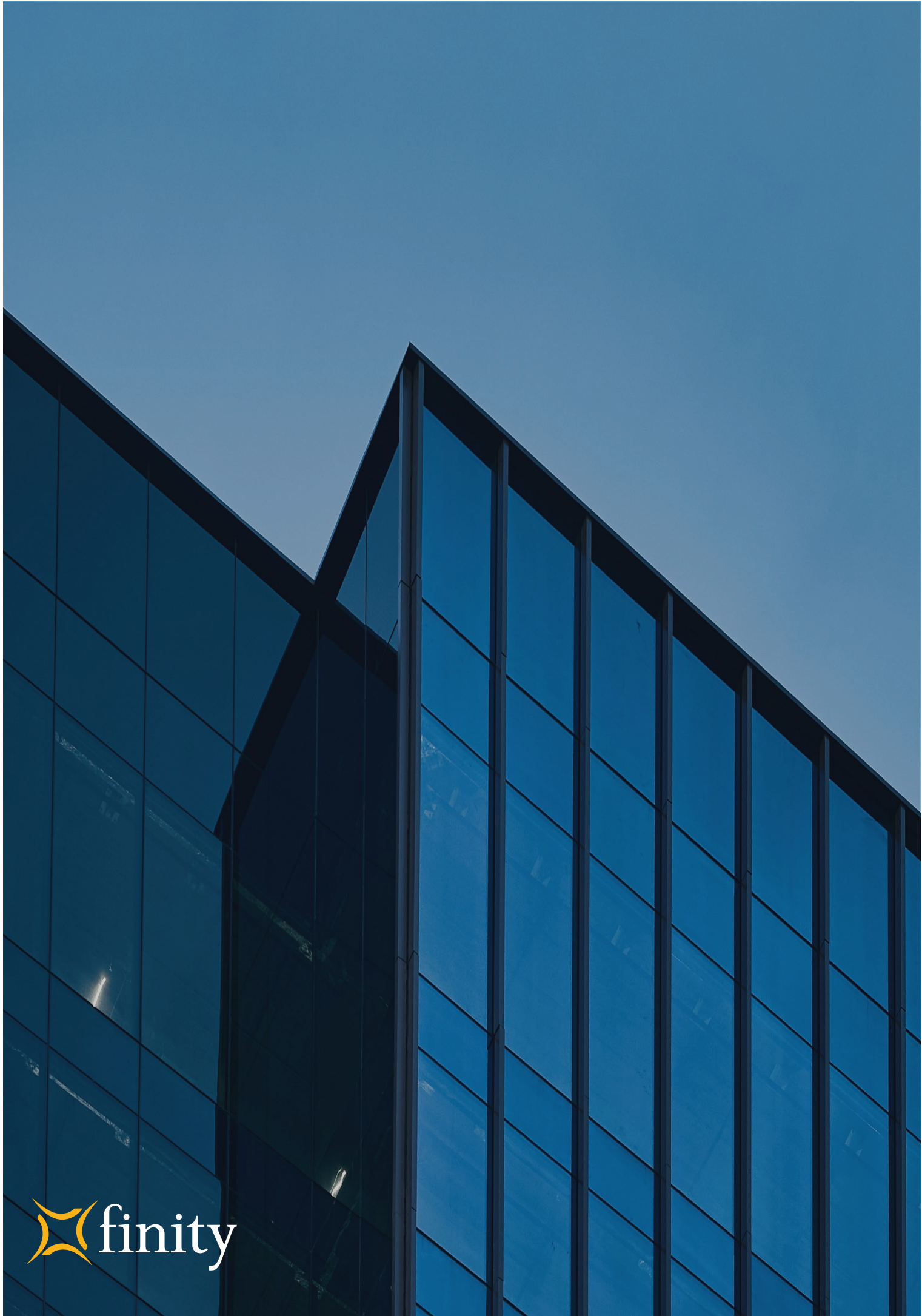
- The Clean Energy Regulator
- The Indigenous Carbon Industry Network
- The National Farmers Federation
- Wilonggin Aboriginal Corporation
- GreenCollar
- Select Carbon
- Tasman Environmental Markets
- RegenCo
- Climate Friendly.

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## C Organisations/individuals consulted

The Reviewer met with the following organisations and individuals.

- The Aboriginal Carbon Foundation
- The Indigenous Carbon Industry Network
- The National Farmers Federation
- The Australian Securities and Investments Commission
- The Clean Energy Regulator
- Climate Friendly
- The Code Administrator
- Dr Kerry Schott (CMI Chair)
- Emily Gerrard (CMI Director)
- The Code Review Panel
- Gondwana Carbon
- The Department of Climate Change, Energy, the Environment and Water
- The Emissions Reduction Assurance Committee
- WeAct
- The Queensland Government Land Restoration Fund
- Tasman Environmental Markets
- RegenCo
- NRM Regions Australia
- Clima Australia



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